

Merchant Cash & Capital, LLC v Shellfish Grille, Inc.
2012 NY Slip Op 32362(U)
September 10, 2012
Supreme Court, New York County
Docket Number: 601226/2010
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C.
Justice

PART 8

Index Number : 601226/2010
MERCHANT CASH AND CAPITAL, LLC
VS.
SHELLFISH GRILLE INC
SEQUENCE NUMBER : 002
DEFAULT JUDGMENT

INDEX NO. 601226-10
MOTION DATE _____
MOTION SEQ. NO. 2

The following papers, numbered 1 to 2, were read on this motion to/for Default
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1-7
Answering Affidavits — Exhibits _____ No(s). —
Replying Affidavits _____ No(s). —

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

MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION

FILED
SEP 12 2012
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/10/12

Joan M. Kenney, J.S.C.
JOAN M. KENNEY
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 8

-----X
Merchant Cash and Capital, LLC,

Plaintiff,

-against-

Shellfish Grille, Inc. T/A Shellfish
Grille & Lounge, and Richard
Greenman,

Defendants.
-----X

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for default.

Papers

Notice of Motion, Affirmation, and Exhibits

DECISION AND ORDER

Index Number: 601226/10

Motion Seq. No.: 002

FILED

SEP 12 2012

**COUNTY CLERKS OFFICE
NEW YORK**

Numbered

1-7

In this action, plaintiff Merchant Cash and Capital, LLC, seeks an order, pursuant to CPLR 3215, for default judgment against defendant, Richard Greenman.¹

Factual Background

Plaintiff, Merchant Cash and Capital, LLC, is a Delaware Limited Liability Company with its principal place of business in New York City. Defendant Shellfish Grille & Lounge (Shellfish) is a business created and located in Augustine, FL. The Defendant, Richard Greenman (Greenman), resides in Augustine, FL, and was the president of Defendant Corporation.

Around December 2009, plaintiff entered into an Agreement with defendants to loan them \$50,000.00 with 17% purchased percentage amounting to a total of \$69,000.00 (the

¹Although the Notice of Motion papers state that the matter is "severed and continued as to defendant, Shellfish Grille, Inc. T/A Shellfish Grille & Lounge due to the business being sold," the attorney affirmation in support seeks judgment against all named defendants. It is also not clear from the above quoted statements whether plaintiff seeks "discontinuance" of this matter against Shellfish.

agreement). The agreement stated that the plaintiff would agree to receive a percentage of defendants' future credit card, debit card, bank and/or other charge card receivable accounts until plaintiff received repayment of the \$69,000.00.

On January 27, 2010, defendants defaulted on the agreement and failed to pay the amounts due. Defendants allegedly refuse to pay the remaining balance of \$58,422.53 plus any statutory interest accruing since January 27, 2010.

On January 04, 2011, plaintiff filed for default judgment but was denied, without prejudice, because it did not present an affidavit of non-military service with respect to the individually named defendant. More than a year later, on May 18, 2012, plaintiff seeks the exact same relief sought before: a default judgment.

Arguments

Plaintiff claims to be entitled to a default judgment because defendants: (1) breached the agreement; (2) refused to pay the amount owed; and (3) failed to answer or otherwise appear in this action.

Discussion

Pursuant to CPLR 3215(c), "if a plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned...upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed..." [Emphasis added]. If a movant fails to meet the one-year statute of limitations, the complaint shall be dismissed. (*Peterec-Tolino v Harap*, 93 AD3d 577 [1st Dept. 2012]). To avoid dismissal of the complaint against a party, the

moving party must demonstrate that there is both a reasonable excuse for the delay in seeking a default judgment and the existence of a meritorious cause of action. (*Butindaro v Grinberg*, 57 AD3d 932 [2nd Dept. 2008]).

The determination of what constitutes a reasonable excuse is under the court's sound discretion. (*Kay Waterproofing Corp. v. Ray Realty Fulton, Inc.*, 23 AD3d 624 [2nd Dept. 2005]). In *Kay*, the plaintiff did not offer a reasonable excuse for failing to move for default judgment until more than four years after defendant defaulted. (*Id.*). In considering whether to render a default judgment, the court will take into account several factors which are, but not limited to: the length of the delay; the excuse for the delay; willfulness and possibility of prejudice; as well as the merits of the claim or defense." (*Guzetti v. City of New York*, 32 AD3d 234 [1st Dept. 2006]).

Here, plaintiff commenced this action on May 12, 2010, and argues that the defendants failed to answer after they were properly served. It is noted that by decision and order dated February 25, 2011, this Court denied plaintiff's motion for a default judgment against the individually named defendant, upon submission of proper papers including an affidavit of non-military service. Now, plaintiff seeks the same relief previously sought. Plaintiff did not set forth a statement that a prior similar relief was sought, and subsequently denied. Moreover, leave to renew was granted and should have been interposed within a reasonable amount of time rather than wait over a year to renew its application.

CPLR 3215(c) states in pertinent part:

"If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless

sufficient cause is shown why the complaint should not be dismissed.”

It is now over two years since defendant's default and plaintiff has not presented sufficient cause for its delay in seeking a judgment pursuant to CPLR 3215. Accordingly, it is hereby

ORDERED that the plaintiff's motion for default judgment is denied, and the clerk of the Court shall mark this matter dismissed pursuant to CPLR 3215(c).

Dated: September 12, 2012

ENTER:



Joan M. Kenney, J.S.C.

FILED

SEP 12 2012

**COUNTY CLERK'S OFFICE
NEW YORK**