99 A.D.3d 496
Supreme Court, Appellate Division, First Department, New York.

Frederick B. **WHITTEMORE**,
Plaintiff–Respondent,
v.
Edwin H. **YEO**, et al., Defendants–Appellants.

Oct. 9, 2012.

Synopsis
Background: Defendant appealed from an order of the Supreme Court, New York County, Richard F. Braun, J., which entered default judgment in plaintiff's favor.

Holding: The Supreme Court, Appellate Division, held that trial court providently exercised its discretion in finding that defendants' excuse for more than five-month delay in answering was not reasonable.

Affirmed.

West Headnotes (1)

[1] Judgment
Time of answering or filing plea, answer, or affidavit of defense
Pleading
Extension or shortening of time

Trial court providently exercised its discretion in finding that defendants' excuse for their more than five-month delay in answering was not reasonable, and thus that denial of motion to compel acceptance of the late answer and entry of default judgment were warranted, even though length of delay was not inordinate and plaintiff failed to carry its burden of showing that delay was prejudicial, where such factors were outweighed by strong evidence of willfulness.

4 Cases that cite this headnote

Attorneys and Law Firms

****136** Kasowitz Benson Torres & Friedman LLP, New York (Aaron H. Marks of counsel), for appellants.

Bushell, Sovak, Ozer & Gulmi, LLP, New York (Christopher J. Sovak of counsel), for respondent.

SWEENY, J.P., RICHTER, ABDUS–SALAAM, ROMÁN, JJ.

Opinion

***496** Order, Supreme Court, New York County (Richard F. Braun, J.), entered July 26, 2011, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for a default judgment against defendants as to liability only, and denied defendants' cross motion to compel acceptance of their late answer and to dismiss the complaint against defendant Yeo Farms, LLC for lack of jurisdiction, unanimously affirmed, without costs.

The motion court providently exercised its discretion in finding that defendants' excuse for their more than five-month delay in answering was not reasonable (*see Cirillo v. Macy's, Inc.,* 61 A.D.3d 538, 540, 877 N.Y.S.2d 281 [1st Dept. 2009]). Defendant Edwin Yeo's claim that other business commitments prevented him from engaging counsel to respond is inadequate (*see e.g. Flannery v. Stewart,* 22 A.D.2d 786, 254 N.Y.S.2d 130 [1st Dept. 1964]), particularly in view of the undisputed fact that his present counsel was aware of the complaint in mid–April 2010, less than one month after the unchallenged service of ****137** process on all of the defendants and more than five months before plaintiff moved for a default; moreover, his firm was representing the defendant Endurance entities in this State in another matter at the time, notwithstanding his assertion that his firm had not yet been formally retained in this matter. Defendant Yeo's failure to do anything during this period evinces willfulness (*see Casimir v. Consumer Home Mtge., Inc.,* 65 A.D.3d 954, 886 N.Y.S.2d 11 [1st Dept. 2009][motion to vacate default]). Although the length of defendants' delay is not inordinate under the circumstances (*see e.g. American Intl. Ins. Co. v. MJM Quality Constr., Inc.,* 69 A.D.3d 520, 895 N.Y.S.2d 35 [1st Dept. 2010]; *Rosa v. 42 Holding Corp.,* 254 A.D.2d 213, 679 N.Y.S.2d 573 [1st Dept. 1998]), and plaintiff failed to carry his burden of showing that the delay was

prejudicial (*see Pieretti v. Flair Dé Art*, 99 A.D.2d 980, 473 N.Y.S.2d 191 [1st Dept. 1984]), these factors, and the policy preference for deciding cases on their merits, are outweighed in this instance by the strong evidence of willfulness. Nor do the circumstances warrant denial of a default in the interest of justice (*see generally New Media Holding Co. LLC v. Kagalovsky*, 97 A.D.3d 463, 465, 949 N.Y.S.2d 22 [1st Dept. 2012]). Because ***497** a defendant opposing entry of a default judgment must demonstrate both a reasonable excuse and meritorious defenses (*id.*), it is unnecessary to consider defendants' claimed defenses. We note, however, that the breach of contract and breach of fiduciary duty causes of action were properly predicated on an oral limited partnership agreement pursuant to Delaware law, and that plaintiff was not precluded from reasonably relying on defendants' misrepresentations in light of the alleged failure to disclose certain diversions and defendants' failure to provide requested information regarding the allocation of plaintiff's investment in the limited partnership; the defenses to the other causes of action were also meritless.

Plaintiff carried his burden of asserting facts warranting a finding of long arm jurisdiction over Yeo Farms, LLC (*see Marie v. Altshuler*, 30 A.D.3d 271, 272, 817 N.Y.S.2d 261 [1st Dept. 2006]). It is undisputed that Edwin Yeo, acting on behalf of Yeo Farms, met with plaintiff in New York to discuss the guaranty that is the subject of the claim asserted; the factual disagreement as to whether the guaranty was requested or offered gratuitously presents an issue as to the merits, not one requiring a hearing as to jurisdiction.

All Citations

99 A.D.3d 496, 952 N.Y.S.2d 136, 2012 N.Y. Slip Op. 06763

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