SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART DJMP

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RAISA CHERAPANAVA,

Plaintiff(s),

-against-

LOZNER & MASTROPIETRO, P.C. D/B/A LOZNER & MASTROPIETRO ATTORNEYS AT LAW, DAVID LOZNER, ESQ., DINO MASTROPIETRO, ESQ., LAW OFFICE OF STEVEN T. SCHWARTZ AND STEVEN T. SCHWARTZ, ESQ.,

Defendants.

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DECISION/ORDER

Index No.: 517023/2019

Motion Date: 1/12/2021
Motion Cal. No.:
Mot. Seq. 1,2,3

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	NYSCEF NUMBERS
Plaintiff's Motion #1 and #2	10-18
Defendant Lozner & Mastropietro, P.C. D/B/A Lozner & Mastropietro Attorneys At Law, David Lozner, Esq., Dino Mastropietro, Esq.'s Cross-Motion (Motion #3)	19-37
Defendant Schwartz's Opposition to Plaintiff's Motion #1.....	39-46
Plaintiff's Opposition to Cross Motion.....	48-56
Defendant Schwartz's Opposition to Plaintiff's Motion #1.....	57

MONTELIONE, RICHARD J., J.

Background/Procedure

This action involves a claim for legal malpractice. Defendants allegedly provided legal services to plaintiff in a pedestrian knock down/motor vehicle accident that occurred on December 13, 2015. Plaintiff moves by motion dated December 12, 2019, for default judgment against the defendants asserting that three months passed since defendants were served with the summons and complaint (Motion Sequence No. 1). Affidavits of service were filed on August 28, 2019, September 11 and September 16, 2019. Plaintiff brought a second motion dated December 27, 2019, seeking, *inter alia*, pursuant to CPLR 3101 (d) (2), that non-party Liberty Mutual produce certain discovery. (Motion Sequence No. 2). By cross-motion dated January 28, 2020, defendants Lozner & Mastropietro, P.C., D/B/A Lozner & Mastropietro, Attorneys At Law, David Lozner, Esq., and Dino Mastropietro, Esq., moved to extend their time to appear and to compel plaintiff to accept service of their answer pursuant to CPLR 3012(d) and CPLR 5015. Defendant Steven T. Schwartz opposes the motion but only provides the court with an attorney affirmation, affirmed on August 18, 2020. By letter dated August 17, 2020 defendant Steven T. Schwartz requested an adjournment of the default motion in order to submit opposition papers but the court by order dated August 20, 2020 denied the request because it was made 10 days

after the original return date of August 4, 2020 and no explanation was given as to the lateness of the application. By letter dated August 21, 2020 defendant Steven T. Schwartz provided the court with an explanation and the court by order filed on September 8, 2020 granted the application and adjourned the motion.

Applicable Law

The legal standards for obtaining and/or vacating a default or default judgment are found in *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59-60 [2d Dept 2013]):

> On a motion for leave to enter a default judgment pursuant to CPLR 3215, a plaintiff is required to file proof of: (1) service of a copy or copies of the summons and the complaint, (2) the facts constituting the claim, and (3) the defendant's default (*see* CPLR 3215 [f])... To demonstrate 'the facts constituting the claim' the movant need only submit sufficient proof to enable a court to determine that 'a viable cause of action exists' (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]; *see Alterbaum v Shubert Org., Inc.*, 80 AD3d 635, 636 [2011]; *Neuman v Zurich N. Am.*, 36 AD3d 601, 602 [2007]). CPLR 3215 (f) expressly provides that a plaintiff may satisfy this requirement by submitting the verified complaint.
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> To defeat a facially adequate CPLR 3215 motion, a defendant must show either that there was no default, or that it has a reasonable excuse for its delay and a potentially meritorious defense (*see Wassertheil v Elburg, LLC*, 94 AD3d 753, 753 [2012]; *New Seven Colors Corp. v White Bubble Laundromat, Inc.*, 89 AD3d 701, 702 [2011]; *Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 789 [2011]; *cf.* CPLR 5015 [a] [1]; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). Whether a proffered excuse is "reasonable" is a "sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (*Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 876-877 [2005]; *see Zanelli v JMM Raceway, LLC*, 83 AD3d 697, 697 [2011]; *Grinage v City of New York*, 45 AD3d 729, 730 [2007]; *Greene v Mullen*, 39 AD3d 469, 469-470 [2007]).

When assessing delays of *more than six months*, it is not an abuse of discretion for the court to condition vacatur of the default or default judgment on a financial penalty to be paid by the defaulting party. *Murphy v. D.V. Waste Control Corp.*, 124 A.D.2d 573, 507 N.Y.S.2d 717, 718 (AD 2nd Dept 1986):

> Although the length of the defendants' delay in serving their answer (more than six months) cannot be considered minor (*see, Association for Children with Learning Disabilities, Nassau Ch. v. Zafar,* 115 A.D.2d 580, 496 N.Y.S.2d 472; *Klenk v. Kent,* 103 A.D.2d 1002, 478 N.Y.S.2d 204, *appeal dismissed* 63 N.Y.2d 953), and the only explanation proffered for the delay was the negligence of the defendants' insurance broker, which is "akin to a law office failure" (*Strasser v. Pendino,* 92 A.D.2d 590, 459 N.Y.S.2d 479, quoting from *Bruno v. Village of Port Chester,* 77 A.D.2d 580, 430 N.Y.S.2d 13, *appeal dismissed* 51 N.Y.2d 769), the court did not abuse its discretion in granting the defendants' motion, given that the defendants have established a meritorious defense, the delay did not result in any prejudice to the plaintiffs and there was no showing that the delay was in any way deliberate (*see, Tugendhaft v. Country Estates Assoc.,* 111 A.D.2d 846, 490 N.Y.S.2d 991; *Stolpiec v. Wiener,* 100 A.D.2d 931, 474 N.Y.S.2d 820). As we have often pointed out, there is a long-established policy favoring the resolution of cases on their merits (*see, Tugendhaft v. Country Estates Assoc., supra; Salch v. Paratore,* 100 A.D.2d 845, 474 N.Y.S.2d 85). We note that the court conditioned the vacatur of the default judgment upon the insurance carrier's payment to the plaintiffs of a $1,000 penalty (*see, Tugendhaft v. Country Estates Assoc., supra; Stolpiec v. Wiener, supra*).

The court in *Braisted v. Bullock*, 133 A.D.2d 438, 439, 519 N.Y.S.2d 658, 659 (AD 2nd Dept 1987) in considering a relatively short delay in answering, held:

> In light of the appellants' demonstration of the merits of their defense, the minimal nature of the delay, the lack of any prejudice to the plaintiff as a result of the delay, and the absence of any intent on the part of the appellants to abandon their defense of the action, the trial court abused its discretion in refusing to vacate the appellants' default (*see, Kaplow v. Katz,* 120 A.D.2d 569, 502 N.Y.S.2d 216; *Tugendhaft v. Country Estates Assoc.,* 111 A.D.2d 846, 490 N.Y.S.2d 991; *Heffney v. Brookdale Hosp. Center,* 102 A.D.2d 842, 476 N.Y.S.2d 609, *appeal dismissed* 63 N.Y.2d 770). Moreover, the strong public policy favoring the resolution of cases on their merits mandates the vacatur of the default and the reinstatement of the appellants' answer in the interest of justice and fairness.

Legal Analysis

The motion for default judgment against defendants Lozner & Mastropietro, P.C. d/b/a Lozner & Mastropietro Attorneys At Law, David Lozner, Esq., Dino Mastropietro, Esq. is denied as moot

inasmuch as plaintiff has agreed to accept the foregoing defendants' answer (Affirmation of William Pager, affirmed on January 11, 2021, NYSCEF Doc. #53).

Defendant Law Office of Steven T. Schwartz and Steven T. Schwartz, Esq. electronically filed an answer on February 3, 2020. On February 26, 2021 the plaintiff efiled a letter of rejection. Even though the serving and filing of the answer may serve as a waiver of seeking the right to default a party, no waiver applies when filing the answer after a default motion is served and filed. *See J.O. Dedicated Med., P.C. v. State Farm Mut. Auto. Ins. Co.*, 23 Misc. 3d 144(A), 889 N.Y.S.2d 882, 2009 N.Y. Slip Op. 51089(U), 2009 WL 1532879 (App. Term 2nd Dept 2009).

The court notes that the verified complaint is verified by an attorney (NYCEF Doc. #21) and the affidavit of merit contains only conclusory statements without any factual basis to provide the court with a viable cause of action in legal malpractice relating to defendant Law Office of Steven T. Schwartz and Steven T. Schwartz, Esq. (NYCEF Doc. 12). The complaint verified only by plaintiff's counsel cannot substitute for an affidavit of merit from the party. *See* CPLR 3215 (f); *Henriquez v. Purins*, 245 A.D.2d 337, 666 N.Y.S.2d 190, 1997 N.Y. Slip Op. 10560, 1997 WL 756636 (AD 2nd Dept 1997). Moreover, because the affidavit of merit is devoid of any relevant facts that provide any information regarding legal malpractice, the court will not enter a default judgment because without a verified complaint or an affidavit giving some facts of the alleged legal malpractice, there is no basis to enter a default judgment. *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59-60 [2d Dept 2013]).

Although defendant Law Office of Steven T. Schwartz and Steven T. Schwartz, Esq. ("Schwartz") submitted an attorney affirmation in support of the cross-motion, the cross motion only pertained to vacating the default against the other defendants. In other words, Schwartz never sought to vacate his own default and only opposed the plaintiff's motion for default judgment. Nonetheless, it is within the court's discretion to grant relief to a non-moving party, and in light of plaintiff's failure to provide a basis to enter a default judgment against defendant Schwartz, the less than six month delay in filing the proposed answer, and it appearing that a potentially meritorious defense exist, there being no prejudice to the plaintiff and because plaintiff already stipulated to withdraw defendants' default motion against the other defendants, and in the interest of justice, this court will deem defendant Schwartz's answer as timely filed nunc pro tunc. *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 59-60 [2d Dept 2013]).

Based on the foregoing, it is

ORDERED that plaintiff's motion for default judgment against defendants Lozner & Mastropietro, P.C. d/b/a Lozner & Mastropietro Attorneys At Law, David Lozner, Esq., Dino Mastropietro, Esq., is DENIED as moot because plaintiff agreed to accept the answer of these defendants (MS#1); and it is further

ORDERED that plaintiff's motion for default judgment against defendant Law Office of Steven T. Schwartz and Steven T. Schwartz, Esq. is DENIED as no complaint verified by plaintiff was provided to the court and the affidavit of merit was deficient (MS#1); and it is further

Cherapanava v Lozner & Mastropietro, P.C., et al, Index No. 517023/2019

ORDERED that non-moving defendant Law Office of Steven T. Schwartz and Steven T. Schwartz, Esq.'s answer is deemed timely filed *nunc pro tunc* (MS#1): and it is further

ORDERED that plaintiff's motion for non-party discovery (MS#2) is GRANTED without opposition and the plaintiff may submit an order within thirty days; and it is further

ORDERED that defendants Lozner & Mastropietro, P.C. d/b/a Lozner & Mastropietro Attorneys At Law, David Lozner, Esq., Dino Mastropietro, Esq., motion to extend the time to file the answer and for other relief is DENIED as moot; and it is further

ORDERED that a preliminary conference is scheduled for July 5, 2022

This constitutes the decision and order of the Court.

JUN 0 3 2022

Hon. Richard J. Montelione