Autovest, LLC v Filoseta
2014 NY Slip Op 33810(U)
May 2, 2014
Supreme Court, Nassau County
Docket Number: 602281/12
Judge: James P. McCormack

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

_____x

AUTOVEST, LLC,

Plaintiff(s),

-against-

MICHAEL D. FILOSETA,

Defendant(s).

_____x

TRIAL/IAS, PART 40
NASSAU COUNTY

Index No. 602281/12

Motion Seq. No.: 001
Motion Submitted: 2/3/14

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X

Plaintiff seeks an order, pursuant to CPLR §3215, for a default judgment against defendant and granting damages in the amount of $5,752.87 plus interest, counsel fees in the amount of $360.00 and $669.00 for reasonable costs and disbursements. Defendant opposes the motion.

This is an action to recover debts involving a consumer car loan. The action was commenced by service of a Summons with Notice on or about November 9, 2012. Defendant appeared through counsel, who filed a Notice of Appearance and Demand on January 9, 2013.

Plaintiff filed a Verified Complaint, electronically, on or about January 22, 2013. According to the plaintiff, defendant never interposed an Answer resulting in the within motion for a default judgment against defendant.

According to CPLR § 3215 a motion for default judgment can be made once a defendant has failed to appear.

According to CPLR 3215(f):

> 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 pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316, and proof by affidavit made by the party of the facts constituting the claim, the default and the amount due. 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 his attorney.

Once plaintiff submits proof of service and an affidavit constituting the merits of his claim, the application for a default judgment must be granted (*see Pampalone v. Giant Building Maintenance, Inc.*, 17 AD3d 556 [2d Dept. 2005]; *Andrade v. Ranginwala*, 297 AD2d 691 [2d Dept. 2002]). Moreover, once the requisite showing has been made and the requisite proof proffered, said motion shall be granted unless the defendant can establish that it has a meritorious defense to the claims made, a reasonable excuse for the delay in interposing its answer, and that the delay in interposing an answer has in no way prejudiced the plaintiffs in the prosecution of their case (*see Buywise Holding, LLC v. Harris*, 31 AD3d 681 [2d Dept. 2006]; *Giovanelli v. Rivera*, 23 AD3d 616 [2d Dept. 2005]; *Mjandi v. Maguire*, 21 AD3d 1067 [2d Dept. 2005]; *Thompson v. Steuben Realty Corp.*, 18 AD3d 864 [2d Dept. 2005]).

A defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action to avoid the entering of a default judgment or to extend the time to answer (*see* CPLR §5015 [a] [1]; *O'Shea v. Bittrolff*, 302 AD2d 439 [2d Dept. 2003]; *Matter of Gambardella v. Orlov Light*, 278 AD2d 494 [2d Dept. 2000]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court (*see Gambardella v. Ortov Light*, 278 AD2d 494 [2000], supra). In the present action counsel for defendant states in his Affirmation in Opposition that he never received the complaint because it was electronically filed and he was not "in the system". Counsel for defendant annexed to his opposition papers a screen shot of the electronic system to which confirms he was not listed as counsel to the defendant at the time the Complaint was electronically filed. He also never received a copy of the complaint in the mail, and asserts he first learned of the complaint after being served with the within motion. As part of his responsive papers, defendant submits a Verified Answer which state his defenses to that action.

Here, the defendant demonstrated a reasonable excuse for the default and a meritorious defense (*see Giovanelli v. Rivera*, 23 AD3d 616 [2d Dept. 2005]). Further, the absence of prejudice to the plaintiff and the public policy in favor of resolving matter on the merits argue in favor of denying the motion. *Giacopelli v. Guiducci*, 36 AD3d 853 [2nd Dept. 2007].

Defendant further argues that the consumer car loan contract contains an arbitration clause divesting this court of jurisdiction. However, the arbitration clause at issue is elective and indicates either party may choose arbitration, but does not mandate it.

Accordingly, it is hereby,

ORDERED, the plaintiffs motion for default judgment against the defendant Michael D. Filoesta, is **DENIED**; and it is further,

ORDERED, that the defendant, Michael D. Filoesta, is directed to serve and file an Answer on or before June 9, 2014.

This constitutes the Decision and Order of the Court.

Dated: May 2, 2014
Mineola, N.Y.

Hon. James P. McCormack, A. J. S. C.

ENTERED

MAY 05 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE