

First Funds LLC v City Place, Ltd.

2012 NY Slip Op 30706(U)

March 21, 2012

Supreme Court, New York County

Docket Number: 100591-2008

Judge: Judith J. Gische

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. JUDITH J. GISCHE
J.S.C.

PRESENT:

PART 10

Index Number : 100591/2008
FIRST FUNDS, LLC
vs
CITY PLACE, LTD.
Sequence Number : 002
DEFAULT JUDGMENT

Office

INDEX NO. 100591/2008
MOTION DATE _____
MOTION SEQ. NO. 002

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) _____

Answering Affidavits — Exhibits _____ | No(s) _____

Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, it is ordered that this motion is

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

MAR 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/21/12

HON. JUDITH J. GISCHE J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT 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: IAS PART 10**

-----X
First Funds LLC,

Plaintiff (s),

-against-

City Place, Ltd. d/b/a City Place
Restaurant and Essam Abdalaal,

Defendant (s).
-----X

DECISION/ ORDER
Index No.: 100591-2008
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

FILED

MAR 23 2012

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of NEW YORK
this (these) motion(s): COUNTY CLERK'S OFFICE

Papers	Numbered
Pltf's n/m (reinstate and 3215) w/JIS affirm, exhs	1
Proof of service	2

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is a breach of contract action. Pursuant to this court's decision of March 17, 2009, the court denied plaintiff's motion for entry of a default judgment against the defendants. The denial was based upon plaintiff having failed to prove that defendants were properly served with the summons and verified complaint. All that plaintiff established was that it had mailed the summons and complaint to the defendants. The denial was without prejudice to renew within 90 days of that order. The court specifically indicated that plaintiff's failure to comply with that prior order would "result in the immediate dismissal [of this action] for lack of jurisdiction."

Pursuant to this court's order dated January 12, 2012, plaintiff was notified that there had no activity in this case since the date of the prior order and if plaintiff did not resume prosecution of its case or notify the court that it was abandoning it, then the case would be dismissed.

Without referencing the court's January 12, 2012 order, plaintiff now seeks to "reinstate" this action and enter a default judgment against the defendants. Plaintiff now seeks to place before the court documents which it claims allowed it to serve the defendants in the manner it did.

This motion is denied.

First, the failure by plaintiff to include a copy of the court's most recent order gives the mistaken impression that plaintiff has independently come to realization that it failed to prosecute this case when, in fact, it was the court that jolted plaintiff to action.

Next, although the most recent order states that plaintiff has 90 days to resume prosecution of this action by, among other things, filing the note of issue, this does not relieve plaintiff of having to explain why it delayed in renewing the motion the court denied more than three (3) years ago. A party seeking entry of a default judgment must act within one (1) year of the alleged default (CPLR 3215 [c]). Failure to do so is an abandonment of the action and the court must dismiss it, unless plaintiff shows sufficient cause for why it should not be dismissed. The showing to be made is two pronged. The first prong is that plaintiff's claim has merit and the second prong requires a valid excuse for why the motion was not brought sooner (Butindaro v. Grinberg, 57 A.D.3d 932 [2nd 2008]).

To explain the delay, plaintiff's counsel states the following:

"we mistakenly read the [March 13, 2009] decision to state that the Court was rejecting service via certified mail despite the parties' written stipulation to allow for such service. As a result, in an effort to keep legal fees to a minimum, we intended on recommencing the lawsuit and to have the papers served via personal service. However, as we revisited the file, it appears that the Court was not aware of the provision in the PSFRA expressly allowing for service of process via certified mail. At no time did Plaintiff intend on abandoning its claim and no prejudice will likely be suffered by the defaulting defendants for our failure to seek this relief until now."

The underlying motion is not a part of the motion at bar. Although referenced as an exhibit to the complaint, the court has no way of knowing whether the purchase and sales agreement was previously provided on the prior motion or whether that provision of the agreement plaintiff contends allows for service by certified mail (paragraph 16), was earlier brought to the court's attention.

The non-military service now provides merely shows that Essam Abdalaal is not presently in active military service. This is not useful to determine whether he was in the active military service when the summons and complaint were purportedly served on him three (3) years ago.

Finally, plaintiff makes no attempt to establish its prima facie claim, merely directing the court to its complaint with the expectation that the court will do the necessary work.

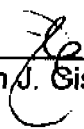
Given these circumstances, plaintiff's motion for entry of a default judgment three (3) years after the court denied its prior motion with a set time frame for renewal and more than four (4) years after this case was commenced is denied.

Conclusion

This motion is denied in its entirety. The clerk is directed to enter a judgment of dismissal. Any relief requested but not specifically addressed is hereby denied. This constitutes the decision and order of the court.

Dated: New York, New York
March 21, 2012

So Ordered:



Hon. Judith J. Sische, JSC

FILED

MAR 23 2012

NEW YORK
COUNTY CLERK'S OFFICE