

Springer v Fontanelli
2011 NY Slip Op 31248(U)
May 5, 2011
Supreme Court, New York County
Docket Number: 108531/2010
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
J.S.C. Justice

PART 11

Index Number : 108531/2010
SPRINGER, ALLEN D.
vs.
FONTANELLI, ESQ., ROBERT
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 *is determined in accordance with the annexed decision and order.*

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

FILED

MAY 11 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 19, 2011

[Signature]
HON. JOAN A. MADDEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
ALLEN D. SPRINGER and ALLEN D. SPRINGER, P.L.L.C, INDEX NO. 108531/10

Plaintiffs,

-against-

ROBERT C. FONTANELLI, ESQ., RCF, P.L.L.C., d/b/a RCF,
P.C., ROBERT C. FONTANELLI, P.C., WOOD AVE.
HOLDINGS, INC., RIVERSIDE ASSOCIATES, INC., CASE
CASH, INC. and PLAINTIFF FUNDING HOLDING, INC.
f/k/a LAWCASH,

Defendants.

-----X

FILED
MAY 11 2011
NEW YORK
COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.:

Plaintiffs move for an order pursuant to CPLR 3215 granting a default judgment against five of the seven named defendants, Robert C. Fontanelli, Esq., RCF, P.L.L.C. d/b/a RCF, P.C., Robert C. Fontanelli, P.C., Wood Ave. Holdings, Inc. and Riverside Associates, Inc., based on their failure to appear and answer, and an order directing an inquest and assessment of damages.¹ Defendants oppose the motion.

Plaintiffs have demonstrated prima facie entitlement to a default judgment against defendants on the issue of liability. Plaintiffs submit proof of service of the summons and complaint, an affidavit of facts from plaintiff Allen D. Springer, a complaint verified by plaintiff Springer, and an attorney's affirmation as to defendants' failure to appear and answer. See CPLR

¹The motion does not seek any relief with respect to defendants Case Cash, Inc. and Plaintiff Funding Holding, Inc. f/k/a Lawcash. The court's records indicate that defendant, Case Cash, Inc. filed an answer, but it is unclear whether defendant Plaintiff Funding Holding, Inc. f/k/a Lawcash answered.

3215(f); Grinage v. City of New York, 45 AD3d 729, 730 (2nd Dept 2007). To successfully oppose plaintiffs' motion for a default judgment, defendants must demonstrate both a justifiable excuse for their failure to appear and answer the complaint, and a meritorious defense to the action. See HSBC Bank USA, N.A. v. Roldan, 80 AD3d 566 (2nd Dept 2011); Grinage v. City of New York, *supra* at 730; Johnson v. Deas, 32 AD3d 253, 254 (1st Dept 2006); ICBC Broadcast Holdings-NY, Inc. v. Prime Time Advertising, Inc., 26 AD3d 239, 240 (1st Dept 2006); Estrella v. Herrera, 23 AD3d 320, 321 (1st Dept 2005); 114 West 26th Street Assocs LP v. Fortunak, 22 AD3d 346 (1st Dept 2005).

In opposition to the motion, defendant Robert C. Fontanelli submits an affidavit without any exhibits or supporting documentation, on behalf of the five defaulting defendants, stating "I am the Defendant herein and have personal knowledge of this matter." Presumably, Mr. Fontanelli, who is an attorney, is representing himself and his law firm, Robert C. Fontanelli, P.C., as well as the other defaulting defendants. Mr. Fontenelli states that "defendants have a reasonable excuse in that they have offered to turn over all investments to Plaintiff" and that "[t]hese investments have been offered to be transferred from the defendants Wood Ave. Holdings, Inc. and Riverside Associates, Inc. to the Plaintiff thus resolving this matter entirely."

Although a good faith belief in settlement supported by substantial evidence may constitute a reasonable excuse for failing to answer the complaint, Mr. Fontanelli's vague, nonspecific and uncorroborated assertions are insufficient to satisfy the reasonable excuse requirement. See Armstrong Trading, Ltd v. MBM Enterprises, 29 AD3d 835 (2nd Dept 2006); Hyundai Corp v. Republic of Iraq, 20 AD3d 56 (1st Dept) , appeal withdrawn and discontinued 6 NY3d 808 (2006); Fekete v. Camp Skwere, 16 AD3d 544 (2nd Dept 2005). Notably, Mr.

Fontanelli is an attorney and does not deny receiving the summons and complaint in June 2010, yet he took no steps to appear in this action until plaintiffs moved for a default judgment in September 2010, and then he simply submitted an affidavit in opposition without seeking any affirmative relief by way of a cross-motion. Moreover, when the parties appeared before this court on January 20, 2001, they attempted to negotiate a settlement, and the court gave them additional time for plaintiffs to inspect defendants' books and records so that an accurate accounting could be conducted in connection with settlement discussions. The court's notes indicate that the motion was adjourned on consent to March 31, 2011, and "defendant agrees to permit plaintiffs to inspect and examine books." Plaintiffs' counsel submits an additional affirmation as to the details of the subsequent events, which is not controverted by defendants. Plaintiffs' counsel states that after plaintiffs retained a forensic accountant, he contacted Mr. Fontenelli to arrange for the inspection, and Mr. Fontenelli offered to provide him with a complete set of records rather than conducting the inspection at his office. According to plaintiffs' counsel, "after repeated demands," the records were never provided and no inspection took place. On March 31, 2001, the parties appeared before this court when the motion was submitted.

Based on the foregoing, it is clear that defendants have not engaged in any good faith efforts to settle this matter, and their "total failure to show any reasonable excuse makes it unnecessary to consider whether [they have] a meritorious defense" Hyundai Corp v. Republic of Iraq, supra at 63; accord HSBC Bank USA, N.A. v. Roldan, supra; Time Warner City Cable v. Tri State Auto, Inc, 5 AD3d 153 (1st Dept), appeal dismissed 3 NY3d 656 (2004). However, even if the court were to consider the issue, Mr. Fontanelli's conclusory and unsubstantiated

assertions are insufficient to establish the existence of a meritorious defense. To the extent he objects to the amount of damages sought in the complaint, since an inquest an assessment of damages are necessary in this action, defendants have a right to appear at the inquest where they will be given "a full opportunity to cross-examine witnesses, give testimony and offer proof in mitigation of damages." Waltzer v. Tradescape & Co., LLC, 31 AD3d 302, 305 (1st Dept 2006); accord Amusement Business Underwriters v. American International Group, Inc, 66 NY2d 878, 880 (1985); Ruzal v. Mohammad, 283 AD2d 318, 319 (1st Dept 2001); Conteh v. Hand, 234 AD2d 96 (1st Dept 1996).²

Accordingly, it is hereby

ORDERED that plaintiff's motion for a default judgment is granted as against defendants Robert C. Fontanelli, Esq., RCF, P.L.L.C., d/b/a RCF, P.C., Robert C. Fontanelli, P.C., Wood Ave. Holdings, Inc., and Riverside Associates, Inc., and an inquest and assessment of damages against said defendants are directed at the time of the trial of this action; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on May 5, 2011, at 9:30 a.m., Part 11, Room 351, 60 Centre Street.

The Court is mailing copies of this decision and order.

DATED: ~~APRIL~~ *May 5, 2011*, 2011

FILED

ENTER:

MAY 11 2011

NEW YORK COUNTY CLERK'S OFFICE

[Signature]
J.S.C.
JOAN A. MADDEN

²The court declines to consider the request in Mr. Fontanelli's affidavit "to interpose an answer," as defendants have neither cross-moved for leave to serve a late answer, nor submitted a proposed answer.