SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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CONWAY & CONWAY,

Plaintiff,

- v -

JOHN LEOPOLDO FIORILLA, CITIGROUP GLOBAL MARKETS, INC.

Defendants.

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INDEX NO. 652138/2020

MOTION DATE 10/19/2022, 11/09/2022

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 147, 148, 149

were read on this motion to/for JUDGMENT - DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146

were read on this motion to/for DISMISSAL.

Plaintiff, Conway & Conway (plaintiff), commenced this action for legal fees against defendants John Leopoldo Fiorilla, Individually and as Trustee f/b/o John Leopoldo Fiorilla Trust U/A/D 06-25-2003 (Fiorilla), and Citigroup Global Markets, Inc. (as Bailee), stemming from plaintiff's legal representation of Fiorilla in a Financial Industry Regulatory Authority (FINRA) arbitration against defendant Citigroup, entitled *John Leopoldo Fiorilla, Individually and as Trustee FBO John Leopoldo Fiorilla Trust Ubi/D 06-25-2003 v Citigroup Global Markets, Inc.*, FINRA Docket No. 10-03615 and in a second action in Supreme Court, New York County, entitled *Citibank, N.A. v. John L. Fiorilla*, Index No. 651702/2010. In motion sequence 004, plaintiff now moves pursuant to CPLR 3215 for a default judgment against defendant. In motion sequence 005, Fiorilla moves pursuant to CPLR 3215 to dismiss the complaint. The motions are opposed. For the following reasons, plaintiff's motion is granted in part, and Fiorilla's motion is denied.

In 2012, Fiorilla sought legal representation from plaintiff concerning the underlying FINRA arbitration. On May 14, 2012, plaintiff and Fiorilla executed a retainer agreement (2012 retainer), which provided that Fiorilla compensate plaintiff with a contingent fee in the amount of thirty percent on any amounts recovered in the FINRA arbitration from all awards or settlements in Fiorilla's favor. The 2012 retainer contained the following language:

> "As consideration for our representation, our professional legal fee shall be: 1. Five Thousand Dollars ($5,000) to be paid upon the execution of this Retainer,

> and 2. FINRA Action: Thirty percent of any amounts recovered in the FINRA action ("contingent fee")."

(NYSCEF doc. no. 109 at 1)

The 2012 retainer defines "amounts recovered," specifying:

> "For purposes of calculating the contingent fee, "amounts recovered" shall mean the total of all cash and non-cash assets, benefits or services which you, directly or indirectly, receive or become entitled to receive, in connection with the dispute contemplated herein, as a result of settlement, compromise, judgment, award, or contract, including any interest, attorneys' fees, litigation expenses and/or costs awarded to you"

(*id.* at 2).

Pursuant to the 2012 retainer, Fiorilla was also obligated to pay interest accruing on plaintiff's unpaid legal fees, at a monthly rate of one and a half percent (1.5%) from the date of nonpayment until paid (*id.*).

Plaintiff thereafter litigated the FINRA arbitration, including in appearing in twenty-eight hearing sessions at FINRA over the course of two years. Pursuant to the arbitration award dated July 30, 2013, plaintiff received an award of approximately $17,000,000, inclusive of interest. In 2013, Citigroup petitioned to vacate the Panel's award. On May 15, 2014, the Court entered a judgment (the 2014 judgment) in the amount of $800,000 against Citigroup. The Law Firm of Alexander D. Tripp (Tripp) and Law Office of Bernard V. Kleinman (Kleinman) subsequently represented Fiorilla in his attempt to overturn the 2014 judgment. Such representation commenced after the conclusion of plaintiff's representation in the FINRA Arbitration.

Plaintiff asserts that it recently learned that, as a result of recent court filings in New York by Citigroup, Fiorilla has obtained a judgment confirming the FINRA award from a French Court (the French judgment). Plaintiff further states that Citigroup appealed this judgment, and Citigroup's appeal was denied. Plaintiff indicates that Citigroup has further appealed the denial to the French high court, which is currently pending.

Plaintiff further alleges that on July 29, 2013, plaintiff and Fiorilla entered into a second retainer agreement (2013 retainer), providing for plaintiff's legal representation of Fiorilla in an action by Citigroup against Fiorilla. Under the 2013 retainer, legal fees were calculated on an hourly basis, and unpaid legal fees would accrue contractual interest at a monthly rate of 1.5%. The retainer called for a $30,000 a retainer to be applied against an hourly rate of $625 for partner work and $350 for associate work. According to the complaint, plaintiff's work litigating Fiorilla's appeal resulted in fees amounting to $23,532.43. Plaintiff thereafter issued monthly invoices to Fiorilla under the 2013 retainer from approximately September 12, 2014 through at least 2019.

Plaintiff's complaint seeks compensatory damages stemming from the 2012 retainer in the amount of 30% of any amounts recovered by Fiorilla, or $240,000, together with statutory interest accruing from May 15, 2014 until the date of payment. Plaintiff also seeks compensatory damages stemming from the 2013 retainer in the amount of $23,532.43, together with interest accrued at a rate of 1.5% per month, from November 5, 2014 until payment.

Plaintiff commenced this action on June 1, 2020 by filing the summons and complaint, alleging claims for breach of contract concerning the 2012 and 2013 retainers, breach of the duty of good faith and fair dealing as to Fiorilla concerning the 2012 and 2013 retainers, account stated concerning the 2013 retainer, and constructive bailment as to defendant Citigroup. Fiorilla has not answered the complaint and only appeared in this action to oppose the instant motion.

As plaintiff's motion ostensibly appears to have been filed over one-year from Fiorilla's default in this action, the Court must first determine whether plaintiff's motion is timely. The language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory, inasmuch as courts "shall" dismiss claims for which default judgments are not sought within the requisite one year period, as those claims are then deemed abandoned (*Giglio v NTIMP, Inc.*, 86 AD.3d 301, 307 [2d Dept 2011]). "Failure to take proceedings for entry of judgment may be excused, however, upon a showing of sufficient cause, which requires the plaintiff to demonstrate that it had a reasonable excuse for the delay in taking proceedings for entry of a default judgment and that it has a potentially meritorious action" (*HSBC Bank USA, N.A. v Jean*, 165 AD3d 632, 634 [2d Dept 2018] [internal quotation marks and citations omitted]).

The Court finds that plaintiff's motion for a default judgment is timely. On June 16, 2020, plaintiff moved for an order permitting alternative service of the summons and complaint upon plaintiff. On April 27, 2021, another justice of this court granted plaintiff's request, and plaintiff served Fiorilla with the summons and complaint on the that same day. Fiorilla was required to answer plaintiff within thirty (30) days thereafter. Thus, the time for which plaintiff was required to file the motion for a default judgement against Fiorilla was May 27, 2022. On June 10, 2021, plaintiff moved for summary judgment against Fiorilla. On September 26, 2022, the court entered an order denying plaintiff's motion on the basis that the issue was not joined, and further directing plaintiff to move for a default judgment within 60 days. On October 19, 2022, plaintiff filed the instant motion for a default judgement. Taking into the factual background proceeding the instant motion, the court finds reasonable excuse for plaintiff's minimal delay in filing the instant motion.

On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to file proof of (1) service of the summons and complaint, (2) the facts constituting the claim, and (3) the other party's default (*see* CPLR 3215[f]).

As discussed above, plaintiff demonstrates that he served a copy of the summons and compliant upon Fiorilla, and that Fiorilla did not answer. Plaintiff also states sufficient facts demonstrating that he has a viable cause of action and is entitled to judgment on his claims concerning the 2012 retainer. The 2012 retainer specifically states that plaintiff is entitled to 30% of any amount recovered in the FINRA action, and since it is undisputed Fiorilla was entitled to $800,000 pursuant to the 2014 judgment, plaintiff is entitled to 30% of that amount, or $240,000.

Plaintiff also demonstrates its entitlement to a default judgment on his claims related to the 2013 retainer. Thus, the Court finds that plaintiff establishes its entitlement to a default judgment against Fiorilla as to the 2012 and 2013 retainers.

However, plaintiff is not entitled to any judgment on his request for fees related to the French judgment. On a motion for a default judgment, a plaintiff is entitled to relief on its *claim*, whereas here, the complaint does not allege any facts concerning the French judgment, and plaintiff has not moved to amend the complaint to include such facts.

Fiorilla opposes the motion, arguing a number of substantive basis for why plaintiff's motion should be denied. "To successfully oppose a motion for leave to enter a default judgment, a defendant must demonstrate a reasonable excuse for the default and a meritorious defense" (*Morrison Cohen LLP v Fink*, 81 AD3d 467, 468 [1st Dept 2011]). "Where the defendant fails to demonstrate a reasonable excuse for its default, the court need not consider whether the defendant possesses a potentially meritorious defense to the action" (*Lancer Ins. Co. v Fishkin*, 211 AD3d 719, 721 [2d Dept 2022]).

Here, Fiorilla does not submit an affidavit, or otherwise present any facts suggesting a reasonable excuse for his default in answering the complaint. Instead, plaintiff argues the following: plaintiff abandoned this action pursuant to CPLR 3215(c); that the statute of limitations for plaintiff's claims related to attorneys' fees has expired; that the 2014 judgment was not the result of plaintiff's work; that plaintiff failed to notify Fiorilla of his right to resolve the fee dispute by arbitration; and that the charges purportedly pursuant to the 2013 retainer was work actually performed under the 2012 retainer.

Even if plaintiff established a reasonable excuse for failing to answer, he fails to demonstrate a meritorious defense to the action. Fiorilla waived his affirmative defense of statute of limitations by failing to plead the defense in an answer or by a timely pre-answer motion to dismiss (*Matter of Augenblick*, 66 NY2d 775, 777 [1985]; *see Orix Fin. Servs., Inc. v Haynes*, 56 AD3d 377 [1st Dept 2008] [the statute of limitations must be pleaded as an affirmative defense]). In addition, Fiorilla's argument that the 2014 judgment was not the result of plaintiff's work is of no moment, since the agreement explicitly states that plaintiff is entitled to a contingency fee stemming from "*any* amounts recovered in the FINRA action" (emphasis added). The parties could have agreed to limit plaintiff's contingency fee to any work plaintiff performed, but they did not. As for Fiorilla's argument that plaintiff failed to comply with 22 NYCRR §136(a), Fiorilla's argument fails in two critical respects. First, that rule was repealed effective January 1, 2002. And second, assuming Fiorilla intended to cite to 22 NYCRR §137, that section is inapplicable as it only applies to disputes of more than $50,000, whereas the dispute here is only $23,532.43 (22 NYCRR §137.1).

Fiorilla's motion to dismiss the complaint mirror's its opposition to plaintiff's motion. Accordingly, Fiorilla's motion is denied for the aforementioned reasons.

Accordingly, it is hereby

ORDERED that the branch of plaintiff's motion pursuant to CPLR 3215 for a default judgment as to the 2012 retainer is granted in part, to the extent that the Clerk shall enter judgment in favor of plaintiff and against defendant John Leopoldo Fiorilla in the amount $240,000.00, plus costs and interest accrued at a rate of 1.5% per month from May 12, 2014; and it is further

ORDERED that the branch of plaintiff's motion pursuant to CPLR 3215 for a default judgment as to the 2013 retainer is granted, and the Clerk shall enter judgment in favor of plaintiff and against defendant John Leopoldo Fiorilla in the amount of $23,532.43, plus costs and interest accrued at a rate of 1.5% per month from November 5, 2014; and it is further

ORDERED that Fiorilla's motion pursuant to CPLR 3215 to dismiss the complaint is denied; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

4/5/2023
DATE

DAKOTA D. RAMSEUR, J.S.C.

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