SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN PART 11
Justice

KIEN GIAN-NGUYEN,

Plaintiff,

- v -

SY JIMMY-NGUYEN,

Defendant.

INDEX NO. : 118117/99

MOTION DATE:

MOTION SEQ. NO.: 007

MOTION CAL. NO.:

The following papers, numbered 1 to _____ were read on this motion to/for_____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	_____
Answering Affidavits — Exhibits	_____
Replying Affidavits	_____

Cross-Motion: [ ] Yes [x] No

Defendant moves, by order to show cause, to stay the execution of a judgment against him, and to permit him to file an answer. Plaintiff opposes the motion, which is denied for the reasons below.

Background

This action seeks to recover the principal amount of $60,000 which plaintiff is alleged to have loaned defendant during the period between July and December 1995. On December 22, 1999, a judgment was entered against defendant in the amount of $90,195, including the

principal amount of $60,000, $29,800 in interest from July 1, 1995, and various costs of the proceeding.

By order to show cause signed on December 21, 2000, defendant moved for an order vacating the judgment entered against him on default, asserting that he did not live at the address identified on the affidavits of service, and that he had a meritorious defense. Plaintiff opposed the motion. By decision and order dated February 9, 2001, Justice Sheila Abdus Salaam granted defendant's motion only to the extent of setting the matter down for a traverse hearing. The order directed defendant "to serve a copy of this order upon the Judicial Support Office so that the issue of whether defendant was properly served can be assigned to a Special Referee to hear and report."

Defendant, however, did not seek a traverse hearing until August 9, 2001, and plaintiff subsequently received a notice from the Judicial Support Office indicating that the standard three month period to seek a traverse hearing had expired, and that defendant was required to apply for a new order from the assigned judge. By notice of motion dated April 26, 2002, defendant moved for an order granting a traverse hearing, and plaintiff opposed the motion. By decision and order dated June 10, 2002, Justice Harold Tompkins denied the motion, writing that:

> A traverse hearing was ordered on February 9, 2001 but defendant took no action to pursue it until August 2001. Since this is beyond the standard sixty days, the court must deem the motion abandoned under 22 NCYRR 202.48[1].... The court notes that this motion was made eight months after the scheduling request.

Although defendant filed a notice of appeal with respect to Justice Tompkins decision and order, he never pursued the appeal.

By notice of motion dated April 30, 2003, defendant moved pursuant to CPLR 317 to vacate the judgment entered against him on default on the grounds that service was improper as he did not reside at the address identified on the affidavits of service, and that he had a meritorious defense. Defendant stated that no previous applications for the relief had been made

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[1]Section 202.48 of the Unified Rules for Trial Court requires that proposed orders and judgments be settled within 60 days or that they be deemed abandoned.

to the court, apparently relying on the fact that the prior motion to vacate the default was not made pursuant to CPLR 317, and made no mention of his prior efforts to vacate his default. Plaintiff did not oppose the motion, which by decision and order dated July 24, 2003, was granted on default. Defendant subsequently answered the complaint

By notice of motion dated August 11, 2003, plaintiff moved for reconsideration of the court's July 24, 2003 decision and order. By decision and order dated April 2, 2004, this court granted the motion only to the extent of directing that a traverse hearing be held with regard to whether service was proper.

A traverse hearing was held and by order dated July 8, 2004, this court granted defendant's motion to vacate the default judgment, finding that plaintiff did not establish that service was made on defendant. The court stayed the vacatur of the judgment to December 9, 2004, pending plaintiff's appeal of the court's April 2, 2004 decision and order directing the traverse.[2]

On August 13, 2004, plaintiff personally served defendant with the summons and complaint. On September 27, 2004, plaintiff moved for a default judgment against defendant based on his failure to answer, move or otherwise respond to the summons and complaint. A copy of the motion was served on defendant's counsel, Mr. Moss. By order dated October 20, 2004, this court granted the motion, on default, to the extent of setting the matter down for an inquest.

Plaintiff then wrote to the court and Mr. Moss, proposing that the inquest was not needed and requesting that the court reinstate the prior judgment to maintain plaintiff's lien position. On November 24, 2004, plaintiff filed an order to show cause, which was served on Mr. Moss and on which defendant defaulted, seeking to expedite the process and maintain the lien on property. By order dated February 24, 2005, the court directed that an inquest be held. On April 7, 2005, the inquest was held, and plaintiff served the Note of Issue and Certificate of Readiness on Mr. Moss as to the inquest. On June 8, 2005, a judgment was entered against defendant in the amount of $60,000, plus interest at a rate of 1% per month from December 1, 1995, in the

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[2]The April 2, 2004 decision and order was affirmed by the Appellate Division, First Department on January 20, 2005. Nguyen v. Nguyen, 14 AD3d 426 (1st Dept 2005).

amount of $68,587.40, for a total amount of $128,587.

Approximately a year and a half after judgment was entered against him, defendant now moves, by order to show cause, to stay the execution of the judgment[3] and to permit him to answer the summons and complaint. In his affidavit, defendant does not contend that he was not served with the summons and complaint in August 2004. Instead, he asserts that although he spoke to his attorney, Mr. Moss, in October and November 2004 about the summons and complaint, that Mr. Moss "never informed me he defaulted." In addition to faulting Mr. Moss, defendant asserts that his "intensive involvement" in the care and maintenance of his wife, who in January 2005, suffered stroke, and remains hospitalized caused him to be "inattentive" to the action. According to defendant's counsel on this motion, approximately, seven and a half months ago, defendant became aware that the judgment against him, and that the judgment had been filed in the County of New Jersey where defendant owns a house.

Defendant also avers that the action against him is without merit as he never loaned money from plaintiff. Instead, according to defendant, he participated in a fund to which he and other individuals (presumably including plaintiff) contributed moneys, and from which money could be drawn on like a bank. Defendant states that an unidentified member of the group borrowed some money and absconded, that no one was paid, and he and the others lost their investments, but that plaintiff blamed him. Defendant also argues that the action is untimely since it purportedly accrued between July 1995 and April 1996.

Discussion

Although not characterized as such by defendant, this motion seeks to vacate the judgment granted against him on default.

CPLR 5015(a)(1) gives the court discretion to relieve a party from a judgment or order granted on default where it is shown that there is a reasonable excuse for the default, and a meritorious claim or defense. See Young v. Richards, 26 AD3d 249, 250 (1st Dept 2006); Basetti v. Nour, 287 AD2d 126, 134 (2d Dept 2001). However, it has been held that such "discretion

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[3]The court granted defendant's request to temporarily stay actions by the Marshall or Sheriff in New York County, but did not stay plaintiff from executing on the judgment in other states, including New Jersey, where defendant's house is located.

should not be exercised where...the moving party has demonstrated a lack of good faith, or been dilatory in asserting its rights." Greenwich Savings Bank v. JAJ Carpet Mart, Inc., 126 AD2d 451, 452-453 (1st Dept 1987)(citation omitted).

In this case, defendant has not provided a basis for relief from the judgment entered against him. First, defendant has not shown a reasonable excuse for the default based on his wife's illness in January 2005, since he was served with the summons and complaint five months before she became ill. Moreover, while defendant admittedly knew about the judgment against him seven months ago, he failed to move for relief until it became clear that his home would be foreclosed upon to satisfy the judgment. See Hyundai Corp. v. Republic of Iraq, 20 AD3d 56, 62 (1st Dept), lv dismissed, 5 NY3d 783 (2005)(judgment granted on default should not be vacated when defendant bank waited until the eve of the expiration of a one year time limit before it moved to vacate its default).

Furthermore, although defendant apparently asserts that his attorney, Mr. Moss, failed to inform him of the default, he provides no explanation for Mr. Moss' failure to act on his behalf. See Sommers v. Sommers, 305 AD2d 662 (2d Dept 2003)(holding that "defendant's failure to explain the reasons for an inordinate delay in serving an answer, which was vaguely attributed to law office failure, is insufficient to establish a reasonable excuse"). In particular, defendant's bare statement that he spoke to Mr. Moss, in October and November 2004 about the summons and complaint, that Mr. Moss "never informed me he defaulted" lacks any specifics about the contents of his communications with Mr. Moss, or whether he had any subsequent communications with Mr. Moss about this case. And, tellingly, defendant does not submit an affirmation from Mr. Moss. Significantly, the court granted plaintiff leave to serve the summons and complaint under the original index number and, thus, Mr. Moss remains the attorney of record notwithstanding that a different attorney made this motion. Furthermore, given the default history of this case and defendant's testimony at the traverse, that defendant fails to offer any explanation as to his lack of inquiry as to the status of the action suggests, at best, inexcusable negligence by defendant.

In addition, with respect to the service of the first summons and complaint even though the court found that plaintiff had not met his burden of showing that service on defendant was

effectuated, the court notes that this is the second time that defendant failed to follow through after he sought to vacate a default in answering. As indicated above, after Justice Abdus Salaam granted, in February 2001, defendant's first motion to vacate his default to the extent of setting the matter down for a traverse hearing, defendant failed to serve a copy of the order on the appropriate clerk's office until six months after the order was issued. Moreover, with respect to the latest default, defendant made no attempt to remedy the failure to answer, even after Mr. Moss was served with a motion for a default judgment, a letter and order to show cause proposing that an inquest was not necessary, and a notice that the inquest was held. Given this pattern of neglect, any negligence by Mr. Moss should be imputed to defendant, and does not provide a reasonable explanation for the default. MRI Enterprises, Inc. v. Amanat, 263 AD2d 530, 531 (2d Dept 1999); Roussodimou v. Zafiriadis, 238 AD2d 568 (2d Dept 1997).

Next, not only does defendant lack a reasonable excuse for the default, but his unsupported assertion that plaintiff lost money as the result of a group arrangement, which he apparently raises for the first time, is insufficient to constitute a meritorious defense. Finally, since plaintiff made reasonably diligent attempts to serve defendant with the first summons and complaint, his claims are not untimely. See Leader v Maroney, Ponzini & Spencer, 97 NY2d 95, 104 (2001).

Conclusion

In view of the above, it is

ORDERED that defendant's motion is denied; and it is further

ORDERED that all stays are hereby rescinded and vacated.

DATED: March 19, 2007

J.S.C.

Check one:[x] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION