

Property Clerk, New York City Police Dept. v Torres
2013 NY Slip Op 31259(U)
June 12, 2013
Supreme Court, New York County
Docket Number: 402522/12
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **MARTIN SHULMAN**
J.S.C.
Justice

PART 1

Index Number : 402522/2012
PROPERTY CLERK
vs.
TORRES, GEORGE
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. 402522/12
MOTION DATE _____
MOTION SEQ. NO. 001

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

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits 1-7 | No(s) 1

Answering Affidavits — ~~Exhibits~~ | No(s) 2

Replying Affidavits Exhibits 1-2 | No(s) 3

Sur Reply
Sur-Sur Reply
Upon the foregoing papers, it is ordered that this motion is *decided in* | No. 4
| No. 5

accordance with the attached decision and order.

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

FILED

JUN 14 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 12, 2013


MARTIN SHULMAN
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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

Property Clerk, New York City Police Department,
Plaintiff,

Index No.: 402522/12

-against-

Motion Seq. No.: 001

George Torres and Bank of America,
Defendants.

FILED Decision & Order

~~JUN 14 2013~~

Hon. Martin Shulman, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this civil forfeiture proceeding commenced pursuant to NYC Adm. Code §14-140, plaintiff, Property Clerk, New York City Police Department ("plaintiff"), seeks forfeiture of the subject vehicle, a 2009 Chevrolet automobile bearing Vehicle Identification Number 3GNFK22339G130734 (the "subject vehicle"), which was seized from defendant George Torres ("Torres" or "defendant") as a result of his October 28, 2012 arrest on charges of driving while under the influence and weapons possession. Co-defendant Bank of America (BOA), the lien holder, is named as a nominal defendant in this action pursuant to *Ford Motor Credit Co. v New York City Police Dept.*, 394 FSupp2d 600 (SDNY 2005), *affd* 503 F3d 186 (2d Cir 2007) (the "Ford case").

Plaintiff moves for a default judgment based upon Torres' failure to answer or appear in this action. Although Torres failed to timely answer the complaint, he now appears by counsel and submits written opposition to the motion. Although this written submission is entitled "Verified Answer & Motion to Dismiss", in actuality it is an attorney's affirmation with a photocopied verification attached.¹ Defense counsel

¹ Torres' opposition is not in the proper format to be deemed an answer (see CPLR §3018) and is not a properly noticed motion (see CPLR §§ 2211, 2212[a] and

alleges in relevant part: 1) Torres was arrested outside the subject vehicle and his son in law was behind the wheel; 2) this court lacks jurisdiction because the affidavit of service of the summons and complaint incorrectly alleges Torres was served on December 5, 2012 at the Office of Administrative Trials and Hearings (OATH) when in fact he had never been to OATH prior to December 6, 2012; 3) this court lacks jurisdiction since none of the alleged acts occurred in New York County and Torres resides in Kings County; and 4) "there are very serious and meritorious issues of facts that should be decided by a jury at a trial".

Plaintiff's motion for a default judgment as to Torres must be granted. In order to successfully oppose a motion for a default judgment, a defendant must demonstrate a justifiable excuse for the default and a meritorious defense. *Johnson v Deas*, 32 AD3d 253 (1st Dept 2006).

Here, defendant fails to offer any specific, credible excuse for his default. The closest approximation to an excuse for the default is defense counsel's half-hearted attempt to claim lack of personal jurisdiction by attacking the affidavit of service, which contains an error as to the date of service which plaintiff subsequently corrected by filing an amended affidavit of service.² Notably, neither Torres nor defense counsel denies service on December 6, 2012 and thus a traverse is unwarranted.

2214).

² The affidavit of service alleges Torres was personally served on December 5, 2012 at OATH's Brooklyn office. In actuality, this matter was scheduled before that tribunal on December 6, 2012 and the amended affidavit of service reflects that Torres was personally served on that date. Plaintiff's counsel avers that Torres was served at OATH in his attorney's presence.

In light of defendant's failure to establish a reasonable excuse for his default, it is unnecessary for this court to address the merits of his remaining claims. Nonetheless, Torres' counsel's allegations fail to establish a meritorious defense. First, venue is proper in New York County based upon plaintiff's place of business. See CPLR §503(a). Second, defense counsel only vaguely states that there are meritorious issues for a jury to decide, without any elaboration other than the bare claim that Torres was arrested outside the subject vehicle and that his son in law was in the driver's seat. These allegations are insufficient without further factual context and in light of the fact that Torres fails to clearly and unequivocally deny the underlying criminal charges.

Finally, with regard to nominal co-defendant BOA, neither the motion papers nor the court file contains proof of service of the summons and complaint upon this lien holder. Thus, notwithstanding plaintiff's entitlement to judgment against Torres, forfeiture of the subject vehicle must await plaintiff's submission of proof that BOA was given notice of this action in accordance with the decision in the Ford case.

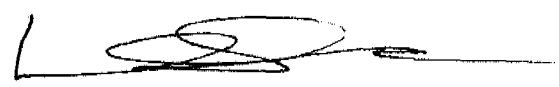
For all of the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for a default judgment is conditionally granted pending plaintiff's submission of proof of service as to defendant BOA; and it is further

ORDERED that within thirty (30) days of the date hereof, plaintiff shall submit proof of service of the summons and complaint upon BOA to chambers, together with a proposed order and judgment granting forfeiture of the subject vehicle.

The foregoing constitutes this court's Decision and Order, copies of which have been sent to counsel for the parties.

Dated: New York, New York
June 12, 2013



Hon. Martin Shulman, J.S.C.

FILED
JUN 14 2013
NEW YORK
COUNTY CLERK'S OFFICE