Dimonda v Tran
2010 NY Slip Op 30537(U)
March 3, 2010
Supreme Court, New York County
Docket Number: 601800/09
Judge: Saliann Scarpulla
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SCANNED ON 3/5/2010

[* 1]

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

PRESENT: SCARPULLA, Justice — PART 19

DIMONDA, DOUGLAS

- v -

MONICA TRAN, ET AL.

INDEX NO. 601800/09

MOTION DATE

MOTION SEQ. NO. 03

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 ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

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

FILED
MAR 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/3/10

[signature], J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

---X

DOUGLAS DIMONDA,

Plaintiff,

Index No. 601800/09

-against-

Decision and Order

MONICA TRAN and TRUST FUND BABY,

Defendants.

---X

FILED
MAR 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

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PRESENT: Hon. Saliann Scarpulla, J.S.C.:

In this action for breach of a loan agreement, defendants Monica Tran ("Tran") and Trust Fund Baby, Inc. ("Trust Fund Baby") (collectively, "defendants") move by order to show cause, pursuant to CPLR 317 and 5015, to vacate a default judgment entered against them on October 19, 2009.

Plaintiff Douglas Dimonda ("Dimonda") commenced this action by service of a summons with notice dated June 10, 2009, which was served by substituted service on June 11, 2009. In the notice, Dimonda stated causes of action for: (1) breach of contract, monies had and received, and conversion, with claimed damages of $56,114.00 on these three causes of action; (2) prima facie tort, with claimed damages of $100,000 for this cause of action; and

(3) attorneys fees and punitive damages, with claimed damages of $50,000 for this cause of action.

In a letter dated June 30, 2009, Tran admitted that she had received a copy of the summons and notice on June 14, 2009. In the June 30, 2009 letter, Tran stated that she wanted to "resolve [the lawsuit] by the end of August." However, defendants did not put in an appearance in this action nor demand service of a complaint.

On or about July 14, 2009, Dimonda's attorney served Notices of Default on Tran and Trust Fund Baby. In the Notice of Default, Dimonda stated that he intended to seek entry of a default judgment against defendants on August 4, 2009. Defendants do not deny that they received the Notice of Default, yet they still did not put in a notice of appearance and demand for a complaint, nor take any other action with respect to this lawsuit.

By decision and order dated October 8, 2009, Justice Lehner granted Dimonda a default judgment against defendants in the amount of $56,114.10 on the breach of loan agreement cause of action. Dimonda discontinued the remaining causes of action without prejudice. Justice Lehner's order was entered on October 19, 2009.

Some time between October 19, 2009 and November 30, 2009 Dimonda served a restraining notice on the bank at which Trust Fund Baby's account was located. Thus, on December 1, 2009, approximately a month after the default judgment had been entered, Tran wrote a letter to Dimonda's attorney, offering to settle defendants' debt with Dimonda on certain terms. Tran's proposal was not satisfactory to Dimonda.

On January 14, 2010, approximately three months after entry of the default judgment, defendants bring this order to show cause to vacate the default judgment. In support, Tran claims that, after receiving the summons with notice, she contacted Dimonda's attorneys, and "believed [the action] would be settled." As for her meritorious defense, Tran claims that "[Dimonda] is now seeking a judgment for monies owed his stepfather."

Discussion

Defendants move to vacate their default under both CPLR 317 and CPLR 5015. CPLR 317 provides, in part, that "[a] person served with a summons other than by personal delivery . . . who does to appear may be allowed to defend the action within one year after he [sic] obtains knowledge of entry of the judgment, . . . upon a finding of the court that he [sic] did not personally receive notice of the summons in time to defend and has a meritorious defense." In this action CPLR 317 is not applicable. Tran acknowledges that defendants received the summons in this action three days after it was served, giving defendants ample time to defend the action prior to the entry of a default judgment. Accordingly, that part of defendants motion in which they seek vacatur of the default judgment pursuant to CPLR 317 is denied.

CPLR 5015(a) provides, in relevant part, that the court that renders a judgment or order may relieve a party from it, upon the ground of: "(1) excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party."

To vacate a default under CPLR 5015, the moving party must show both an adequate excuse for the default, and a meritorious claim or defense. *M.R. v. 2526 Valentine LLC*, 58 A.D.3d 530 (1st Dep't 2009); *Facsimile Communications Industries, Inc. v. NYU Hosp. Center*, 28 A.D.3d 391(1st Dep't 2006). Here, defendants proffer as their excuse for the default in appearing that Tran believed that the action would be settled. However, Tran's assertion that the parties were trying to settle the matter is directly belied by the Notice of Default sent by Dimonda's attorney to defendants. The Notice of Default, which post-dates Tran's offer to repay Dimonda, made clear that no settlement had been reached.

Defendants have failed to submit any documents showing that, at or about the time that Dimonda moved to enter the default judgment, the parties were in active settlement negotiations. Tran's unilateral belief that a settlement would be reached, which was directly belied by the Notice of Default sent to defendants, is an insufficient excuse for defendants' failure to respond to the summons with notice. *See M.R. v. 2526 Valentine LLC*, 58 A.D.3d at 531; *Maines Paper and Food Service, Inc. v. Farmington Foods, Inc.*, 233 A.D.2d 595, 596 (1st Dep't 1996); *Levy v. Blue Cross and Blue Shield of Greater New York,* 124 A.D.2d 900, 901 (1st Dep't 1986).

In addition, defendants have failed to show a meritorious defense. On this order to show cause, Tran merely states that "[p]laintiff has been repaid by Defendants for the monies loaned by Plaintiff. Plaintiff is now seeking a judgment for monies owed to his stepfather." Tran, however, does not submit a single document or any other competent evidence to

substantiate her statement that Dimonda has been repaid. Tran's conclusory assertion of repayment, without any supporting evidence, is insufficient to make out a meritorious defense. *See Facsimile Communications Industries, Inc. v. NYU Hosp. Center,* 28 A.D.3d at 391; *Maines Paper and Food Service, Inc. v. Farmington Foods, Inc.*, 233 A.D.2d at 596; *Nat'l Recovery Systems v. Weiss,* 226 A.D.2d 289, 290 (1st Dep't 1996).

In fact, Tran's statement here that she paid the money she owed to Dimonda is directly refuted by statements she made to Dimonda's attorney during the pendency of the action. In letters Tran sent to Dimonda's attorney both before and after the default judgment was entered against her, Tran acknowledged owing Dimonda money, and stated nothing about money being owed to Dimonda's father-in-law. Thus, in a letter dated June 30, 2009, and in response to Dimonda's service of the summons with notice, Tran stated that "[I] have been seeking a firm resolve on my end to satisfy the Balance to Douglas Dimonda." There is no mention in this letter as to Dimonda's father-in-law.

Similarly, in a letter dated November 30, 2009, after the judgment was entered and a restraint was placed on Trust Fund Baby's bank account, Tran offered to pay Dimonda approximately $59,000 over a period of time. Once again, Tran acknowledged owing the money to Dimonda and said nothing about the money actually being owed to Dimonda's father-in-law.

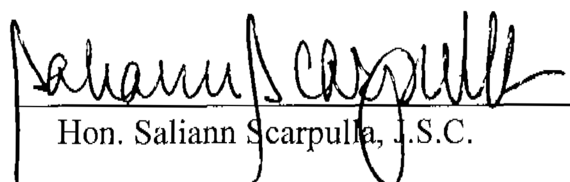
In sum, defendants have failed to show that they have a reasonable excuse for their failure to appear in this action, and have failed to show a meritorious defense to the loan

claim upon which the default judgment was granted. Accordingly, defendants' motion brought by order to show cause to vacate the default judgment against them is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
March 3, 2010

ENTER



Hon. Saliann Scarpulla, J.S.C.

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