

Quick Cash, Inc. v Muraca & Kelly, LLP

2016 NY Slip Op 31247(U)

March 11, 2016

Supreme Court, New York County

Docket Number: 653834/2012

Judge: Eileen A. Rakower

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

QUICK CASH, INC.; GUARDIAN
ADVISORS LP I; GUARDIAN ADVISORS
LP II; MONEY FOR LAWSUITS LP V,

Index No.
653834/2012

Plaintiffs,

- v -

**DECISION
and ORDER**

MURACA & KELLY, LLP; KELLY &
GROSSMAN, LLP; FLANAGAN &
ASSOCIATES, PLLC; KELLY, GROSSMAN,
& FLANAGAN, LLP; DENNIS KELLY, ESQ.,
INDIVIDUALLY; DAVID GROSSMAN, ESQ.,
INDIVIDUALLY; SUZANNE FLANAGAN,
ESQ., INDIVIDUALLY; GROSSMAN,
FLANAGAN, MURACA & KELLY, LLP,

Mot. Seq. 1-3

Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs, Quick Cash, Inc., a Delaware corporation authorized to do business in New York, Guardian Advisors LP I, Guardian Advisors, LP II, and Money For Lawsuits LP V (collectively, "plaintiffs") brought this action to recover monetary damages arising from a series of attorney advance agreements with defendants, Muraca & Kelly, LLP, Kelly & Grossman, LLP, Flanagan & Associates, LLP, Kelly, Grossman & Flanagan, LLP, Dennis Kelly, Esq., individually, David Grossman, Esq., individually, Suzanne Flanagan, Esq., individually, and Grossman, Flanagan, Muraca & Kelly, LLP (collectively, "defendants").

By notice of motion, dated May 21, 2015, plaintiffs now move, pursuant to CPLR § 3215, for default judgment against each of the defendants for compensatory damages in the amount of \$4,282,410.74, plus interest, attorney fees, and costs. In support, plaintiffs submit the attorney affirmation of Raul J. Sloezen, Esq., which annexes, *inter alia*: the complaint, dated October 26, 2012; the original affidavits of service, the stipulation extending time to answer, dated December 14, 2012; and

email correspondence between plaintiffs and defendants dating from January 2013 to January 2015.

On November 6, 2012, plaintiffs filed the summons and complaint. Plaintiffs served defendants with the summons and complaint between November 26, 2012 and November 30, 2012. On December 14, 2012, Dennis Kelly, Esq., on behalf of defendants, entered into a stipulation with plaintiffs' counsel, Raul J. Sloezen, Esq., whereby defendants' time to answer plaintiffs' complaint was extended until February 1, 2013. For approximately the next two years, plaintiffs and defendants periodically discussed settlement of the case and plaintiffs agreed to several extensions of the deadline to file an answer. The parties did not reach a settlement.

Defendants oppose the motion and cross-move for an order dismissing the action, and severing the action as to Suzanne Flanagan, Esq., individually, and Flanagan & Associates, PLLC. Defendants also move for an order deeming defendants' opposition and cross motion timely served, permitting it to be e-filed, and setting a date to e-file a reply.

Defendants Suzanne Flanagan, Esq. and Flanagan & Associates, PLLC (collectively, "Flanagan"), separately oppose plaintiffs' motion for default judgment and cross-move for an order, pursuant to CPLR §§ 3012(d) and 2004, granting an extension of time to answer and compelling the acceptance of Flanagan's proposed verified answer.

Defendants submit the affidavits of David C. Grossman, Esq. and Dennis Kelly, Esq., along with a proposed verified answer. Defendants argue that plaintiffs' motion for default judgment should be denied because plaintiffs did not comply with CPLR §§ 3215(c) and (g). Specifically, defendants allege that (1) the original affidavits of service, dated November 30, 2012, were not properly filed, (2) the motion is untimely under CPLR § 3215(c) because it was not made within one year after the default, and (3) the plaintiffs did not comply with CPLR § 3215(g)(i), which requires 20 days additional notice before the entry of default, service by first-class mail, and service at the defendant's residence in an envelope bearing the legend "personal and confidential."

Alternatively, defendants argue that the action should be dismissed as to David Grossman, individually, and Dennis Kelly, individually, because a final addendum superseding all prior agreements did not require personal guarantees. Defendants allege that the entity, Grossman, Flanagan, Muraca & Kelly, LLP, does

not exist, and therefore the action against Grossman, Flanagan, Muraca & Kelly, LLP should be dismissed. Defendants further argue that dismissal is warranted because the agreements that give rise to the complaint are unenforceable as contrary to public policy.

In reply, plaintiffs' attorney, Raul J. Sloezen, Esq., by his affirmation dated July 27, 2015, admits that he did not e-file the original affidavits of service, but argues that failure to file the proof of service is not a jurisdictional defect fatal to plaintiffs' motion for default judgment. Sloezen notes that the original affidavits of service were filed as Exhibits 2–8 in the motion for default judgment, and he offers to e-file them separately if required by the court.

In reply to the argument that the motion for default is untimely under CPLR § 3215(c), plaintiffs point to the multiple conversations, settlement discussion meetings, and email exchanges as evidence that plaintiffs communicated with defendants for two and a half years after defendants were initially served with the summons and complaint. Plaintiffs argue that, regardless of whether the default occurred after plaintiffs sent defendants a stipulation extending time to answer to January 9, 2015, or after the original stipulation extending time to answer to February 1, 2013, plaintiffs have demonstrated a reasonable excuse for not having filed for a default judgment earlier, and defendants have not provided a reasonable excuse for their default or a meritorious defense to the action.

A plaintiff's delay in filing proof of service within 20 days, as required by CPLR § 308, "is a mere procedural irregularity, which may be corrected by an order of the court permitting late filing of proof of service." *Pipinias v. J. Sackaris & Sons, Inc.*, 116 A.D.3d 749, 752 (2d Dep't 2014) *leave to appeal dismissed*, 24 N.Y.3d 990 (2014); *see also Zareef v. Lin Wong*, 61 A.D.3d at 749 (2d Dep't 2009) (plaintiff did not obtain an order permitting a late filing of proof of service and thus defendants' time to answer never began to run); *Discover Bank v. Eschwege*, 71 A.D.3d 1413, 1414 (4th Dep't 2010); *Hausknecht v. Ackerman*, 242 A.D.2d 604, 606 (2d Dep't 1997); *Haegeland v. Massa*, 75 A.D.2d 864, 427 N.Y.S.2d 887; CPLR 2004 (extensions of time generally).

CPLR § 2001 authorizes the court to correct any "mistake in the filing process, to be corrected, upon terms as may be just" or disregard the mistake "if a substantial right of a party is not prejudiced." Similarly, CPLR § 2004 authorizes the court to "extend the time fixed by any statute rule or order from doing any act, upon such terms as may be just and upon good cause shown."

Plaintiff concedes that the original affidavits of service were not timely filed with the clerk. While the failure to file a timely proof of service is a curable procedural irregularity, here, the plaintiff did not obtain an order permitting a late filing of proof of service. Consequently, defendants' time to reply never began to run. Because the defendants never defaulted, granting the plaintiff's motion for leave to enter default judgment against defendants would be inappropriate. Pursuant to CPLR § 3012(d), plaintiffs are compelled to accept the proposed answers filed by defendants Kelly and Grossman, and defendant Flanagan, dated July 9, 2015, and September 9, 2015, respectively.

Wherefore, it is hereby

ORDERED that plaintiffs' motion for default judgment is denied; and it is further

ORDERED that plaintiffs' time to file proof of service is extended 5 days from the date of the notice of entry of this order.

ORDERED that defendants' cross-motions are granted only to the extent that plaintiffs are compelled to accept the proposed answer, dated July 9, 2015, filed by defendants Muraca & Kelly, LLP; Kelly & Grossman, LLP; Kelly, Grossman & Flanagan, LLP; Grossman, Flanagan, Muraca & Kelly, LLP; Dennis Kelly, Esq.; and David Grossman, Esq., and the proposed answer, dated September 9, 2015, filed by defendants Suzanne Flanagan, Esq., and Flanagan & Associates, PLLC.

This constitutes the Decision and Order of the Court. All other requested relief is denied.

DATED: MARCH 11, 2016

MAR 11 2016


EILEEN A. RAKOWER, J.S.C.