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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 22**
BETHPAGE FEDERAL CREDIT UNION,	**NASSAU COUNTY**
Plaintiff,	
-against-	**Index No: 025929-09**
	Motion Seq. Nos: 2 & 3
TAJ BUILDING PRODUCTS CO., THOMAS JOHN HILLSIDE GARDENS REALTY LLC and PHILLY GARDENS REALTY CORP.,	**Submission Date: 5/3/10**
Defendants.	
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The following papers have been read on these motions:

Order to Show Cause, Affidavits in Support (2), Affirmation in Support and Exhibits.....x
Letter Dated August 14, 2008.....x
Affidavit in Opposition, Affirmation in Opposition and Exhibits.....x

This matter is before the Court for decision on the motions filed by Defendants on March 24 and March 26, 2010 and submitted on May 3, 2010. These motions seek identical relief, specifically an Order vacating a default judgment previously entered against Defendants. For the reasons set forth below, the Court denies Defendants' motions.

BACKGROUND

A. Relief Sought

Defendants move for an Order, pursuant to CPLR §§ 3215 and 5015(a)(1) and (a)(3), vacating the default judgment ("Judgment") entered by the County Clerk on February 9, 2010.

Plaintiff opposes Defendants' motion.

B. The Parties' History

In September of 2007, Defendant TAJ Building Products Co. ("TAJ") obtained a $1 million commercial loan from Plaintiff Bethpage Federal Credit Union ("Bethpage" or "Plaintiff"), which indebtedness is evidenced by, *inter alia,* a Promissory Note and Commercial Loan Agreement, both dated September 26, 2007 (Ex I to P's Aff. in Opp.).

The TAJ loan obligation was further secured by several written guarantees, pursuant to which TAJ principal Thomas John ("Thomas") and co-Defendants Hillside Gardens Realty, LLC and Philly Gardens Realty Corp. unconditionally guaranteed payment of the debt. Bethpage alleges that TAJ defaulted on its payments as early as September of 2009, in response to which Bethpage served notices of default. Thereafter, in December of 2009, Bethpage commenced this action, based on the loan documents and guarantees, to recover the allegedly outstanding sum of $774,505.18 as of November 24, 2009, together with late charges, penalties, collection fees, pre-judgment interest, attorney's fees and costs.

Plaintiff effected service of process on Defendants by 1) delivering the summons and complaint to Kathy John ("Kathy"), Thomas' wife, at Thomas' New York residence at 10 Old Shelter Rock Road, Roslyn, New York ("Residence") on December 26, 2009, and mailing a copy of those documents to Thomas at that Residence on December 29, 2009; and 2) delivering the summons and complaint to Kathy on December 28, 2009 at 999 Gould Street, New Hyde Park, New York ("Office"), the location of the corporate and LLC defendants according to the applicable loan documents. The Affidavits of Service are annexed to Plaintiff's Affirmation in Opposition as Exhibits B, C, D and E. The loan documents reflect that Thomas is an officer or member of the Defendant entities, and that the Office is the address of those entities.

In support of the instant motion, Defendants provide an Affidavit of Kathy dated March 4, 2010 in which she affirms as follows: 1) she is Thomas' wife and works as a payroll clerk at his Office; 2) on or about December 26, 2009, certain papers were hand delivered to her at the Residence, which she took to the Office on December 28, 2009; 3) on December 28, 2009, certain papers were also delivered to the Office; 4) Kathy recognized the papers delivered to the Office as identical to those delivered to the Residence; 5) Thomas had previously instructed all Office personnel, including Kathy, that they were to place all legal documents received in the office of Richard Pelligrino ("Pellegrino"), an attorney with an office at the same location who

has represented Thomas on legal matters in the past; 6) Kathy placed the documents in Mr. Pellegrino's office as she had been instructed to do; 7) because she is not an attorney, Kathy did not know or have reason to know that the documents delivered to her were time-sensitive; and 8) Pellegrino was on vacation during this time and returned to his office "later in January" (Kathy Aff. at ¶ 8).

Defendants also provide an Affidavit of Thomas dated March 4, 2010 in which he affirms: 1) Kathy advised him on or about December 26, 2009 that certain legal documents had been hand delivered to the Residence; 2) he has instructed Office personnel to place all legal documents received into the office of Pellegrino who has handled numerous legal matters on Thomas' behalf; 3) Thomas retained counsel in this matter in early February of 2010; 4) Thomas received a copy of a "restraining order" (Thomas Aff. at ¶ 7) in the mail on February 22, 2010; 5) the following day, Thomas learned that the Judgment had been entered, information subpoenas and restraining orders had been served on his banks and funds in his accounts had been seized; 6) Thomas "had no notice" (Thomas Aff. at ¶ 9) of an application for or entry of a default judgment; 7) Thomas received, at his Residence, an envelope to his attention that did not identify the sender, which contained copies of the restraining order; 8) Thomas did not receive any other envelope that was similarly addressed; and 9) Thomas has a meritorious defense, as allegedly demonstrated by a cancelled check dated October 28, 2009 in the amount of $15,000 payable to Bethpage, which Plaintiff cashed, allegedly contradicting Plaintiff's claims that Defendants did not pay all sums due.

Counsel for Defendants ("Counsel") affirms that, upon Pellegrino's return from vacation, Pellegrino retained the law firm of Creedon and Gill to appear on the Defendants' behalf on or about February 4, 2010. Counsel affirms that she spoke with Plaintiff's counsel on February 23, 2010 who advised Counsel that, prior to the entry of the Judgment, Plaintiff's counsel had received a telephone call from Creedon advising her that they would represent Defendants. On February 23, 2010, Counsel advised Plaintiff's counsel that a substitution of counsel had just been effected, and requested copies of relevant documents. During that conversation, Plaintiff's counsel advised Counsel that the Judgment had been entered on February 9, 2010. Counsel avers that, despite her request, Plaintiff's counsel would not provide her with a copy of the application or the Judgment. Counsel contacted the Clerk of Nassau County on February 23,

2010 and was advised that no judgment had yet been entered. On February 23, 2010, Thomas was advised by his bank that Plaintiff had served information subpoenas and restraining orders on the bank as early as February 18, 2010. Defendants have not submitted affidavits from Creedon or Pellegrino.

Plaintiff's counsel provides an Affirmation in Opposition dated April 14, 2010 in which she disputes Counsel's assertion that Creedon contacted Plaintiff's counsel in early February and affirms that no one representing Defendants contacted Plaintiff's counsel until February 22, 2010, thirteen (13) days after the Judgment had been issued. The first time that someone appeared on Defendants' behalf was on February 23, 2010, when Plaintiff's counsel received an Answer on behalf of the Defendants (Ex. F to Aff. in Opp.). Although that Answer was dated February 15, 2010, Plaintiff's counsel did not receive it until February 23, 2010, and Plaintiff's counsel notes that Defendants have not produced an Affidavit of Service reflecting the date of its mailing. Moreover, even assuming that the Answer was mailed on February 15, 2010, it was nonetheless untimely. Plaintiff's counsel repeatedly rejected the late Answer which, she affirms, Counsel continued to mail to Plaintiff's counsel despite those repeated rejections.

Plaintiff's counsel submits that Plaintiff properly sought a default judgment on February 9, 2010 for sums owed to Plaintiff by Defendants. Plaintiff's counsel provides copies of the Judgment and corresponding Bill of Costs (Ex. G to Aff. in Opp.).

Counsel provides a Reply Affirmation dated April 26, 2010 in which she submits, *inter alia*, that notwithstanding Creedon's "courtesy call to Plaintiff's counsel" (Reply Aff. at ¶ 8), Plaintiff's counsel "sprinted to the county clerk's office and obtained the default judgment" without so informing Creedon (*Id.*). Counsel also sets forth her alleged conversations with Creedon but, as noted *supra*, does not provide an Affidavit of Creedon. Counsel also submits that the application for the default judgment was procedurally flawed with respect to the notice and mailing.

C. The Parties' Positions

Defendants submit that the Court should grant their motion to vacate the Judgment because they have demonstrated 1) an excusable default, given the fact that the Complaint was served during the holiday season and Kathy and Thomas have provided an explanation for the delay in providing Pellegrino with that documentation; and 2) a meritorious defense, given

Defendants' production of a cancelled check dated October 28, 2009 in the sum of $15,000.

RULING OF THE COURT

CPLR § 5015(a)(1) permits a court to relieve a party from a judgment or order upon the ground of excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry. A party seeking to vacate an order entered upon his default is required to demonstrate, through the submission of supporting facts in evidentiary form, both a reasonable excuse for the default and the existence of a meritorious cause of action or defense. *White v. Incorp. Village of Hempstead*, 41 A.D.3d 709, 710 (2d Dept. 2007).

Although documented law office failure may constitute a reasonable excuse for a default, *Moore v. Day*, 55 A.D.3d 803, 804 (2d Dept. 2008), a conclusory, undetailed and uncorroborated claim of law office failure does not amount to a reasonable excuse. *White v. Daimler Chrysler Corp.*, 44 A.D.3d 651 (2d Dept. 2007). Rather, a claim of law office failure should be supported by a detailed and credible explanation of the default or defaults at issue. *Campbell-Jarvis v. Alves*, 68 A.D.3d 701, 702 (2d Dept. 2009), quoting *Henry v. Kuveke*, 9 A.D.3d 476, 479 (2d Dept. 2004). Whether an excuse is reasonable is a determination within the sound discretion of the court. *Hye-Young Chon v. Country-Wide Ins. Co.*, 22 A.D.3d 849 (2d Dept. 2005).

With respect to the issue of reasonable excuse, Defendants rely on the unsubstantiated and vaguely framed assertion that their attorney Pellegrino was on vacation until some unspecified point in January of 2010. Defendants, however, have not provided a statement from Pellegrino corroborating in detailed and credible fashion, as the law requires, the factual chronology relied upon in support of the law office claim. Moreover, Defendants have not explained their failure to provide an Affidavit of Pellegrino, an attorney they have employed for many years.

Counsel has asserted facts regarding Pellegrino of which she has no personal knowledge and Defendants have failed to provide an Affidavit of Pellegrino. Moreover, Defendants have failed to identify, *inter alia*, 1) the specific dates when Pellegrino was actually absent from the office; 2) when he returned; 3) when and how he ultimately discovered the Plaintiff's papers in his office; and 4) how long thereafter he waited before contacting the Creedon firm to represent

the Defendants in this action. Finally, Defendants have not provided an affirmation from Creedon to support their allegations regarding his conversation with Plaintiff's counsel in early February, and Plaintiff's counsel, who was a participant in that conversation, disputes Counsel's characterization of the conversation.

Under all the circumstances, the Court concludes that Defendants have not demonstrated a reasonable excuse for their default. *See Brownfield v. Ferris*, 49 A.D.3d 790 (2d Dept. 2008) (conclusory statement by moving party's attorney that one of the attorneys from the firm was away on vacation was insufficient to excuse default); *47 Thames Realty, LLC v. Robinson*, 61 A.D.3d 923, 924 (2d Dept. 2009) (motion to vacate order denied, *inter alia*, because moving party failed to submit supporting affidavit from someone with personal knowledge); *Mattera v. Capric*, 54 A.D.3d 827, 828 (2d Dept. 2008) (court declined to excuse plaintiff's delay in moving for default judgment where attorney's affirmation was not based on personal knowledge and failed to set forth sufficient evidentiary facts).

In support of their meritorious defense claim, Defendants merely annex to their papers a single $15,000,00 cancelled check dated one month after the alleged September, 2009 default date identified in the Complaint (Ex. A to Aff. in Opp.). Defendants' papers contain only circular and obscure statements in support of their theory that the check constitutes proof that they are not in default under the controlling loan documents and/or that they possess a viable defense to Plaintiff's action. The Court concludes, under the circumstances, that Defendants have not established the existence of a meritorious defense. *See, e.g., Yepez v. Damico*, 239 A.D.2d 412 (2d Dept. 1997) (conclusory assertions in affidavits inadequate to show that claim has merit).

Finally, John's bare assertion that he never received the additional default notice prescribed by CPLR § 3215(g)(3)(i) is insufficient to rebut the presumption of proper service created by the affidavit of service. *See Carrenard v. Mass*, 11 A.D.3d 501 (2d Dept. 2004) (appellant's mere denial that he was served with summons and complaint was insufficient to rebut presumption of proper serviced raised by affidavit of service). Nor would such a claim, even if established, warrant vacatur of the judgment absent proof, which Defendants have not provided, of a reasonable excuse for the default and a meritorious defense to the action. *See Kurtz v. Mitchell*, 27 A.D.3d 697, 698 (2d Dept. 2006) (plaintiff's failure to submit affidavit of

service of additional notice pursuant to CPLR § 3215 (g)(3)(i) did not constitute fatal defect where defendant failed to present grounds for vacatur of default judgment).

The Court has considered Defendants' remaining contentions and concludes that they are lacking in merit. Accordingly, the Court denies Defendants' motions in their entirety.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
June 30, 2010

HON. TIMOTHY S. DRISCOLL
J.S.C.