Marks v Nail & Spa 72, Inc.
2022 NY Slip Op 33278(U)
September 29, 2022
Supreme Court, New York County
Docket Number: Index No. 153667/2021
Judge: David B. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN **PART** 58

Justice

---X

MICHELLE MARKS,

Plaintiff,

- v -

NAIL & SPA 72, INC.,1012 LEXINGTON AVENUE CO. LLC, and HUBB NYC PROPERTY MANAGEMENT LLC,

Defendants.

---X

INDEX NO. 153667/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 36, 37, 38

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this premises liability action, defendant Nail & Spa 72, Inc. ("Nail & Spa") moves, pursuant to CPLR 317 and 5015(a)(1), to vacate this Court's prior order granting a default judgment against it and, pursuant to CPLR 3012(d), to compel plaintiff to accept a late answer. Plaintiff opposes the 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

Plaintiff commenced this action in April 2021 after she was allegedly injured when she slipped and fell inside Nail & Spa's place of business (Doc No. 1 at 10). In November 2021, after Nail & Spa failed to answer or otherwise appear in this action, plaintiff moved for a default judgment against it (Doc No. 12). By order entered January 27, 2022, this Court granted plaintiff's motion for a default judgment against Nail & Spa (Doc No. 21).

Nail & Spa now moves, pursuant to CPLR 317 and 5015(a)(1), for an order vacating the default judgment against it and, pursuant to CPLR 3012(d), to compel plaintiff to accept a late

answer (Doc Nos. 30-31, 38). In support of the motion, Nail & Spa argues, among other things, that it has a reasonable excuse for its delay in responding to the complaint, i.e., inaction by its insurance carrier caused its attorney to receive the case file for the first time in late February 2022, almost a month after the default judgment was granted (Doc No. 31 at 4-5; Doc No. 38 at 2-4).[1] It further argues that it has a meritorious defense because it did not create, nor had prior notice of, any alleged wet spot (Doc No. 31 at 5-6; Doc No. 38 at 4-5). Last, it argues that plaintiff must be compelled to accept a late answer from Nail & Spa because it has a reasonable excuse for failing to respond to the complaint and a meritorious defense to plaintiff's claims, accepting a late answer would not prejudice plaintiff, and public policy favors resolving cases on the merits (Doc No. 31 at 6-8). Plaintiff opposes the motion, contending that CPLR 317 is inapplicable and that Nail & Spa's contention that it has a reasonable excuse for the delay and a meritorious defense to the claims is conclusory (Doc No. 36).

Legal Conclusions

Nail & Spa's Request to Vacate the Default Judgment Pursuant to CPLR 5015(a)

"A party seeking to vacate a judgment entered upon default under CPLR 5015(a)(1) must show a reasonable excuse for the default as well as a potentially meritorious defense" (*Perez v Table Run Estates, Inc.*, 191 AD3d 416, 416 [1st Dept 2021] [citations omitted]; *accord Soffer v Montanez*, 198 AD3d 606, 606 [1st Dept 2021]). However, "[a] determination of the sufficiency of the proffered excuse and the statement of merits rests within the sound discretion of the court" (*Marquez v 171 Tenants Corp.*, 161 AD3d 646, 647 [1st Dept 2018]; *see Rivera v Shypri Realty*

[1] Nail & Spa also argues that it has a reasonable excuse for its delay because the COVID-19 pandemic made it difficult to gather information and an interpreter was required for conversations between it and its attorney (Doc No. 38 at 2). However, this Court will not consider those arguments because they were raised for the first time in Nail & Spa's reply papers (*see Ormsbee v Time Warner Realty Inc.*, 203 AD3d 630, 631-632 [1st Dept 2022]; *Matter of Gonzalez v City of New York*, 127 AD3d 632, 633 [1st Dept 2015]).

Corp., 198 AD3d 448, 448 [1st Dept 2021]). Although an insurer's failure to timely appoint counsel to appear in an action on behalf of a defendant *may* be considered a reasonable excuse for a delay (*see Schwartz v Port Imperial Ferry Corp.*, 197 AD3d 1057, 1057 [1st Dept 2021]; *Gecaj v Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600, 604 [1st Dept 2017]; *Triangle Transp., Inc. v Markel Ins. Co.*, 18 AD3d 229, 229 [1st Dept 2005] [finding reasonable excuse established when defaulting party provided "evidence, in admissible form" that insurance carrier responsible for delay]), "vacatur of a default judgment is not warranted merely because the default was occasioned by lapses on the part of an insurance carrier" (*Sanchez v Avuben Realty LLC*, 78 AD3d 589, 590 [1st Dept 2010]; *see Klein v Actors & Directors Lab*, 95 AD2d 757, 758 [1st Dept 1983], *lv dismissed* 60 NY2d 1015 [1983]; *Lemberger v Congregation Yetev Lev D'Satmar, Inc.*, 33 AD3d 671, 672 [2d Dept 2006]). A defendant in default due to an insurer's inaction or delay must still provide sufficient details or facts regarding the delay or inaction (*see Lemberger*, 33 AD3d at 672 [finding no reasonable excuse where insurance carrier alleged that months-long delay in assigning counsel caused by error in case management system]; *Gecaj*, 149 AD3d at 604 [finding no reasonable excuse where defaulting party alleged that it believed insurance carrier already handling matter]).

Here, Nail & Spa fails to set forth any factual allegations to support its assertion that its delay in responding to plaintiff's complaint was caused by the inaction of its insurance carrier. It has not provided any affidavits, from the insurance carrier or otherwise, to substantiate the instant delay (*see Lemberger*, 33 AD3d at 672). Its only attempt to establish a reasonable excuse for the delay is a conclusory statement that there was a delay in the insurance carrier "referr[ing]" the case to counsel (Doc No. 31 at 4; Doc No. 38 at 3-4). Without more specificity regarding facts giving rise to the insurance carrier's actions, Nail & Spa's "general excuse" is

insufficient to demonstrate a reasonable excuse for the delay (*Lemberger*, 33 AD3d at 672; *see Gecaj*, 149 AD3d at 604; *Triangle Transp., Inc.*, 18 AD3d at 229; *Klein*, 95 AD2d at 758).

Inaction by an insurance carrier has also been viewed as "akin to law office failure" (*see Klein*, 95 AD2d at 758; *Parker v I.E.S.I. N.Y. Corp.*, 279 AD2d 395, 395 [1st Dept 2001], *lv dismissed* 96 NY2d 927 [2001]), and law office failure *may* amount to a reasonable excuse (*see e.g. Heijung Park v Nam Yong Kim*, 205 AD3d 429, 429-430 [1st Dept 2022]; *Cornwall Warehousing, Inc. v Lerner*, 171 AD3d 540, 540 [1st Dept 2019]). However, "conclusory references to law office failure, . . . without detail or evidentiary support," are insufficient (*Urban D.C. Inc. v 29 Green St. LLC*, 205 AD3d 634, 634 [1st Dept 2022] [internal quotation marks omitted]; *see Matter of TWU Counseling Ctr. Inc. v New York City Tax Commn.*, 204 AD3d 483, 484 [1st Dept 2022]; *Kapoor v Interzan LLC*, 172 AD3d 519, 520 [1st Dept 2019] [finding reasonable excuse where defaulting party provided documentary evidence of law office failure and affidavit from CEO averring that he expected his corporate counsel to defend matter]).

Even viewing the insurer's inaction as law office failure, Nail & Spa has failed to demonstrate a reasonable excuse for its delay. As noted above, Nail & Spa's moving papers provide only a single, conclusory statement purporting to explain its failure to respond to the complaint (Doc No. 31 at 4; Doc No. 38 at 3-4). It did not submit an affidavit, or any other evidence, from an individual with personal knowledge of the circumstances establishing that the delay was caused by the insurer (*cf. Matter of TWU Counseling Ctr. Inc.*, 204 AD3d at 484; *Kapoor*, 172 AD3d at 520). Thus, Nail & Spa fails to demonstrate a reasonable excuse for its delay (*see Urban D.C. Inc.*, 205 AD3d at 634 [finding no reasonable excuse where defaulting party failed to provide details or evidentiary support for "conclusory references" to law office

failure]; *Hereford Ins. Co. v Forest Hills Med., P.C.*, 172 AD3d 567, 568 [1st Dept 2019] [finding no reasonable excuse because defaulting party assertion of law office failure "unsubstantiated"]; *cf. Kapoor*, 172 AD3d at 520).

Because Nail & Spa fails to demonstrate a reasonable excuse, "[this Court] need not consider whether it established a potentially meritorious defense" in connection with its request for relief pursuant to CPLR 5015(a) (*Aetna Life Ins. Co. v UTA of KJ Inc.*, 203 AD3d 401, 402 [1st Dept 2022]; *see Urban D.C. Inc.*, 205 AD3d at 634).

However, even assuming, arguendo, that Nail & Spa successfully demonstrated a reasonable excuse for its default, it has not established a potentially meritorious defense. "[T]o demonstrate a meritorious defense, a party must submit an affidavit from an individual with knowledge of the facts" (*Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]; *see Young v Richards*, 26 AD3d 249, 250 [1st Dept 2006]). Conclusory assertions made in an attorney affirmation are insufficient (*see Young*, 26 AD3d at 250; *Lopez v Trucking & Stratford*, 299 AD2d 187, 187 [1st Dept 2002]). In support of its motion, Nail & Spa submits, among other things, an answer verified by its attorney and an attorney affirmation (Doc Nos. 31, 34). However, neither of those submissions constitutes an affidavit of merit from a person with personal knowledge of the facts (*see Paez v 1610 St. Nicholas Ave. L.P.*, 103 AD3d 553, 554 [1st Dept 2013]; *Young*, 26 AD3d at 250; *Lopez*, 299 AD2d at 187).

Further, Nail & Spa's attempt to establish its meritorious defense is entirely conclusory. Nail & Spa's sole and general assertion that it "did not create or have notice of the condition which allegedly caused plaintiff to fall" (Doc No. 31 at 5; Doc No. 38 at 5) is insufficient to establish a potentially meritorious defense to plaintiff's premises liability claim (*see Lopez*, 299 AD2d at 187; *cf. Figueroa v Relgold, LLC*, 178 AD3d 425, 426 [1st Dept 2019] [finding

meritorious defense established after defaulting party submitted affidavit from principal of defendant property owner and documentary evidence tending to establish absence of liability]).

Nail & Spa's Request to Vacate the Default Judgment Pursuant to CPLR 317

To vacate a default judgment pursuant to CPLR 317, a defendant must "demonstrate that it did not receive notice of the summons in time to defend and that it had a meritorious defense" (*Country-Wide Ins. Co. v Power Supply, Inc.*, 179 AD3d 405, 406 [1st Dept 2020]; *see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141-142 [1986]).

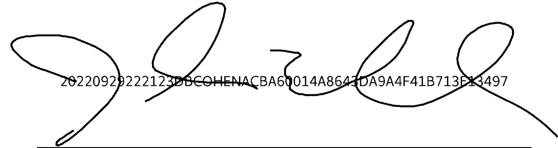
Contrary to Nail & Spa's contention, it fails to satisfy both of these requirements. First, Nail & Spa does not assert, let alone establish, that it did not personally receive notice of the summons and complaint (*see M.R. v 2526 Valentine LLC*, 58 AD3d 530, 531 [1st Dept 2009]; *Metropolitan Steel Indus. v Rosenshein Hub Dev. Corp.*, 257 AD2d 422, 422 [1st Dept 1999]). Indeed, in its moving papers, Nail & Spa provides an affidavit of service of the summons and complaint upon the Secretary of State on April 20, 2021 (Doc No. 33 at 21), which creates a presumption of service (*Country-Wide Ins. Co.*, 179 AD3d at 406). However, Nail & Spa fails to set forth any contention that it did not receive such summons and complaint from the Secretary of State (Doc No. 30 at 2-6; Doc No. 38 at 1-5).

Additionally, as discussed above, Nail & Spa has not demonstrated a meritorious defense but rather makes only a bare, conclusory allegation that it did not create, or have prior notice of, any slippery condition (Doc No. 31 at 5; Doc No. 38 at 5). This is insufficient to establish a meritorious defense (*see Young*, 26 AD3d at 250; *Lopez*, 299 AD2d at 187; *cf. Figueroa*, 178 AD3d at 426).

Since Nail & Spa fails to establish that the default judgment against it must be vacated, there is no need to address its contention that plaintiff must be compelled to accept a late answer.

Accordingly, it is hereby:

ORDERED that defendant Nail & Spa 72, Inc.'s motion to vacate its default and compel plaintiff to accept a late answer is denied in its entirety.



9/29/2022						
DATE			DAVID B. COHEN, J.S.C.			
CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL DISPOSITION	
	☐	GRANTED	☒ DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐ REFERENCE