SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

MICHAEL J. BORRELLI, and BORRELLI & ASSOCIATES, P.L.L.C.,	
Plaintiffs,	**NOTICE OF ENTRY**
-against-	Index No. 603947/14
ROSS ROSENFELD,	
Defendant.	

PLEASE TAKE NOTICE that attached is a true and correct copy of a Decision and Order denying Plaintiffs' motion for default judgment against defendant, Ross Rosenfeld, by the Honorable Daniel Palmieri, duly filed and entered on September 29, 2014, in the Supreme Court of the State of New York, County of Nassau, 100 Supreme Court Drive, Mineola, New York 11501.

Dated: Great Neck, New York
September 29, 2014

Respectfully submitted,

BORRELLI & ASSOCIATES, P.L.L.C.

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Justice Supreme Court

----------x **TRIAL TERM PART: 21**

MICHAEL J. BORRELLI, and BORRELLI & ASSOCIATES, P.L.L.C.,

Plaintiffs,

-against-

ROSS ROSENFELD,

Defendant.

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INDEX NO.: 603947/14
MOTION DATE:9-22-14
SUBMIT DATE:9-22-14
SEQ. NUMBER - 001

The following papers have been read on this motion:

Notice of Motion, dated 9-11-14.....1
Affirmation in Support, dated 9-11-14.....2
Affidavit of Merit in Support, dated 9-11-14.....3
Affirmation in Opposition, dated 9-19-14.....4

The motion, pursuant to CPLR §3215, of the plaintiff (Seq. 001) to enter a default judgment against defendant based on the failure to interpose a timely response to the summons and complaint is denied. Defendant's opposition is deemed a cross motion for leave to serve a late answer and is granted. Although the better course would have been for the defendant to submit a proposed answer with his opposition and make a cross motion, the Court in the interest of justice will overlook such deficiencies and permit defendant to serve a late answer provided it is served no later then 10 days after service upon defendants' attorney by plaintiff of a copy of this Decision and Order with Notice of Entry.

All requests for relief not specifically addressed are denied.

This is the second of two actions between parties. As gleaned from the papers both actions arise from the same facts and series of events. The first action is not assigned to this Court. In this action plaintiffs' are suing under the trademark provision of New York's General Business Law. In the first action between the same parties under Index #600668/2014, the claim is for defamation.

Defendant and his counsel claim to be defending the first action and the attorneys have been in contact with each other, however, plaintiffs did not inform either defendant or his counsel when this action was commenced and defendant states that if and when he was served he believed the papers were in connection with the prior action which has a similar Index Number. Defendant has also proffered a potential meritorious defense to this action claiming that his use of plaintiffs' trademark was for purposes of parody and did not constitute a trademark violation or infringement.

This action was commenced on July 31, 2014 and defendant was personally served on August 6, 2014 meaning that his time to respond expired on August 26, 2014. There is no communication or correspondence about this action from plaintiffs' counsel or plaintiff to defendant or his counsel and this motion was made on September 11, 2014.

Although trademark violations are alleged, neither the complainant nor the moving papers contain any copies of the trademarks or the alleged violations, thereby depriving this

Court of the ability to assess the merit of plaintiffs' claims. See, CPLR §3215(f).

The Court finds that by reason of these omissions the plaintiff has failed to adequately demonstrate the merit of its claims and thus entitlement to a default judgment. See, *Dole Food Co. v. Linden General Insurance Co.*, 66 AD3d 1493 (4th Dept. 2009); *Matone v. Sycamore Realty Corp.*, 31 AD3d 721 (2d Dept. 2006).

Given that the relief sought includes a declaratory judgment and an injunction, the Court is unable to conclude that the merit of the claims made justifies such remedies. A default judgment in a declaratory judgment action will not be granted based on a default in pleading alone. It is necessary in such instances that plaintiffs establish a right to a declaration against a defendant. *Merchants Ins. Co. of New Hampshire, Inc. v. Long Island Pet Cemetery, Inc.*, 206 Ad2d 827 (4th Dept. 1994). Here plaintiffs are seeking a declaratory judgment as well as injunctive relief, and have failed to make a *prima facie* showing of merit. See, *Manhattan Telecommunications Corp. v. H&A Locksmith, Inc.*, 21 NY3d 200 (2013). *Cf., Triangle Properties 2 LLC v. Narang*, 773 AD3d 1030 (2d Dept. 2010). Neither the complaint nor the submission provided sufficient factual content for the Court to determine that such relief is appropriate. Hence plaintiffs have failed to make a *prima facie* showing of the facts constituting the claim. CPLR §3215 (f).

In order to be relieved of his default, defendant is required to demonstrate a meritorious defense to the complaint and a reasonable excuse for the default *Falla v. Keel Holdings, LLC,* 50 AD3d 844 (2d Dept. 2008); *Taylor v. Saal*, 4 AD3d 467 (2d Dept. 2004). In determining whether to permit late service of a responsive pleading, courts should consider the extent of the delay, whether it was wilful, presence or absence of prejudice, and the public policy of resolving cases on their merits. *Harcztark v. Drive Variety, Inc.*, 21 AD3d 876 (2d Dept. 2005).

Here, the issues in both pending actions are intertwined and based on the same documents, events and conduct, and defendant has submitted evidence of merit with respect to its claims and a lack of merit to the plaintiff's claim. Defendant has provided a reasonable explanation for a failure to serve a timely answer and has demonstrated that he acted promptly to obtain and consult with counsel. The default was only for a matter of 16 days and given the history of prior litigation cannot be said to be willful or intentional. Prejudice to plaintiffs is neither perceived nor claimed.

Based on the foregoing, it is appropriate to permit the service of a late answer and to deny the motion for a default judgment *See, Performance Construction Corp., v. Huntington Building, LLC,* 68 AD3d 737 (2d Dept. 2009); *Rottenberg v. Preferred Property Management, Inc.* 22 AD3d 826 (2d Dept. 2005).

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