Amourgianos v Cummins Diesel Sales Corp.
2008 NY Slip Op 31952(U)
July 9, 2008
Supreme Court, New York County
Docket Number: 0103576/2004
Judge: Louis B. York
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SCANNED ON 7/11/2008

[* 1]

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

PRESENT: LOUIS B. YORK J.S.C. PART 2

Amorgianos

INDEX NO. 103576/04

MOTION DATE

- v -

MOTION SEQ. NO. 05

Cummins Diesel

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 ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED JUL 11 2008 COUNTY CLERK'S OFFICE NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/9/08

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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JAMES AMOURGIANOS,

Plaintiff,

Index No. 103576/2004

-against-

CUMMINS DIESEL SALES CORPORATION and DAIMLERCHRYSLER CORP.,

Defendants.

FILED
JUL 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

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LOUIS B. YORK, J.:

In this action, plaintiff James Amourgianos ("Amourgianos") seeks to vacate an order granting summary judgment on default. Plaintiff submitted opposition to the motion in a timely manner, but his lawyer failed to make an appearance on the scheduled argument date. Consequently, the Court granted the motion on default on May 18, 2007. Plaintiff made this motion on October 11, 2007, four months from the date when defendants Cummins Diesel Sales Corporation ("Cummins") and DaimlerChrysler Corp. ("DaimlerChrysler") served plaintiff with a copy of the order.

Background

On August 27, 1998 Amourgianos purchased a 1999 Dodge Ram Quad Cab, manufactured by DaimlerChrysler, and the vehicle was delivered to him on December 31, 1998. The written limited warranty covered repairs and was good for a period of five years or 100,000 miles, whichever occurred sooner. Plaintiff experienced problems with the car over the course of the following few years and had to take it in for repairs. On

October 30, 2003 the car lost power and was towed to Northern Boulevard Dodge (not a party in this lawsuit) for repairs. On January 28, 2004, plaintiff's lawyer sent a revocation of acceptance to Cummins, but not to DaimlerChrysler. Cummins rejected the revocation claiming that it was time-barred by the statute of limitations. Plaintiff initiated this lawsuit on March 9, 2004, claiming that defendants breached the written limited warranty of the vehicle and violated the Magnuson-Moss Warranty Act. Plaintiff alleges that after he got his vehicle back eleven months after the engine failed, in September 2004, the car had dents and would not start. The dealership ultimately repaired the car at no cost to plaintiff but, plaintiff claims, his problems with the car continued.

Plaintiff filed this note of issue on October 6, 2007. On February 22, 2007, after more than thirty-five months of litigation, defendants moved for summary judgment and plaintiff filed opposition papers. Defendants argued that plaintiff cannot maintain a cause of action for breach of express warranty because that cause of action is time-barred as a matter of law. Also, defendants contended, the written limited warranty does not promise future performance of the vehicle and the revocation of acceptance is also time-barred. Plaintiff contended that the statute of limitation runs from the time of the breach of the written limited warranty that defendants issued to plaintiff, that is, from the time that the vehicle's engine failed on October 30, 2003. Therefore, plaintiff alleges, the case is not untimely. As stated, plaintiff did not appear for argument and the court granted the motion on default.

Discussion

To prevail under CPLR 5015, a movant must establish a reasonable excuse for failure to appear in court and a meritorious claim. See Goldman v. Cotter, 10 A.D.3d

289, 291, 781 N.Y.S.2d 28, 31 (1st Dep't 2004). First, the default must be excusable. Beneficial Finance Co. of New York, Inc. v. Kramer, 48 A.D.2d 822, 822, 368 N.Y.S.2d 266, 267 (2d Dep't 1975). The determination of the sufficiency of the proffered excuse and the statement of the merits rests within the sound discretion of the court. Navarro v. A. Trenkman Estate, Inc., 279 A.D.2d 257, 258, 719 N.Y.S.2d 34, 35 (1st Dep't 2001).

The excuse of "law office failure" has generally been accepted so long as it is specific. See Troiano v. Otsego Mut. Fire Ins. Co., 99 A.D.2d 719, 719, 472 N.Y.S.2d 331, 332 (1st Dep't 1984). The First Department has held that when "plaintiff submitted timely written opposition to defendants' summary judgment motion demonstrating meritorious cause of action, and her nonappearance at oral argument of motion was demonstrably due to law office failure" she was entitled to an excusable default. DePompo-Seff v. Genovese Drug Stores, Inc., 13 A.D.3d 109, 109, 785 N.Y.S.2d 446, 446 (1st Dep't 2004). More specifically, the First Department has ruled, "the inadvertent calendar error caused by law office failure, is a reasonable excuse for plaintiff's default." Reyes v. New York City Housing Authority, 236 A.D.2d 277, 279, 653 N.Y.S.2d 585, 587 (1st Dep't 1997).

Many courts also consider the amount of time that passed between the filing of the motion to vacate and the default judgment. See Kojalo v. City of New York, 248 A.D.2d 512, 512, 670 N.Y.S.2d 52, 52 (3d Dep't 2000) (court denied defendant's motion to vacate in response to a motion for summary judgment because defendant waited seven (7) months after summary judgment was entered to submit the motion to vacate the judgment).

Plaintiff alleges that his lawyer did not appear at the motion for summary judgment due to law office failure of "miscalendaring." Also, plaintiff moved to vacate the default only four months after the decision was rendered. Plaintiff explained his brief delay in filing this motion as due to plaintiff's misconception that summary judgment was ordered on default because the court did not receive plaintiff's papers in opposition to the motion for summary judgment.

The First Department, under similar circumstances, has found that where a plaintiff showed no signs of "willful or contumacious conduct," calendar error was a justified excuse. Reyes, 236 A.D.2d at 279, 653 N.Y.S.2d at 587. Thus, the Court finds that plaintiff has set forth an excusable default.

In addition, to satisfy CPLR 5015, plaintiff must establish that he has a meritorious claim. Plaintiff claims that he has a valid cause of action on the merits because the defendants violated the Magnuson-Moss Warranty Act by failing to perform their obligations under the warranty. The Act provides that any written warranty for a consumer product must disclose the terms and conditions of that warranty. 15 USC §2301 (1975). Plaintiff also asserts that this claim is valid because the statute of limitations has not expired.

Before reaching the substantive merits of the claim, the Court addresses the issue of statute of limitations. The First Department has ruled that a motion to vacate judgment under CPLR 5015 is denied if the statute of limitations has run on the claim. Callwood v. Cabrera, 49 A.D.3d 394, 394, 854 N.Y.S.2d 42, 42 (1st Dep't 2008). UCC §2-725 provides a four-year (forty-eight-month) statute of limitations for breach of any contract of sale, which commences on the date of delivery of the goods. Plaintiff received his

vehicle on December 31, 1998 and the express warranty provided by DaimlerChrysler falls under the category covered by UCC §2-725. The Chrysler warranty specifically states that it covers the cost of repairing specific parts of the vehicle for five years or 100,000 miles, whichever occurs first, starting from the date of delivery of the vehicle. The warranty further provides: "This warranty, together with the express commercial warranties are the sole warranties made by Chrysler Motors, there are no other warranties, express or implied, or of merchantability, or fitness for a particular purpose." Here, the statute of limitations started to run on the date of delivery of the vehicle, December 31, 1998. Thus, any action for breach of contract should have been brought by December 31, 2002 to satisfy the statute of limitations.

Plaintiff filed the amended summons and complaint on April 12, 2006, seven years and three months after he received the vehicle and three years and three months after the statute of limitations had expired. Under this analysis, the case is untimely and defendants urge the Court to deny plaintiff's motion on this basis. However, plaintiff asserts that the statute of limitations should begin to run at the time of breach of the limited written warranty, which occurred on October 30, 2003 when the car engine failed. Plaintiff alleges that DaimlerChrysler's five year or 100,000 miles warranty is a warranty of future performance for which the statute of limitations begins to run at the point of discovery of the defect.

Here, plaintiff relies on the point that if a warranty explicitly extends to future performance of the goods, the statute of limitations begins to run when discovery of the breach occurs. St. Patrick's, 264 A.D.2d at 656-657, 696 N.Y.S.2d at 120. If "the clause specifically warrants future performance, a claim for its breach accrues when the breach

was or should have been discovered." Dormitory Authority of the State of New York v. Baker, 218 A.D.2d 515, 517, 630 N.Y.S.2d 313, 314 (1st Dep't 1995). In fact, "[w]arranties to repair or replace the product in the event that it fails to perform, without any promise of performance, do not constitute warranties of future performance." St. Patrick's, 264 A.D.2d at 657, 696 N.Y.S.2d at 121.

The written limited warranty at issue here contains a promise to repair without charge "any defective item on your truck that was supplied by Chrysler Motors." It did not explicitly guarantee or promise that the vehicle would be free of defects in the future. It only warranted that DaimlerChrysler would repair the vehicle for 5 years or 100,000 miles. Thus, the Chrysler written limited warranty did not guarantee future performance but only promises to repair defective parts for a specified period of time.

Hence, the statute of limitations should have been calculated from the time of delivery of the vehicle, not the breach of the written limited warranty. The statute of limitations began to run at the time of delivery of the vehicle to plaintiff on December 31, 1998 and expired four years later on December 31, 2002. In Hull v. Moore's Mobile Homes Stebra, 214 A.D.2d 923, 924, 625 N.Y.S.2d 710, 711 (3d Dep't 1995), the court ruled that plaintiffs' breach of warranty cause of action accrued at the time of delivery of the mobile home to plaintiffs and was time barred by the four-year statute of limitation. "Plaintiffs' argument that their cause of action accrued on the date the warranty was breached is unavailing because the warranty herein does not extend to the future performance of the goods as it was expressly limited to repair or replacement". Id. Therefore, the statute of limitations had run by the time plaintiff filed the complaint on March 9, 2004.

Accordingly, it is

ORDERED that the motion to vacate the Court's decision dated May 18, 2007, motion sequence number 2, is denied and the case is dismissed.

Dated: 7/9/08

ENTER:

LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.

FILED
JUL 11 2008
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