

Wells Fargo Fin. Leasing, Inc. v South Asian Youth Action (SAYA), Inc.
2012 NY Slip Op 33987(U)
December 13, 2012
Supreme Court, Queens County
Docket Number: Index No. 701534/12
Judge: Robert J. McDonald
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ORIGINAL

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. ROBERT J. McDONALD

IAS PART 34

Justice

- - - - - X

WELLS FARGO FINANCIAL LEASING, INC.,

Index No.: 701534/12

Plaintiff,

Motion Date: 12/6/12

- against -

Motion No.: 112

SOUTH ASIAN YOUTH ACTION (SAYA), INC., Motion Seq.: 1
 d/b/a SOUTH ASIAN YOUTH ACTION d/b/a
 SAYA!

Defendants.

- - - - - X

The following papers numbered 1 to 13 on this motion:

	<u>Papers Numbered</u>
Plaintiff's Notice of Motion-Affirmation- Affidavit(s)-Service-Exhibit(s)	1-4
Defendant's Notice of Cross Motion-Affirmation- Affidavit(s)-Exhibit(s)	5-8
Plaintiff's Reply Affirmation-Exhibit(s)	9-11
Defendant's Reply to Plaintiff's Opposition to Cross-Motion	12-13

Plaintiff, by notice of motion, seeks an order of the Court, pursuant to CPLR § 3215, granting a default judgment in favor of plaintiff and against defendant (SAYA!) for the balance of payments remaining due under a commercial lease agreement in the sum of \$59,850.00 plus interest from March 28, 2012 calculated at the rate of 1-1/2% per month, plus the residual value of the equipment in the sum of \$4,797.98, plus taxes in the sum of \$5,737.51, plus a late fee in the sum of \$475.00, plus reasonable attorneys' fees in the sum of \$1,560.00, plus costs and disbursements.

Defendant moves by notice of cross-motion, for an order pursuant to CPLR § 3012(d) and CPLR § 317, extending the time for

defendant to appear on the grounds of a reasonable excuse for the delay; and, denying plaintiff's motion for a default judgment.

Plaintiff submits a reply and defendant submits a reply to plaintiff's opposition to defendant's cross motion.

The underlying action is for breach of a written commercial agreement lease agreement in which plaintiff as lessor executed a commercial written lease agreement with defendant. In consideration of the leasing equipment, the defendant agreed to pay to Wells Fargo the sum of \$59,8850.00 in 63 consecutive monthly payments of \$950.00 per month over the course of 63 consecutive months. Defendant thereafter defaulted on the lease agreement.

A summons and complaint were filed on August 7, 2012 and an affidavit of service was filed on August 22, 2012. The defendant, a not-for-profit corporation had thirty days in which to answer or until September 21, 2012. At the filing of plaintiff's motion, defendant was over one month late to appear or interpose an answer. The defendant now cross-moves seeking an order of the Court granting them an extended period of time of 30 days to answer plaintiff's complaint and plead a meritorious defense and counter-claims. Defendant maintains that plaintiff has engaged in fraudulent and predatory practices.

In support of the cross-motion, defendant submits the affidavit of Udai Tambar, Executive Director of South Asian Youth Action (SAYA!) who maintains that defendant's failure to answer the complaint in a timely manner was neither intentional nor willful and that there was never an intent on the part of the defendant to abandon the defense of this action and the prosecution of the counter-claims.

Mr. Tambar maintains that SAYA! inadvertently failed to update its present address with the Secretary of State and as a result defendant did not receive the summons and complaint. The first notice they received regarding this lawsuit was plaintiff's notice of motion for a default judgment received on October 11, 2012. Mr. Tambar contends that they immediately contacted an attorney who was a former board member who in turn contacted Wells Fargo's counsel. After discussions with Wells Fargo failed, the board members contacted defendant's current counsel. Ultimately, plaintiff and defendant agreed to adjourn plaintiff's motion for a default judgment to November 16, 2012.

Defendant maintains that plaintiff Wells Fargo and its agent EZ Docs, Inc. fraudulently induced them to sign an agreement that

contained certain rebates, incentives and monies that would be issued to them in consideration for entering into the leasing agreement (Exhibit D). Defendant maintains that the leasing agreement is in the custody of EZ Doc. Inc. however contends Wells Fargo disavows any relationship with EZ Doc. Inc.

Counsel for defendant maintains that due to his case load, Hurricane Sandy, the failure of defendant's to update their address with the Secretary of State and due to the complexity of this action has not been able to properly interpose an answer and requests from the Court a period of (30) days to do so.

"A defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action, when opposing a motion for leave to enter a default judgment upon its failure to appear or answer and moving to extend the time to answer or to compel the acceptance of an untimely answer." Moriano v. Provident New York Bancorp, 71 AD3d 747, 899 (2d Dep't 2010) quoting Lipp v. Port Auth. of NY and NJ, 34 AD3d 649, 824 NYS2d 671 (2d Dep't 2006).

Plaintiff maintains that defendant's failure to update its current address with the Secretary of State is not a reasonable excuse for a default or failure to timely answer.

"It is within the court's power to grant such an extension where it is established . . . that the delay in service was not willful or lengthy and that it did not cause any prejudice to the parties." A & J Concrete Corp. v Arker, 54 NY2d 870 [1981]; also see Maurice v Maurice, 78 AD3d 792 [2d Dept. 2010]; MMG Design, Inc. v Melnick, 35 AD3d 823 [2d Dept. 2006]; Twersky v Kasaks, 24 AD3d 657 [2d Dept. 2005]).

Furthermore, plaintiff's motion and reply papers are devoid of any argument that the defendant's delay prejudiced it in any way. In fact, both parties stipulated to an adjournment of this within motion from October 29, 2012 to November 14, 2012. In consideration of the lack of prejudice to plaintiff as a result of the short delay, the existence of a potentially meritorious defense, and the public policy favoring the resolution of cases on the merits the court is inclined to compel plaintiff to accept an answer from defendant. Wiesel v. Friends Exhaust Sys. Inc., 71 AD3d 1006, 1007 (2d Dep't 2010).

Moreover, the defendant who was served through delivery of process to the Secretary of State established that they did not receive personal notice of the summons in time to defend.

Furthermore, there is no basis to conclude that the defendant deliberately attempted to avoid notice of the action. There is no evidence that defendant was on notice of the failure to designate a new registered agent for service or that an old address was on file with the Secretary of State (see Calderon v. 163 Ocean Tenants Corp., 27 AD3d 410 (2d Dep't 2006); Tselikman v. Marvin Court, Inc., 33 AD3d 908 (2nd Dep't 2006)).

Accordingly, plaintiff's motion for a default judgment in favor of plaintiff and against defendant is denied; and it is further

ORDERED, that defendant's cross-motion is granted to the extent that the defendant is directed to serve an answer and counter-claims upon plaintiff within 30 days of the date of this order with notice of entry on opposing counsel.

Plaintiff is given leave to serve any responsive papers necessitated by the verified answer within 20 days after service of a copy of the order to be entered hereon.

Dated: Long Island City, NY
December 13, 2012



ROBERT J. McDONALD
J.S.C.