

Suffolk County Natl. Bank v Michael K. Lennon, Inc.
2014 NY Slip Op 30193(U)
January 10, 2014
Sup Ct, Suffolk County
Docket Number: 9274-2012
Judge: Emily Pines
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SHORT FORM ORDER

INDEX NO.: 9274-2012

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

*Present:*HON. EMILY PINES

J. S. C.

Motion Dates: 10/31/12; 11/13/12**Submit Date:** 01/10/2014**Motion Nos.:** 001 MD
002 MD

SUFFOLK COUNTY NATIONAL BANK,
Plaintiff,**- against -**

MICHAEL K. LENNON, INC., MICHAEL K. LENNON., THOMAS J. LENNON, THE ESTATE OF MARIE V. LENNON, and John Doe Nos. "1" through "5" intended to represent any and all unknown individuals and entities asserting a claim upon the Estate of Marie V. Lennon,

Defendants.

X
Attorney for Plaintiff

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ORDERED that the motion (001) by the plaintiff for a default judgment pursuant to CPLR 3215 against the defendants is denied; and it is further

ORDERED that the answers submitted by the defendants Michael K. Lennon, Inc., Michael K. Lennon, and Thomas J. Lennon are deemed served; and it is further

ORDERED that the action as asserted against the Estate of Marie V. Lennon is dismissed; and it is further

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ORDERED that the cross motion (002) by the defendants is denied as academic; and it is further

ORDERED that the parties are directed to appear at a preliminary conference in Part 46 on Monday, February 3, 2014 at 11:00 a.m.

In this breach of contract action, the plaintiff seeks the payment on a commercial line of credit loan in the principal amount of \$125,000. The plaintiff entered into the loan with the defendant Michael K. Lennon, Inc. on October 28, 2008. As security for the loan, a pledge agreement dated November 6, 2008 was executed by the plaintiff, Michael K. Lennon, Inc., and Marie V. Lennon. The record reveals that the term of the note was extended by a demand grid note dated November 30, 2009. At that time, the defendants Michael K. Lennon and Thomas J. Lennon executed personal guarantees for the indebtedness of Michael K. Lennon, Inc. The record further reveals that Marie V. Lennon died on May 25, 2011. The defendants allegedly defaulted on the May 31, 2011 payment of the loan. The record reveals that the plaintiff served a notice of default and demand for payment on the loan upon the defendants on January 9, 2012. This action was commenced by filing on April 2, 2012.

The complaint alleges four causes of action: breach of contract by all defendants, breach of agreement by all defendants to pay attorney fees upon default, breach of personal guaranties by the defendants Michael K. Lennon and Thomas J. Lennon, breach of a pledge agreement by the decedent Marie V. Lennon.

The plaintiff now moves pursuant to CPLR 3215 for a default judgment against all defendants on the ground that the defendants have not appeared in the action. The defendants cross-move to vacate their defaults and dismiss the action as asserted against the Estate of Marie V. Lennon.

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In support of the branch of the motion seeking a default judgment as against the defendants Michael K. Lennon, Inc., Michael K. Lennon, and Thomas J. Lennon, the plaintiff claims that despite proper service, the defendants have failed to appear in the action. The plaintiff submits a copy of the complaint and affidavits of service evidencing substituted personal service upon the corporate defendant, Thomas J. Lennon, and Michael K. Lennon on April 11, 2012, April 25, 2012, and May 4, 2012 respectively, and an affidavit of service of the instant motion. In addition, the plaintiff submits a copy of a stipulation which extended the defendants' time to answer until May 31, 2012.

In opposition, and in support of their cross motion, the defendants contend that a default should not be granted inasmuch as the parties were engaged in settlement talks and the plaintiff agreed to extend their time to answer. The defendants Michael K. Lennon, Inc., Michael K. Lennon and Thomas J. Lennon submit copies of their verified answers. In support, the defendants submit copies of correspondence between the parties and the answers of the corporate defendant, Michael K. Lennon, and Thomas J. Lennon, dated October 24, 2012.

Under CPLR 3215 (a), a plaintiff may move for entry of judgment by default when a defendant has failed to appear. A plaintiff must normally commence proceedings for the entry of judgment within one year after the time of default. (CPLR 3215 [c]). A plaintiff who submits proof of service of summons and complaint and a factually detailed verified complaint is entitled to a default judgment against a defendant on the issue of liability, where the defendant has failed to appear or answer. *Zino v Joab Taxi, Inc.*, 20 AD3d 521, 522, 799 NYS2d 124 (2d Dept 2005); CPLR 105(u).

To defeat a facially adequate CPLR 3215 motion, a defendant must show either that there was

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no default, or that it has a reasonable excuse for its delay and a potentially meritorious defense. See *Wassertheil v Elburg, LLC*, 94 AD3d 753, 753, 941 NYS2d 679 (2d Dept 2012); *New Seven Colors Corp. v White Bubble Laundromat, Inc.*, 89 AD3d 701, 702, 931 NYS2d 899 (2d Dept 2011); *Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 789, 921 NYS2d 643 (2d Dept 2011); cf. CPLR 5015(a) (1). Whether a proffered excuse is “reasonable” is a “sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits.” *Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 876-877, 800 NYS2d 613 (2d Dept 2005); see *Zanelli v JMM Raceway, LLC*, 83 AD3d 697, 697, 919 NYS2d 878 (2d Dept 2011); *Grinage v City of New York*, 45 AD3d 729, 730, 846 NYS2d 300 (2d Dept 2007); *Greene v Mullen*, 39 AD3d 469, 469-470, 833 NYS2d 215 (2d Dept 2007).

Here, the defendants served their answers in their cross motion. In addition, the Court finds that, in considering all the surrounding circumstances, the defendants’ excuse for the delay is reasonable and the plaintiff has made no showing of prejudice. Accordingly, the branch of the plaintiff’s motion seeking a default judgment against Michael K. Lennon, Inc., Michael K. Lennon, and Thomas J. Lennon is denied and their answers are deemed served on November 3, 2013.

The branch of the plaintiff’s motion seeking a default judgment against the estate of Marie V. Lennon is denied. “[A] plaintiff is unable to commence an action during the period between the death of a potential defendant and the appointment of a representative of the estate.” *Laurenti v Teatom*, 210 AD2d 300, 301, 619 NYS2d 754 (2d Dept 1994). Therefore the action, insofar as asserted against Marie

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V. Lennon, was a nullity. A personal representative should have been named as the defendant at the outset, inasmuch as Marie V. Lennon was already deceased at the commencement of the action. Thus, the Court finds that the plaintiff has improperly sued the Estate of Marie V. Lennon and the action as asserted against the Estate must be dismissed. The defendants' cross motion seeking the same relief is denied as academic.

Accordingly, the plaintiff's motion is denied, the action as asserted against the Estate of Marie V. Lennon is dismissed, and the defendants' cross motion is denied as academic.

Dated: January 10, 2014
Riverhead, New York



EMILY PINES
J. S. C.

Final
 Non Final