

**Youngstown Tube Co. v Russo**

2014 NY Slip Op 33328(U)

February 19, 2014

Supreme Court, Orange County

Docket Number: 9417/2012

Judge: Robert A. Onofry

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
IAS PART - COUNTY OF ORANGE

Present : HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT: COUNTY OF ORANGE  
-----X

YOUNGSTOWN TUBE CO.,

Plaintiff

-against-

ANTHONY J. RUSSO, individually and  
d/b/a UNIVERSAL FIRE FABRICATING  
& SUPPLY,

Defendants.

-----X

**DECISION/ORDER**

To commence the statutory  
time period for appeals  
as of right (CPLR 5513  
[a]), you are advised to  
serve a copy of this order, with  
notice of entry, upon all parties.

Index No. 9417/2012  
Motion Date: December 10, 2013

The following papers numbered 1 to 7 were read and considered on this motion by Defendant Anthony Russo, in his individual capacity, in which Defendant seeks: (1) An Order setting aside and vacating a Default Judgment entered on August 22, 2013, for the sum of \$41,832.48; and (2) upon the vacatur of same, dismissing complaint and all causes of action alleged therein:

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Upon the foregoing papers, it is

ORDERED, that Defendant's motion is denied for the reasons set forth below.

**Factual Background/Procedural History**

The facts, insofar as they are relevant to the pending motion, reveal that Plaintiff commenced the instant action by the filing of a Summons and Complaint on or about October 24, 2012. Service was thereafter effectuated upon Defendant by serving a person of suitable age and discretion on

November 17, 2012, service which was supplemented, pursuant to CPLR §308(4), by followup service by mail of a copy the Summons and Complaint on November 19, 2012.

In its complaint, Plaintiff seeks to recover for monies allegedly due and owing pursuant to a Credit Agreement (the "Agreement") entered into between the parties, the Defendant's purchase of good on credit and his default in the payment of same. Plaintiff further alleges that the outstanding principal balance, as of the date of default [March 2008] amounts to \$30,500.37. Plaintiff therefore seeks recovery of the unpaid balance, together with interest and costs from the alleged date of default.

Notwithstanding the aforementioned service, Defendants failed to appear, enter an answer or request an extension of their time to do so. Thereafter, and on August 22, 2013, a Judgment was entered in the Orange County Clerk's Office based upon Defendants' default.

Defendant Anthony Russo, in his individual capacity, now moves to vacate the Judgment upon multiple grounds including, *inter alia*: (1) improper service; and (2) that he did not do business with Plaintiff in his individual capacity. In support of his application, Defendant avers that he was never served with the Summons and Complaint, that his wife does not fit the description of the woman upon whom service of process was allegedly effectuated upon, and that the mail may not have been delivered to his home due to an incorrect spelling of the street name. Plaintiff further argues that he only did business with the Plaintiff through his corporation, Universal Fire Fabricating & Supply, Inc., [a company which he admits owes the debt but has since ceased operation]. He further avers that he never transacted business in his individual capacity.

In opposition, Plaintiff has submits a copy of the Summons and Complaint and an Affidavit of Service of same. Thus, Plaintiff argues, despite Defendant's unsupported claims to the contrary,

Plaintiff has demonstrated, in unrebutted fashion, that the Defendant was properly served. Plaintiff further argues that the facts of the claim have been properly demonstrated, as well as Defendant's default. Thus, the Default Judgment, entered on August 22, 2013, should remain intact since it was both procedurally and substantively proper.

In any event, Plaintiff argues, Defendant has failed to establish a meritorious defense. In fact, Defendant does not dispute the existence of the Agreement, his purchase of goods on credit and his failure to repay the amounts due. Defendant merely asserts that all purchases were made by the corporate defendant and that no business relationship existed between Plaintiff and Defendant in his individual capacity. Moreover, and in rebutting Defendant's claim, Plaintiff has produced a credit application which indicates that Russo applied for credit as both a corporation and in his individual capacity. As such, Plaintiff asserts, Defendant has neither established a reasonable excuse for his default nor the existence of a meritorious defense. Therefore the motion must be denied in its entirety. The Court agrees.

Defendant's motion to vacate the default is denied.

#### **Discussion/Legal Analysis**

The Court, as a preliminary matter, begins its analysis with its recognition of the longstanding articulated public policy favoring the resolution of disputes on their merits. See, e.g. *Lawrence v. Palmer*, 2009 NY Slip Op 651; 59 A.D.3d 394 [2d Dept. 2009]; *Falla v. Keel Holdings, LLC* 50 A.D.3d 844 [2d Dept.2008].

Nevertheless, in those cases where excusable default is deemed to exist, such a finding is typically accompanied by the companion findings that a potentially meritorious defense exists coupled with the absence of resulting prejudice to the plaintiff. See, *Yonkers Rib House, Inc. v. 1789*

[\* 4]

*Central Park Corp.*, 19 A.D.3d 687, 799 N.Y.S.2d 62 [2d Dep't-2005]; *Goodman v. City Health and Hospital Corp.*, 2 A.D.3d 581, 768 N.Y.S.2d 365 [2<sup>nd</sup>Dept.2003]. Moreover, the law is equally clear, that a defendant who has failed to timely appear and answer a complaint (and desires to be relieved from that default), must satisfy the two pronged requirement of demonstrating both:(1)the existence of a reasonable excuse for the default; and (2) the existence of a meritorious defense to the pending action. See, CPLR 5015[a][1]; *Peterson v. Lysaght, Lysaght & Kramer, P.C.*, 47 A.D.3d 783 [2d Dept.2008]; *Lipp v. Port Authority of NY & NJ*, 2006 NY Slip Op 8746, 34 A.D.3d 649 [2d Dept.2006]; *Traore v. Nelson*, 277 A.D.2d 443 [2d Dept.2000]; *Putney v. Perlman*, 203 A.D.2d 333 [2d Dept.1994]; *Ortega v. Bisogno & Myerson*, 38 A.D.3d 510 [2<sup>nd</sup>Dept.2007]. Ultimately, however, the determination of whether to vacate such a default rests within the sound discretion of the court and is typically fact driven. See, *Hegarty v. Ballee*, 18 A.D.3d 706, 795 N.Y.S.2d 747 [2<sup>nd</sup>Dept.2005].

Here, the Court is unable to conclude that the Defendant has satisfied either of the required statutory prongs. Nothing in the record suggests any factual basis that would warrant a finding of reasonable excuse for Defendant's default. The affidavits of service offered by the Plaintiff established, *prima facie*, that proper service, and supplemental service, was effectuated upon the Defendant. Moreover, a mere denial of receipt of the Summons and Complaint is insufficient to rebut such presumption or to raise a triable issue of fact. *Kihl v. Pfeffer*, 94 N.Y.2d 118, 700 N.Y.S.2d 87 (1999).

Similarly, even if the Court were to conclude that a reasonable excuse exists for the default, and viewing the application in the light most favorable to the Defendant, the Defendant nevertheless failed to establish the required second prong; a meritorious defense. In fact, Defendant admits that

[\* 5]

Universal Fire Fabricating and Supply, of which he was the president and sole owner, did business with Plaintiff and failed to repay Plaintiff for the billed goods and services. Although he denies the existence of a personal relationship with the Plaintiff, a review of the credit application, which was filled out by Russo himself, reveals that the application was made in both his corporate and individual capacities.

On the record presented, Plaintiff established all required prerequisites for the entry of a default judgment, pursuant to CPLR §3215(f), i.e., proof of service, proof of the underlying facts constituting the claim and proof of the Defendant's default. *See, Matone v. Sycamore Realty Corp.*, 50 A.D.3d 978, 858 N.Y.S.2d 202 [2<sup>nd</sup>Dept.2005]; *Allstate Insurance Co. v. Austin*, 48 A.D.3d 720, 851 N.Y.S.2d 375 [2<sup>nd</sup>Dept.2008].


Accordingly, the Court concludes, and so finds, that Defendant has failed to establish the requisite elements necessary to be relieved of his default. Thus, for the reasons hereinbefore set forth Defendant's application must be, and is hereby, denied, and in accordance therewith, it is hereby

ORDERED, that Defendant's motion to vacate his default be, and the same is hereby, denied, in its entirety.

This constitutes the decision and order of this court.

Dated: February 19, 2014  
Goshen, New York

ENTER

  
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HON. ROBERT A. ONOFRY, A.J.S.C.