

**JPMorgan Chase Bank, N.A. v St. Anthony
Pharmacy Inc.**

2008 NY Slip Op 32328(U)

August 20, 2008

Supreme Court, New York County

Docket Number: 0110135/2006

Judge: Shirley Werner Kornreich

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

PRESENT: HON. SHIRLEY WERNER KORNREICH
Justice

PART 54

Index Number : 110135/2006
JP MORGAN CHASE BANK, N.A.
vs.
ST. ANTHONY PHARMACY, INC.
SEQUENCE NUMBER : 002
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE 6/4/08
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

ad on this motion to/for Default Judgment

Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: 8/20/08

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

Index No.: 110135/06

-against-

DECISION
and ORDER

ST. ANTHONY PHARMACY INC. and
HECTOR PEREZ

Defendants.

FILED
AUG 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X

KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover for monies due under a line of credit agreement executed by defendant St. Anthony Pharmacy Inc., (St. Anthony) and guaranteed by defendant Hector Perez (Mr. Perez). Plaintiff here moves for a default judgment against both defendants seeking: (1) to recover the principal sum of \$41,666.66 with interest at the bank's prime rate plus 1.5% per annum from February 9, 2006; and (2) attorneys' fees. Defendants do not oppose.

I. *Statement of Facts*

Plaintiff's Assistant Vice President of Portfolio Management, Lecann A. Toner (Ms. Toner), avers the following. On or about August 8, 2002, St. Anthony applied to plaintiff JPMorgan Chase Bank, N.A. (Chase) for a \$50,000 Business Revolving Credit Line. On or about August 9, 2002, Chase approved the application and the parties entered into a Business Credit Agreement (Agreement). That same day, Mr. Perez entered into a written guarantee (Guarantee) in which he unconditionally guaranteed Chase full and prompt payment of all debts and obligations owed by St. Anthony under the Agreement. Pursuant to the terms of the Agreement, St. Anthony agreed to pay back the \$50,000 loan with interest at the banks prime

rate, plus 1.5% per annum in thirty-six consecutive monthly installments due on the ninth of every month. The Agreement additionally provides that St. Anthony's failure to make any payment due would result in default, and in the event of default, Chase could declare the entire principal to be immediately due and payable. St. Anthony defaulted under the Agreement on February 9, 2006. Ms. Toner avers Chase subsequently demanded that, pursuant to his Guarantee, Mr. Perez honor St. Anthony's remaining obligations under the Agreement. To date, neither St. Anthony nor Mr. Perez have made any payments toward the remaining balance due under the Agreement.

Plaintiff served its summons and verified complaint on St. Anthony on July 26, 2006, by service upon the Secretary of the State of New York pursuant to Business Corporation Law § 306. Plaintiff served Mr. Perez with its summons and complaint at his residence on July 31, 2006, by delivering and mailing the documents to his residence, pursuant to CPLR § 308. Plaintiff served and filed the instant motion on or about June 4, 2008. Neither defendant has answered or opposed this motion.

II. *Conclusions of Law*

"When a defendant has failed to appear . . . the plaintiff may seek a default judgment against him." CPLR 3215(a). To succeed on a motion for a default judgment, the plaintiff must submit proof of service of process and affidavits attesting to the default and the facts constituting the claim. *See Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3215:16, at 557.* CPLR § 3215(c) states, *inter alia*, that, "if [a] plaintiff fails to take proceedings for entry of judgment within one year after default, the court shall not enter judgment but shall dismiss the complaint as abandoned. . . unless sufficient cause is shown as to

why the complaint should not be dismissed." To demonstrate "sufficient cause", a plaintiff must present a valid excuse for the delay and a meritorious claim. *Valentin v. Rinder*, 65 AD2d 716, (1st Dept 1978). Pursuant to CPLR § 2005, law office failure no longer constitutes a *per se* unreasonable excuse for a party's default or delay. *LaValle v. Astoria Constr. & Paving Corp.*, 266 AD2d 28 (1st Dept 1999). The extent of an attorneys negligence "must instead be weighed against the merits of the claim and the lack of prejudice to the other side."

Regarding St. Anthony, Chase concedes that it did not file the instant motion on time. This motion was not filed until June 4, 2008, well after the expiration of the one-year allotment of time to move for a default judgment pursuant to CPLR § 3215(c). Therefore, plaintiff's motion for a default judgment against St. Anthony is denied.

Mr. Perez filed for Chapter 11 Bankruptcy in the District of New Jersey on February 17, 2007, which was dismissed by the District Court on March 24, 2008. Therefore, Mr. Perez's bankruptcy filing served to toll the year long statute of limitations period under CPLR § 3215(c) until the final decree was issued by the District Court on March 24, 2008. See CPLR 204; *Mercury Capital Corp. v. Shepherd's Beach, Inc.*, 281 AD2d 604 (2d Dept 2001) (statute of limitations tolled under CPLR 204 during entire period of automatic stay imposed during a bankruptcy petition under 11 USCS 362). In addition, plaintiff has submitted signed copies of the Agreement, Guarantee and Ms. Toner's affidavit. These documents serve as evidence of executed contracts between Chase and each defendant, which are now in default due to non-payment. Accordingly, since plaintiff has set forth a valid excuse and meritorious cause of action, and defendants have not put forth any evidence to show that they suffered any prejudice as a result of the delay, plaintiff's motion for a default judgment against Mr. Perez is granted.

* 5]

See *Bazac v. Odelia Enters. Corp.*, 272 AD2d 226 (1st Dept 2000) (plaintiff's attorney's failure to track progress of action was excusable law office failure that reasonably accounted for failure to timely move for default where meritorious cause of action existed and defendant suffered no prejudice from delay); *LaValle*, 266 AD2d at 28 (court exercised proper discretion in denying motion to dismiss complaint pursuant to CPLR 3215(c) where even though inadvertent error by counsel was not "compelling" meritorious cause of action existed and no tenable showing made that plaintiffs' delay prejudiced defendant); *Sanders v. Aziz*, 101 AD2d 734 (1st Dept 1984) (plaintiff's failure to take proceedings for entry of judgment within one year after defendant's default would be excused where it was clear that a meritorious claim existed and that no legal or other prejudice resulted to defendant from the minimal period of delay which apparently resulted from an error by plaintiff's counsel). Accordingly, it is

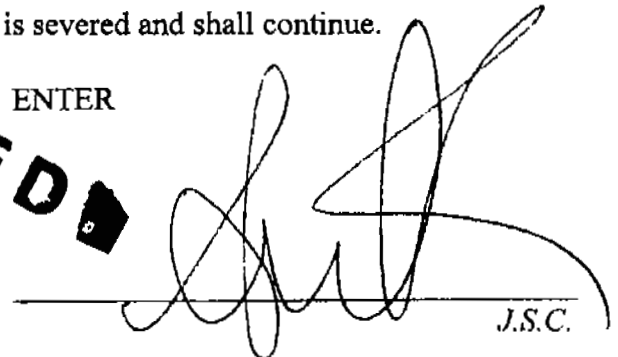
ORDERED that plaintiff's motion for a default judgment against defendant St. Anthony Pharmacy, Inc. is denied; and it is further

ORDERED that plaintiff's motion for a default judgment against defendant Hector Perez, is granted and the Clerk is directed to enter judgment in plaintiff's favor and against defendant Hector Perez in the amount of \$41,666.66 with interest at the bank's prime rate plus 1.5% per annum from February 9, 2006 (date of default under the note), to be computed by the Clerk, together with costs and disbursements as taxed by the Clerk.; and it is further

ORDERED that the remainder of the action is severed and shall continue.

ENTER

FILED **FILED**
AUG 22 2008 AUG 22 2008
COUNTY CLERK'S OFFICE COUNTY CLERK'S OFFICE
NEW YORK NEW YORK
DATE: AUG 22 2008
New York



J.S.C.