

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER
Justice

IAS Part 12

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NANCY SHUNKUEN NG, individually and
derivatively on behalf of ASQUARED
GROUP, INC. As successor in interest to
KYOTO RESTAURANT INC. and KYOTO DINING
GROUP INC.,

Index
Number: 714168/2016

Motion Date:
January 17, 2018

Plaintiff(s),

-against-

Motion Seq. No.: 1

ASQUARED GROUP, INC. as Successor in
Interest to KYOTO RESTAURANT INC. and
KYOTO DINING GROUP INC., XYZ CORP. a
fictitious corporation name intending
same to be a successor in interest to
ASQUARED GROUP, INC d/b/a MIRA SUSHI
a/k/a MIRA SUSHI & IZAKAY, and ANDY LEE,

Defendant(s).

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FILED
FEB 27 2018
COUNTY CLERK
QUEENS COUNTY

The following papers were read on this motion by plaintiff for an
order granting default judgment against all defendants, pursuant
CPLR §3215 and setting the matter for an inquest assessing damages.

Papers
Numbered

Notice of Motion, Affirmation, Affidavit
and Exhibits.....E9-18
Affirmation In Opposition, Affidavit, Exhibit.....E19-21
Reply Affirmation, Exhibits.....E22-25

Upon the foregoing papers, it is ordered that this motion is
determined as follows:

In this action Plaintiff's verified complaint alleges that she is a 25% shareholder in two closely-held corporations, Kyoto Restaurant Inc. and Kyoto Dining Group Inc. (the "Kyoto corporations"), which were formed for the purpose of operating a restaurant business. She alleges that the 75% shareholder, Defendant Andy Lee, misappropriated the assets of the Kyoto corporations and wrongly transferred them to Defendant Asquared Group, Inc. for no consideration, dissolved the Kyoto corporations without Plaintiff's knowledge or consent, and continues to run the restaurant under a new name and under his exclusive control. Plaintiff further alleges that Defendant Lee, upon information and belief, then transferred the corporation's assets from Asquared Group Inc. to another corporate entity, the name of which is not known to Plaintiff, in a further effort to distance himself and the restaurant from Plaintiff. Plaintiff therefore names as a defendant "XYZ Corp.," a fictitious corporation, "intending same to be a successor in interest to Asquared Group Inc." Plaintiff's complaint asserts claims both on behalf of herself individually and derivatively on behalf of Asquared Group, Inc., as successor in interest to the Kyoto corporations.

Plaintiff now moves for a default judgment against all Defendants. The affidavits of service submitted with Plaintiff's motion reflect that Defendant Asquared was served pursuant to Business Corporation Law § 306(b)(1) on December 9, 2016; Defendant Lee was served pursuant to CPLR § 308(2), with proof of service filed on December 27, 2016; and Defendant "XYZ Corp." was served pursuant to CPLR 311(a)(1) on December 15, 2016, by service upon Eugene Tan, a manager and person authorized to accept service on behalf of the corporation.

Defendant Andy Lee opposes the motion. The other Defendants fail to oppose the motion.

Defendant Andy Lee's arguments that Plaintiff's motion for default is defective, are without merit. Plaintiff's application for a default judgment is timely under CPLR § 3215(c), and Plaintiff properly complied with the notice requirements of CPLR § 3215(g). Plaintiff's caption in this derivative action is not defective. (See generally Bus. Corp. Law § 626; *Russo v Zaharko*, 53 AD2d 663, 666 [2d Dept 1976].)

In his opposition Defendant Lee also seeks leave to interpose a late answer, but does not cross-move for such relief. A court has the discretion to grant such relief, even when it is not requested in a notice of cross-motion, if a defendant demonstrates "that it had a reasonable excuse for its default and

a potentially meritorious defense." (*Fried v Jacob Holding, Inc.*, 110 AD3d 56, 66 [2d Dept 2013].) Here, however, Defendant Lee has failed to demonstrate either a reasonable excuse or a potentially meritorious defense. Counsel's affirmation in opposition is not accompanied by an affidavit from Defendant. (See *Baldwin v Mateogarcia*, 57 AD3d 594, 594 [2d Dept 2008].) Counsel's statement that an action is pending in federal court involving claims against the Plaintiff and Defendant, which would affect settlement of the instant action, does not constitute a reasonable excuse for Defendant's failure to answer.

Plaintiff's motion is granted to the extent that all Defendants are held to be in default, and an inquest shall be held on the issue of damages.

Plaintiff is directed to file a conformed copy of this Decision and Order with Notice of Entry, and a Note of Issue for inquest on damages, with payment of the proper fee therefore, if any, upon the calendar clerk at least two (2) weeks prior to the inquest date of April 30, 2018. Inquest to be held at 9:30 a.m. in Trial Scheduling Part.

Plaintiff is directed to serve a copy of this Decision and Order, by regular and certified mail, return receipt requested, upon the defaulting defendants, within fifteen (15) days of entry of the Decision and Order.

This constitutes the Decision and Order of the Court.

Dated: February 21, 2018



Denis J. Butler, J.S.C.

FILED
FEB 27 2018
COUNTY CLERK
QUEENS COUNTY