

Perini v Leo
2013 NY Slip Op 34138(U)
August 12, 2013
Supreme Court, Nassau County
Docket Number: 304/2012
Judge: Margaret C. Reilly
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

BERNARD J. PERINI,

Plaintiff,

-against-

FRANK A. LEO,

Defendant.

TRIAL/IAS PART 26

Index No.: 304/2012

Motion Seq. No.: 001

Submit Date: 6/11/13

**DECISION AND
ORDER**

PRESENT: HON. MARGARET C. REILLY, J.S.C.

The following papers having been read on the plaintiff's motion for default judgment:

Plaintiff's Notice of Motion for Default Judgment, Affirmation in Support, Affidavit in Support & Exhibits	1
Attorney Affirmation in Further Support of Motion for Entry of Default Judgment & Exhibits	2
Affidavit in Opposition to Motion for Default Judgment	3
Supplemental Attorney Affirmation in Further Support of Plaintiff's Motion for Entry of Default Judgment & Exhibits	4
Supplemental Affirmation in Opposition	5
Affidavit in Support & Exhibits	6

Upon the foregoing papers, it is ordered that the plaintiff's motion is decided as follows:

The plaintiff moves, pursuant to CPLR §3215, for an order granting a default judgment in favor of the plaintiff and against the defendant. The defendant opposes the plaintiff's motion. The defendant submits a supplemental affirmation in opposition. The plaintiff's attorney submitted a supplemental affirmation in further support of the default judgment.

The plaintiff, Bernard J. Perini's, motion for an order, pursuant to CPLR §3215, granting a default judgment in favor of the plaintiff and against the defendant, Frank A. Leo, is **DENIED**.

"On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served... and proof of the facts constituting the claim, the default and the amount due, by affidavit made by the party. ...Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney" (*see* CPLR §3215).

In the instant case, the plaintiff has filed proof of service of the summons with notice (*see* Exhibit "B", attached to the plaintiff's moving papers).

The plaintiff also attaches an affidavit of the plaintiff, setting forth the facts constituting the claim. The plaintiff alleges the following:

In or about January 2006, defendant entered into negotiations wherein he agreed to loan money to Spotted Zebra, Inc., which was a company that the plaintiff was affiliated with at the time. Spotted Zebra was founded in December 2005, to engage business with Paseges, which was a company that offered a variety of Greek products, including olive oil. Spotted Zebra intended on using the monies received from defendant to purchase, market, and sell olive oil. All the discussions with the defendant and Spotted Zebra took place with Spotted Zebra's principal, Bruce Brigandi, not the plaintiff. The defendant alleges that he told Brigandi that he would only loan the monies if Brigandi's prior debt (\$180,000.00) was built into the note executed by Spotted Zebra, Inc., and guaranteed by Brigandi and the plaintiff individually. The parties executed a draft note date January 10, 2006. Pursuant to the note, the defendant was required to lend \$307,500.00 to Spotted Zebra and Spotted Zebra agreed to re-pay this amount, with interest, for a total of \$330,000.00, by March 16, 2006. Although the plaintiff did guaranty the note, the plaintiff alleges that he only agreed to guaranty this note if all parties, including Nick Meintana, whom was affiliated with Paseges, signed the note. Since Meintanas

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never signed the note, the parties thereafter executed a January 24, 2006 note. Pursuant to the terms of the January 24 note, the defendant was required to lend \$392,500.00 to Spotted Zebra. Spotted Zebra agreed to pay the defendant \$430,000.00 by April 24, 2006. The plaintiff alleges that the defendant loaned far-less money to Spotted Zebra and that the defendant attempted to back-door money that he had previously loaned to Brigandi at least ten years prior, which has gone unpaid, in hopes of foisting his personal liability upon the plaintiff.

In New Jersey, the defendant commenced an action against Spotted Zebra for the monies due pursuant to the guaranty set forth in the January 10 note. The plaintiff alleges that the defendant attempted to convince the court that the plaintiff should be liable as a guarantor for all amounts that remained unpaid pursuant to the terms of the January 10 note. The plaintiff claims that he first learned that the defendant did not intend on loaning the full amount on the January 10 note, because of prior loans to Brigandi that had not been paid back. On April 27, 2011, the New Jersey Appellate Division vacated the Judgment in its entirety holding that the plaintiff was not liable at all to the defendant. In its opinion, the Appellate Division held, it would be improper to enforce the guaranty "because of the material misrepresentation regarding [the defendant's] loan to Spotted Zebra."

On or about October 5, 2012, the plaintiff returned an information subpoena to the defendant's attorney. In the plaintiff's responses, he noted that though he maintained a bank account at Bank of America, this account solely contained funds received from his New York City Police pension and from Social Security and that the account does not contain funds from any other sources.

In or about November 2010, the defendant entered Judgment with the Clerk of the Court of Nassau County, Index number 18879-2010. On December 1, 2010, the plaintiff became aware that the defendant had restrained the plaintiff's Bank of America account.

The plaintiff alleges that he has incurred damages, including but not limited to unnecessarily incurring attorneys' fees in having to defend the "Prior Action" in New Jersey and after appealing the Judgment. Also, the plaintiff claims to have suffered damages as a result of the defendant restraining the plaintiff's bank account and in refusing to refrain from executing on the Judgment while the appeal was pending, which included damage to the plaintiff's financial reputation and credit, as the fraudulently-obtained Judgment was reported to the three major credit bureaus. Finally, the plaintiff claims to have suffered general damages, as a result of the defendant's fraudulent conduct.

The defendant, in his opposition sets forth an excusable default and meritorious defense to the action.

In view of the foregoing, the Court in its discretion **DENIES** the plaintiff's motion.

The defendant is directed to serve upon the plaintiff and file with this Court an answer within twenty (20) days of the date of this Decision.

The parties shall appear on **October 2, 2013 at 9:30 a.m.**, at the Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, Part 26, for a Conference in this matter.

The remainder of the plaintiff's requested relief, not specifically addressed herein, is hereby **DENIED**.

This constitutes the Decision and Order of this Court.

Dated: August 12, 2013
Mineola, New York

ENTER:



HON. MARGARET C. REILLY, J.S.C.

To: Hogan & Cassell, LLP
Attorneys for Plaintiff
500 North Broadway, Suite 153
Jericho, New York 11753

ENTERED

AUG 15 2013

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**