

Norowzian v Jones

2011 NY Slip Op 31547(U)

May 16, 2011

Sup Ct, NY County

Docket Number: 102121/09

Judge: Joan A. Madden

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

PRESENT: JOAN A. MADDEN
Justice

PART 11

NOROWZIAN

INDEX NO.

102121/09

Plaintiffs,

MOTION DATE

- v -

MOTION SEQ. NO.

002

JONES

MOTION CAL. NO.

Defendants.

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

FILED

MAY 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 16, 2011

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 11

-----X
MEHDI NOROWZIAN, individually and as a member
of JOY FILMS USA, LLC and in the right of and on
behalf of JOY FILMS USA, LLC,

INDEX NO. 102121/09

Plaintiff,

-against-

MATTHEW JONES and JOY FILMS USA, LLC,

Defendants.

-----X
JOAN A. MADDEN, J.:

FILED

MAY 18 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

Plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment against defendants Matthew Jones and Joy Films, USA LLP ("Joy Films"). Both defendants have defaulted on the motion, but only defendant Jones served an answer to the complaint.

Leaving aside defendant Jones' failure to appear for oral argument on January 20, 2011 and February 3, 2011, defendant Jones has not submitted any papers in opposition to the motion, in violation of this court's Interim Order dated November 18, 2010. The Interim Order granted the cross-motion by the attorney for defendant Jones, to be relieved as counsel, and specifically directed that "opposition papers are be served so as to be received by January 10, 2011, to plaintiff's motion for summary judgment," and that "oral argument shall be held on January 20, 2011 at noon, and that defendant Matthew Jones must appear pro se or by an attorney on that date or he will be in default." The Interim Order expressly noted that defendant Matthew Jones was present in court that day, November 18, 2010. Defendant Jones did not serve any opposition papers by the court-ordered deadline of January 10, 2011 deadline. Moreover, he

made no attempt to serve his opposition papers at any time thereafter, or any attempt to request an extension of time to serve his opposition papers. Under these circumstances, where defendant Jones has not served any opposition papers, he has defaulted on the motion.¹

Summary judgment is not appropriate as against co-defendant Joy Films since it has neither appeared nor answered. The proper relief is a default judgment pursuant to CPLR 3215. However, CPLR 3215© imposes a one-year time limit for plaintiff to take a default judgment against a defendant who has not answered, and if the default is not taken within the one-year period, the court on motion or sua sponte “shall” not enter judgment but “shall” dismiss the complaint as abandoned. The court can excuse an untimely application on a showing of “sufficient cause.” Under CPLR 3215(d), when an action involves defaulting and non-defaulting defendants and plaintiff timely moves pursuant to CPLR 3215© for a default judgment, the court may order that any further proceedings relating to the default judgment be deferred until disposal of the claims against the non-defaulting defendants, whether by trial or other means. See Weinstein, Korn and Miller, *New York Civil Practice* ¶ 3215.18. CPLR 3215(d) “does not affect the requirement of CPLR 3215© that the plaintiff take proceeding for the entry of judgment within one year after the default, on pain of dismissal of the claim unless good cause can be shown for the delay.” *Id.*

Here, it appears that the one-year period for plaintiff to make a timely application for a

¹The court is not considering the March 31, 2011 letter Jones sent to the court, since the letter does not indicate that plaintiff’s counsel was copied on the letter. In any event, even if plaintiff’s counsel received a copy, the letter merely requested a “new hearing date” without addressing the fact that Jones had yet to serve opposition papers and had not complied with the court’s order to serve his opposition papers by January 10, 2011.

default judgment against defendant Joy Films, has expired since Joy Films was served sometime in or before March 2009.² Thus, unless plaintiff can make a showing of “sufficient cause,” the complaint must be dismissed as against Joy Films. The court is therefore denying plaintiff’s motion for summary judgment against Joy Films, without prejudice to moving within 30 days, for a default judgment under CPLR 3215. If the one-year period for moving for default judgment has expired, plaintiff shall address the issue of “sufficient cause” for the delay. If plaintiff fails to move within 30 days of the date of this order, the complaint will be dismissed as to defendant Joy Films.

Thus, plaintiff’s motion is granted on default only to the extent of awarding plaintiff partial summary judgment as to the issue of liability against defendant Matthew Jones, and an inquest and assessment of damages shall be held. In the event plaintiff secures a default judgment against defendant Joy Films, the issue of damages as to both defendants shall be determined at one inquest.

Accordingly, it is

ORDERED that plaintiff’s motion is granted only to the extent of awarding plaintiff partial summary judgment on the issue of liability as against defendant Matthew Jones, and an inquest and assessment of damages are directed; and it is further

ORDERED that plaintiff’s motion for summary judgment is denied as against defendant Joy Films USA, LLC , without prejudice to plaintiff making a motion pursuant to CPLR 3215 for a default judgment against said defendant; and it is further

²Although a copy of the affidavit of service is not annexed to plaintiff’s motion papers, the Court’s computer records indicate that two affidavits of service were filed on March 9, 2009.

ORDERED that within 30 days of the date of this order, plaintiff shall move for a default judgment against Joy Films, USA, LLC, and if plaintiff fails to do so, the complaint as against Joy Films, USA, LLC will be dismissed; and it is further

ORDERED that on or before June 30, 2011, plaintiff shall serve a copy of this order with notice of entry, a note of issue and a statement of readiness upon the Clerk of the Trial Support Office (Room 158), and shall pay the proper fees, if any, and said Clerk shall there upon place this action on the appropriate trial calendar for the inquest and assessment directed herein above; and it is further

ORDERED that if plaintiff fails to comply with the immediately preceding paragraph, the claims against Matthew Jones will be dismissed; and it is further

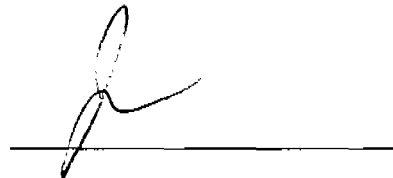
ORDERED that if plaintiff secures a default judgment against defendant Joy Films, the amount of damages against defendants Jones and Joy Films, shall be determined together at one inquest.

The Court is mailing copies of this order.

DATED: ~~April~~ ^{May 16, 2011} 2011

FILED
MAY 18 2011
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:



J.S.C.