

Nuyorican Media Corp. v Nuyorican Poets Café

2014 NY Slip Op 32490(U)

September 19, 2014

Supreme Court, New York County

Docket Number: 654376/2012

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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NUYORICAN MEDIA CORP., individually and as
Successor-in-interest to NUYORICAN PRESS,

Plaintiff,

DECISION AND
ORDER

-against-

Index No. 654376/2012

NUYORICAN POETS CAFÉ and CARLTON “TONY”
SPILLER,

Defendant.

-----X

HON. ANIL C. SINGH, J.:

Plaintiff, Nuyorican Media Corp (“Media”), moves for a default judgment
against defendant, Nuyorican Poets Café (“NPC”), pursuant to CPLR 3215.

Defendant, NPC, cross moves for an order, pursuant to CPLR 3211(a)(5), to
dismiss the complaint based upon the statute of limitations, or if not, an order of a
twenty day extension to respond to the complaint pursuant to CPLR 3012(d).

Defendant Carlton Spiller moves for dismissal for lack of timely service and
personal jurisdiction, pursuant to CPLR 306(b) and 3211(a)(8). Spiller’s motion is
unopposed.

Plaintiff has sued defendants twice before. The first suit was brought in U.S.
District Court, but dismissed due to loss of diversity. The second was filed in this

court, but dismissed due to lack of proper service of process by plaintiff. Plaintiff then commenced this action via summons and complaint on December 14, 2012, for breach of contract, and collection of \$3 million in compensatory damages. On August 8, 2013, plaintiff brought a motion for default judgment.

On a motion for default judgment, the movant must file “proof of service of the summons and the complaint... and proof of the facts constituting the claim, the default and the amount due by affidavit” (CPLR §3215).

Plaintiffs have adequately established proper service of the summons and complaint onto defendants pursuant to CPLR 3215(f). Plaintiffs completed service onto NPC properly through Secretary of State’s office pursuant to Business Corporation Law §306 (NYCTL 1999-1 Trust v. 114 Tenth Ave. Assoc., Inc., 44 A.D.3d 576 [1st Dept 2007]). Service is valid irrespective of whether the process subsequently reaches the corporate defendant (Associated Imports, Inc. v. Leon Amiel Publisher, Inc., 168 A.D.2d 354 [1st Dept 1990]).

To defeat a motion for leave to enter a default judgment, a defendant “must establish a reasonable excuse for the default and a potentially meritorious defense to the action” (Diederich v. Wetzel, 112 A.D.3d 883[2d Dept 2013]).

Plaintiff did not get a response from NPC for over nine months. The address listed for NPC with the Secretary of State was that of, Gulielmetti & Gesmer, PC, a law firm which NPC retained in 1989. The firm has long since been disbanded.

NPC claims they were unaware of the improper address listed with the Secretary of State by the disbanded firm. Given the circumstances, NPC has shown a reasonable excuse for default. Defendants also raise potentially meritorious defenses in the affidavit of Carlton Spiller.

NPC brought a cross-motion based on the statute of limitations, which bars actions after six years (CPLR §213). The complaint indicates that the cause of action is for continuing breaches over the last six and a half years. Where a duty imposed by a contract is a continuing one, “the statute of limitations is not a defense to actions based on breaches of that duty occurring within the limitations period” (Meadowbrook Farms Homeowners Ass'n, Inc. v. JZG Res., Inc., 105 A.D.3d 820, 822 [2d Dept 2013]). Thus, the plaintiff’s allegation of continued breaches within the six years is not barred.

NPC also alternatively seeks an additional twenty day extension to respond. Favorable factors for an extension include the “relatively brief nature of the delay, the lack of prejudice to the plaintiff, the reasonable excuse for the delay, the evidence of meritorious defenses, the lack of evidence of a willful default or intent to abandon any defenses to the action, and public policy which favors the resolution of cases on the merits” (City Line Auto Mall, Inc. v. Citicorp Leasing, Inc., 45 A.D.3d 716 [2d Dept 2007]). A twenty day extension is reasonable. Accordingly, it is

ORDERED that plaintiff Nuyorican Media Corp's motion for default judgment herein is denied; and it is further

ORDERED that defendant Nuyorican Poets Café's cross-motion to dismiss herein is denied; and it is further

ORDERED that defendant Carlton Spiller's motion to dismiss herein is granted; and it is further

ORDERED that defendant Nuyorican Poets Café motion for additional time to respond is granted and thus they are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on December 10,, 2014, at 9:30 AM.

Date: September 19, 2014
New York, New York



Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE