SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

----------X

INDEX NO. 151428/2019

NORMA TURNER,

Plaintiff,

MOTION SEQ. NO. 003

- v -

PRIDE & SERVICES ELEVATOR CO., INC., TRANSEL ELEVATOR & ELECTRIC, INC., TRANSEL ELEVATOR INDUSTRIES, INC., TEI GROUP AND ELECTRIC, INC., TEI GROUP, INC., WEWITT LLC, and KONE, INC.,

DECISION + ORDER ON MOTION

Defendants.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 107, 108, 109, 110, 124, 125, 126, 127

were read on this motion to/for DEFAULT JUDGMENT.

In this negligence action, plaintiff Norma Turner moves, pursuant to CPLR 3215, for a default judgment against defendant WeWit LLC i/s/h/a WeWitt LLC ("WeWit").[1] WeWit opposes the motion and cross-moves, pursuant to CPLR 3211(a)(1) and (a)(7) and CPLR 3215(c), to dismiss the complaint. Plaintiff opposes the cross motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on February 17, 2016, in which plaintiff Norma Turner was injured when she tripped due to a misleveled elevator allegedly serviced by WeWitt. On February 9, 2019, plaintiff commenced the captioned action by filing a summons and complaint against defendants Pride & Service Elevator Co., Inc., Transel Elevator & Electric, Inc., Transel

[1] In the caption, WeWit is incorrectly spelled as WeWitt. Doc. 93 at par. 1.

Elevator Industries, Inc., TEI Group and Electric Inc., TEI Group, Inc., WeWit, and Kone, Inc. Doc. 1. WeWit was thereafter served with process pursuant to CPLR 308 and Limited Liability Company Law § 303 in February 2019. Docs. 2, 9. On September 23, 2020, plaintiff's counsel served WeWit with an additional copy of the summons and complaint in accordance with CPLR 3215(g)(4). Doc. 68.

By stipulation dated March 1, 2019, plaintiff allowed WeWit until April 5, 2019 to answer or otherwise move against the complaint. Doc. 69. Although plaintiff's counsel had "some discussions [with WeWit's attorney] about a possible discontinuance without prejudice", there was no such discontinuance and WeWit failed to answer or otherwise move by April 5, 2019. Doc. 64 at par. 9.

On October 14, 2020, plaintiff filed the instant motion, pursuant to CPLR 3215, for a default judgment against WeWit. Docs. 63-70. In support of the motion, plaintiff submitted proof of service of the summons and complaint, proof of additional service of the summons and complaint, the stipulation extending WeWit's time to answer until April 5, 2019, an attorney affirmation establishing proof of WeWit's failure to answer or otherwise appear, and an affidavit of merit by plaintiff. Id.

On November 9, 2020, WeWit filed opposition to plaintiff's motion and cross-moved, pursuant to CPLR 3211(a)(1) and (a)(7) and CPLR 3215(c), to dismiss the complaint. Docs. 76-93. WeWit opposes plaintiff's motion on the ground that it has demonstrated a reasonable excuse for failing to answer, i.e., that plaintiff's counsel promised to discontinue against WeWit and not to move for a default against it. Doc. 77. In support of this contention, WeWit's attorney submits as exhibits emails from April 2019 in which he wrote to plaintiff's counsel "you stated that you may release [WeWit] once you confirmed" that it did not own or control the

elevator which allegedly malfunctioned. 84-85. WeWit also asserts that it has a meritorious defense, i.e, that it did not even exist until September 9, 2016, some seven months after the alleged incident, as evidenced by a New York State Department of Corporations printout. Doc. 89. Additionally, it submits a contract reflecting that WeWit was not the elevator contractor at the premises where the alleged incident occurred. Doc. 89. WeWit further asserts that plaintiff's motion for a default judgment must be denied on the ground that it was not filed within one year after WeWit's alleged default. Doc. 92. Additionally, WeWit argues that the complaint must be dismissed pursuant to CPLR 3211(a)(1) based on documentary evidence and pursuant to CPLR 3211(a)(7) on the ground that the complaint fails to state a cause of action against it. Id.

Stephan Diemer ("Diemer"), the sole member of WeWit, submits an affidavit in opposition to plaintiff's motion and in support of the cross motion, asserting, inter alia, that the complaint must be dismissed on the ground that WeWit did not exist until over seven months after the plaintiff's alleged accident. Doc. 93, at par. 3. Diemer represents that he was formerly an officer of CEMD Elevator Corp., which did business as City Elevator, and which should have been named as the proper defendant in this action. Id. at par. 4. He further maintains that, although he obtained a copy of City Elevator's contract in May 2019, and his attorney provided the same to plaintiff's counsel, thereby establishing that City Elevator serviced the elevator which allegedly injured plaintiff, plaintiff's counsel nevertheless continued the action against WeWit. Id. at par. 13.

In a reply affirmation in further support of plaintiff's motion for default and in opposition to the cross motion, plaintiff's attorney argues that, despite Diemer's representation that City Elevator should have been named as a defendant herein, the Department of Buildings' ("DOB") website does not indicate that that company performed any work at the premises. Docs. 107-108.

However, the DOB website does indicate that WeWit performed inspections of elevators at the premises in 2013, 2014, 2015, and then after plaintiff's 2016 accident. Doc. 107 at par. 7. Thus, urges plaintiff, the DOB's records conflict with WeWit's representation that the company did not exist until September 2016. Doc. 107 at par. 8, Doc. 108.

In a reply affidavit in further opposition to plaintiff's motion and in further support of the cross motion, Diemer argues that the DOB mistakenly "changed all its computer records to make it appear that WeWit performed all inspections on all City Elevator elevators going back for almost twenty years" (Doc. 124 at par. 11) although it did not exist until 2016. Id. at par. 13. Diemer further maintains that WeWit does not even inspect elevators, but merely observes other companies performing elevator testing. Id. at par. 12.

LEGAL CONCLUSIONS

Plaintiff's Motion For A Default Judgment

It is well settled that one moving for a default judgment must demonstrate proper service of process on the defendant, defendant's failure to answer or otherwise appear, and the facts constituting the claim (*See Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 [1st Dept 2016]). The question of whether to grant a default judgment lies within the broad discretion of the court. *Id.* Although plaintiff has proven the elements set forth above, this Court, in its discretion, denies plaintiff's motion for a default judgment for the reasons set forth below.

CPLR 3012(d) provides that "the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and a showing of reasonable excuse for delay or default." This Court has the discretion and authority to grant relief pursuant to CPLR 3012(d) *sua sponte,* even in the absence of a cross motion seeking such relief *(See Willis v New York*, 154 AD2d 289, 289-290 [1st Dept 1989] citing *Shure v Village of*

Westhampton Beach, 121 AD2d 887 [1st Dept 1986]). The Appellate Division, First Department has held that the following factors "must . . . be considered and balanced" in determining whether a court should exercise its discretion in granting relief pursuant to CPLR 3012(d): "the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense" (*Emigrant Bank v Rosabianca*, 156 AD3d 468 at 472 [1st Dept 2017] [citations omitted]).

Here, WeWit's delay in answering has been rather lengthy. WeWit was served with process in February 2019 and, although it obtained an extension to answer until April 5, 2019, it still has not done so. However, WeWit maintains that it did not answer because it was engaged in written and oral exchanges with plaintiff's counsel about obtaining a stipulation of discontinuance without prejudice on the ground that WeWit was not formed until after the plaintiff's accident. Thus, WeWit clearly evinced its intention to participate in this case, at the very least to the extent of resolving plaintiff's claims against it, and thus its actions were not willful. Nor is there any evidence in the motion papers reflecting that the plaintiff would be prejudiced in any way if WeWit were to answer the complaint at this juncture. Given these factors, along with the recognition by the First Department of the "strong public policy in favor of resolving cases on the merits" (*Artcorp Inc. v Citirich Realty Corp.*, 140 AD3d 417, 418 [1st Dept 2016]), this Court denies plaintiff's motion for a default judgment and determines that WeWit is entitled to submit an untimely answer.

Since no default judgment has been entered against WeWit, it is not required to demonstrate a meritorious defense (*Marine v Montefiore Health Sys., Inc.*, 129 AD3d 428, 428-429 [1st Dept 2015]). Nevertheless, this court notes that WeWit sets forth such a defense by submitting proof that it was not formed until after the date of the alleged accident, even if said

proof conflicts with the DOB records reflecting that WeWit inspected the elevators at the premises prior to the date of plaintiff's accident.

WeWit's Cross Motion To Dismiss

WeWit's cross motion to dismiss the claims against it is denied in all respects. As noted previously, the parties stipulated to allow WeWit to answer on or before April 5, 2019. When it did not do so, plaintiff had until April 5, 2020 to move for a default judgment pursuant to CPLR 3215(c), which requires that a complaint be dismissed if a default motion is not filed within that time period. However, Executive Order 202.8, issued by the Governor on March 20, 2020, and extended thereafter, suspended all deadlines set forth in the CPLR until November 3, 2020. Between April 5, 2019, the date of the default, and March 20, 2020, 350 days elapsed. Thus, plaintiff had 15 days after the toll was lifted to move for a default. However, the motion was filed with the court on October 14, 2020, before the toll expired on November 3, 2020. Since the motion was thus filed within one year (including the tolled period), plaintiff's claims against WeWit are not subject to dismissal pursuant to CPLR 3215(c).

Additionally, plaintiff's claims against WeWit are not subject to dismissal pursuant to CPLR 3211. In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7):

> "the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (*Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d 618, 621-622 [1st Dept 2018]). Further, a motion court must only determine "whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see Johnson v Proskauer Rose LLP*, 129 AD3d 59, 67 [1st Dept 2015]).

(*Feldman v Port Auth. of NY & New Jersey*, ___AD3d___, 2021 NY Slip Op 01719, *2 [2021]).

Here, the complaint clearly states a negligence claim against WeWit and thus the cross motion is denied on this ground.

Finally, the claims against WeWit are not subject to dismissal pursuant to CPLR 3211(a)(1) based on documentary evidence. Dismissal pursuant to this section may only be granted "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v Martinez*, 84 NY2d at 88. It is evident that WeWit fails to meet this standard since the DOB records submitted by plaintiff indicate that the company worked at the building prior to the alleged accident despite its claim that it was not formed until seven months after the occurrence.

The parties' remaining arguments are either without merit or need not be addressed in light of the findings above.

Accordingly, it is hereby:

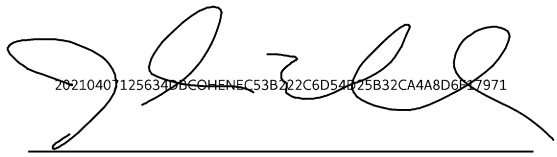
ORDERED that the plaintiff's motion for a default judgment against defendant WeWit LLC i/s/h/a WeWitt LLC is denied; and it is further

ORDERED that the cross motion by defendant WeWit LLC i/s/h/a WeWitt LLC seeking to dismiss the complaint insofar as asserted against it is denied in all respects; and it is further

ORDERED that this Court, *sua sponte*, grants defendant WeWit LLC i/s/h/a WeWitt LLC leave to serve an untimely answer; and it is further

ORDERED that defendant WeWit LLC i/s/h/a WeWitt LLC is directed to file an answer to plaintiff's complaint within 30 days after this order is uploaded to NYSCEF; and it is further

ORDERED that the parties are directed to appear for a compliance conference via Microsoft Teams (for which they will receive an invitation from the Part 58 Clerk), on June 7, 2021 at 3:00 p.m.



4/6/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE