

National Union Fire Ins. Co. of Pittsburgh, Pa. v Rucker
2010 NY Slip Op 32584(U)
September 15, 2010
Sup Ct, NY County
Docket Number: 104227/2006
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

National Union

INDEX NO. 104227/06

MOTION DATE 6/16/10

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -
Rucker et al

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

Notice of Motion/ 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

^{is}
motion ~~and cross-motion~~ are decided in accordance
with accompanying memorandum decision.

This constitutes the decision and order of the Court.

FILED
SEP 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: September 15, 2010

Saliann Scarpulla
SALIANN SCARPULLA, 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: CIVIL TERM: PART 19

----- X
NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA as subrogee of
TACT CORP,

Plaintiff,

Index Number 104227/2006
Submission Date June 16, 2010
Mot. Seq. No. 001 & 002
DECISION and ORDER

-against-

DAVID S. RUCKER, PATRICK L. LINTON, and
MICKEL A. DUVERGER

Defendants.

----- X
Appearances: For Plaintiff:
The Law Offices of Edward Garfinkel
By Bradley J. Corsair, Esq.
12 Metrotech Center, 28th Floor
Brooklyn, New York 11201
718-2501100

For Defendant Duverger:
The Blanch Law Firm, P.C.
By Douglas M. Schneider, Esq.
261 Madison Avenue, 12th Floor
New York, New York 10016
212-736-3900

Papers considered in review of these motions to dismiss and for default judgment:

Seq	Papers	Numbered
Seq 001	Notice of Mot. and Affirm. in Supp.....	1
	Affirm. in Opp.....	2
	Reply Affirm.....	3
Seq. 002	Notice of Mot. and Affirm. in Supp.....	1
	Affirm. in Opp.....	
	Reply Affirm.....	

FILED
SEP 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

HON SALIANN SCARPULLA, J.:

In motion seq. 001, defendant Mickel A. Duverger ("Duverger") moves to dismiss the complaint under CPLR 3215(c) for failure of plaintiff National Union Fire Insurance Company of Pittsburgh ("National Union") to file for a judgment of default within a year of Duverger's failure to answer. In motion seq. 002, National Union moves for the entry

of default judgment against all three defendants. Sequences 001 and 002 are joined for the purpose of this decision.

On March 22, 2006, National Union filed a verified complaint against defendants for breach of contract, money had and received, unjust enrichment, and recovery as a "crime victim." On April 15, 2006, Duverger was served. Defendant David S. Rucker ("Rucker") was served on May 19, 2006, and defendant Patrick L. Linton ("Linton") was served on June 10, 2006. Neither Rucker nor Linton ever responded in any way to the action. National Union twice extended Duverger's time to answer to June 9, 2006 and subsequently to July 28, 2006. In this period, Duverger contemplated settlement of the dispute. Having failed to reach any resolution, the parties took no action, and no defendant answered the complaint. Nothing transpired until Duverger brought his CPLR 3215(c) motion on March 5, 2010.

In response, National Union moved for default judgment on April 26, 2010. National Union argues that it has a meritorious claim against defendants, who allegedly defrauded National Union's subragor Tact Corp. out of \$ 80,000.00. According to National Union, defendants David S. Rucker ("Rucker") and Patrick L. Linton ("Linton") were both prosecuted. Duverger, however, was never charged. In an attempt to excuse the delay, National Union explains that "the firm did not have diary entries to trigger case activity after any defendant's time to answer the complaint had expired. . . [i]n fact this

[* 4]
firm did not have diary entries in place after the action was commenced in 2006, or in 2007. . . the matter was completely quiet herein 2007 and beyond.”

National Union argues that it should be able to enter default judgment against Rucker and Linton because they had already been prosecuted for the subject fraud. With respect to Duverger, National Union maintains that the delay in seeking default judgment should be overlooked in the interests of justice.

Discussion

An application for default judgment must be timely filed within one year of default. CPLR 3215(c). Failure to do so within the prescribed period may result not only in forfeiture of the default judgment against the defendant, but may also bring about the dismissal of the plaintiff's own complaint as abandoned. CPLR 3215(c); *see also* Siegel, *New York Practice*, sec 294 (4th ed. 2005). The court, however, has discretion to excuse, for sufficient cause, the applicant's tardiness, and allow the entry of default judgment after the one-year period expires. CPLR 3215(c). To establish sufficient cause, plaintiff has the burden to proffer reasonable excuse for lateness and demonstrate that the complaint is meritorious. *Waterproofing Corp. v Ray Realty Fulton, Inc.*, 23 A.D.3d 624, 625 (2nd Dep't 2005).

The court retains broad discretion to determine if delay in requesting default judgment under CPLR 3215(c) should be excused. *See Charles F. Winson Gems, Inc. v D. Gumbiner, Inc.*, 85 A.D.2d 69 (1st Dep't 1982), *aff'd* 57 N.Y.2d 813. While an

ordinary law office failure alone is insufficient to justify either extending the time to file for default judgment or vacating entered default judgment, the court must weigh the law office failure in the context of the duration of the delay and the extent to which plaintiff participated in the action. *See Eaton v Equitable Life Assurance Society of the United States, Inc.*, 56 N.Y.2d 900, 902 (1982); see also Siegel, *New York Practice*, sec 294 (4th ed. 2005).

In this case, National Union waited nearly four years before attempting to revive this action. In addition, National Union did not even initiate the motion to enter a default judgment. National Union's motion for default judgment was only in response to Duverger's motion to dismiss the action. Had Duverger not brought the motion to dismiss, it is not apparent that National Union would have ever applied for default judgment. Finding sufficient cause to excuse delay in a typical law office failure under these circumstances would undermine the policy of expeditious adjudication of disputes, which is behind the one-year deadline set by CPLR 3215(c).¹

National Union cites *Bazac v Odelia Enterprises Corp.*, 272 A.D.2d 226 (1st Dep't 2000) to support its argument that a law office failure may alone establish sufficient cause to permit entry of default judgment after the expiration of a one-year deadline.

¹ The Court also notes the prejudice to defendants on entering a default judgment at this late date. The alleged events giving rise to this action occurred about ten years ago. Both counsel admitted at oral argument that they completely lost contact with all of the defendants and witnesses. Even if the Court declined to dismiss the action, it would be unlikely the parties would be able to present sufficient evidence at trial.

[*6]

However, National Union's reliance on *Bazac v Odelia Enterprises Corp.* is misplaced. In *Bazac v Odelia Enterprises Corp.*, the First Department excused law office failure to timely move for default judgment against one of the defendants where plaintiff diligently prosecuted the case against the rest. *See Bazac*, 272 A.D.2d at 226. Here, National Union failed to prosecute the action against all of the defendants.

National Union argues that it had conducted settlement negotiations with Duverger and, as a result, held the case in "abeyance" between 2006 and 2010. National Union and Duverger did hold talks in the spring and summer of 2006, but the talks failed, and Duverger did not answer the suit after the extended deadline lapsed on July 28, 2006. No negotiations took place past that date. With respect to the other two defendants, National Union did not have any contact with Rucker and Linton at all. Accordingly, National Union's self-imposed "abeyance" did not toll the CPLR 3215(c) deadline.

National Union's alternative argument that CPLR 3215(c) one-year deadline is inapplicable to Duverger because Duverger informally appeared in the action by asking for an extension of the time to file an answer and entering settlement negotiations also finds no support in CPLR. Under CPLR 320(a), "[t]he defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer." Nothing Duverger did qualified as an appearance in the action. *See e.g., Sports Legends Inc. v Carberry*, 38 A.D.3d 470, 470 (1st Dep't 2007).

[* 7]

Therefore, because National Union cannot establish sufficient cause to excuse its delay in pursuing default judgment, the Court dismisses the action.² In accordance with the foregoing, it is

ORDERED that the motion seq. 001 by defendant Mickel A. Duverger to dismiss the action in its entirety under CPLR 3215(c) is granted, and this action is hereby dismissed against all defendants; and it is further

ORDERED that the motion seq. 002 by plaintiff National Union Insurance Company of Pittsburgh, PA for default judgment is denied; and it is further

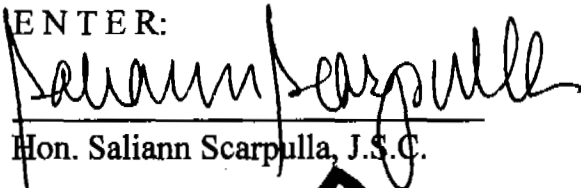
ORDERED that counsel for Mickel A. Duverger shall serve a copy of this decision and order upon all parties and upon the Clerk of Court (60 Centre St., Basement), who shall enter judgment in accordance with the foregoing

This constitutes the decision and order of the Court.

Dated:

9/15, 2010
New York, New York

ENTER:


Hon. Saliann Scarpulla, J.S.C.

FILED
SEP. 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

² At the oral argument on June 16, 2010, National Union presented an argument that was not included in its written submissions. National Union alleged that Duverger's counsel lost complete contact with his client, and the counsel was unauthorized to bring the motion to dismiss on behalf of Duverger. However, irrespective of the recency of communication between Duverger and his attorney, CPLR 3215(c) authorizes the Court to dismiss the action upon its own initiative, even in the absence of a motion. Hence, National Union's argument is academic.