TD Auto Fin. LLC v Fenner
2016 NY Slip Op 32932(U)
August 3, 2016
Supreme Court, Bronx County
Docket Number: 24682/2015E
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
--X **Index No. 24682/2015E**
TD Auto Finance LLC
Plaintiff,

-against-

DECISION and ORDER

Charles Fenner,

Present:

Defendant.

Hon. Julia I. Rodriguez
--X Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant's motion to renew/reargue a motion to vacate a default judgment.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1**
Memorandum of Law	**2**
Affirmation in Opposition & Exhibits	**3**
Reply Affirmation	**4**

Upon reviewing the transcript of oral argument which was held on December 21, 2017 in this matter and considering the parties' submissions, defendant's motion to renew/reargue, pursuant to CPLR 2221, is **granted** and upon renewal/reargument the Court's Short Form Order dated April 12, 2018 is recalled and vacated and the following Decision & Order is substituted therefor:

The 80-year-old defendant moved by order to show cause, pursuant to CPLR 5015(a)(1) and (a)(4), for an order vacating a judgment entered against him, dated December 11, 2015, after he failed to appear in the instant action in which plaintiff seeks a deficiency judgment against him on an auto loan assigned to plaintiff TD Auto Finance LLC ("TD Auto"). From the time he filed the order show cause until the oral argument proceeding, defendant appeared *pro se*. Defendant is now represented by counsel who presents that the defendant became disabled as a result of a car accident in 1999 which permanently affected his memory and made it impossible for him to adequately present his arguments to the Court. Defendant submitted an affidavit attesting to same. Upon reviewing the transcript of the proceeding, the Court finds that it is

possible that the defendant was confused and, as a result, he may not have fully and/or clearly articulated his arguments and contentions. Through counsel, defendant now presents the following grounds for vacatur of the deficiency judgment: (1) the court lacks personal jurisdiction over him because he was not served with the summons and complaint; (2) he has a reasonable excuse for his failure to appear as he was not served with the summons and complaint; (3) plaintiff fraudulently induced him to enter into the Retail Installment Contract dated August 5, 2013 ("the Contract"); (4) plaintiff violated the New York State Lemon Law (GBL §198-b(b)) by refusing to return his money when he returned his first vehicle; and (5) the Notice of Repossession did not comply with N.Y. General Obligations Law §7-401; (5) venue in Bronx County is improper pursuant to CPLR 503(f) because this case involves a consumer credit transaction and defendant does not reside in Bronx County.

In support of the motion, defendant submitted, *inter alia,* his affidavits[1], a copy of the Contract and a TD Auto Finance LLC document dated January 13, 2015. In his affidavit, defendant states the following: He suffered a head injury as a result of a car accident in 1999 which makes it difficult for him to communicate, focus and concentrate. The injury has also impaired his memory. It is hard for him to read and write due to his disability. His children handle his business affairs because he is no longer able to do so. His daughter is the payee for his social security disability benefits because it was deemed that he could not handle the money himself. He did not receive the summons and complaint and found out about the judgment around August 2017 when his employer told him it had received an income execution. The affidavit of service describes the woman that the documents were allegedly served upon as being a black female, 5'4-5'6, weighing 120-140 pounds. The only person that lives with him is his daughter who is 5'10-5'11 and weighs "closer to 250 pounds." He bought his first car from a dealer in 2013 but it kept breaking down. He returned it for repairs on three occasions. When

[1]Defendant submitted the affidavit he initially submitted in support of the order to show cause as well as an affidavit dated after the date of the court proceeding. Plaintiff urges the Court not to consider the latter affidavit because it was not submitted with the original motion. However, as the latter affidavit contains information pertaining to the defendant's mental state at the court proceeding, the Court will consider it.

they couldn't fix it, he told the dealer (Bronx Suzuki) to keep the car and give him his money back. The dealer pressured him and convinced him to "take a replacement car instead." The second car was more expensive than the first but the dealer told him that if he paid another $1000.00 they would apply the payments he made on the first car and it would bring the price of the second car "down to the same." He could not read the Contract himself and trusted what the dealer told him. He paid the $1000.00 and took the car home. When he received bills showing that the price had not been lowered, he spoke to the dealer and the bank several times "but they would not correct the problem." He was unable to make the payments because the price was "so much higher" than they had told him. He had driven the car the day before it was repossessed and there were no problems with the car when he parked it that night. The day after the car was repossessed, his son went to see the dealer who gave his son a receipt. He "thought this would be the end of it, because they had the car back."

The Contract is two pages and is printed in very small typeface. A TD Auto document explaining the deficiency indicates that defendant's "secured obligation" was $24,740.74 and that the vehicle was sold for $9,500.00.

In opposition, plaintiff submitted, *inter alia,* correspondence sent from plaintiff's attorney to defendant and various TD Auto documents. By letter dated December 14, 2015, plaintiff's attorney indicates that a judgment had been entered against the defendant on December 11, 2015. A copy of the judgment is attached to the letter, however, no affidavit of service was submitted.

A TD Auto Notice After Possession Or Voluntary Surrender, dated November 13, 2014, states that the vehicle would be offered for sale on December 8, 2014. A Repossession Invoice indicates that the vehicle was recovered on November 8, 2014 and that the battery and engine were inoperable.

* * * * * * * * * *

In order to vacate a judgment pursuant to CPLR 5015(a)(1), a defendant must establish a reasonable excuse for the default and a meritorious defense. *See* CPLR 5015(a)(1); *Liberty Taxi Management, Inc. v. Gincherman,* 32 A.D.3d 276, 820 N.Y.S.2d 49 (1st Dept. 2006). The

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affidavit of service of Plaintiff's process server constitutes *prima facie* evidence of proper service of the summons and complaint. *See Reem Contracting v. Altschul & Altschul,* 117 A.D.3d 583, 986 N.Y.S.2d 446 (1st Dept. 2014). Defendant's blanket denial of service based upon an alleged misdescription of his daughter without any supporting evidence, i.e., daughter's affidavit, photo of daughter, is insufficient to rebut plaintiff's *prima facie* showing. As such, the Court has jurisdiction over the defendant and this is not a viable ground for excusable default. However, given the defendant's uncontroverted statements regarding his mental state after a head injury in 1999, as well as the Court's preference to decide cases on the merits, the Court finds that defendant has established excusable default.

The Court also finds that defendant has established a meritorious defense. While the Court is unpersuaded that venue in Bronx County improper, or that Uniform Rule §202.27-a (consumer credit matters) is applicable here as that provision expressly excludes debt incurred in connection with auto loans and retail installment contracts, the Court finds that the defendant has raised an issue of fact as to whether TD Auto complied with General Obligations Law §7-401and is entitled to a deficiency judgment. Section 7-401 provides that "[w]ithin seventy-two hours after the repossession or surrender of such motor vehicle the holder shall personally deliver or mail to the borrower at his last known address a written notice setting forth the right granted to redeem the vehicle, the dollar amount necessary to redeem, and the name, address and telephone number of the holder where information may be obtained regarding redemption of the vehicle." Here, the Repossession Invoice indicates that the vehicle was recovered on November 8, 2014 at 10:00 a.m. However, the Notice After Repossession Or Voluntary Surrender is dated November 13, 2014, more than seventy-two hours after the vehicle was repossessed.

In addition, based upon the defendant's affidavit, issues of fact exist as to whether he was induced to enter into the Contract based upon misrepresentation made by Bronx Suzuki regarding the payment amounts required under the Contract.

The Court also notes that given the defendant's claim that he did not receive notice of entry of judgment and TD Auto's failure to submit an affidavit of service of the notice, the Court does not find defendant's motion to vacate to be untimely. CPLR 5015(a)(1).

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For the foregoing reasons, defendant's motion to vacate the default judgment against him, entered on December 11, 2015, is **granted**, and it is hereby

ORDERED that the default judgment against Charles Fenner in the amount of $16,496.14 entered on December 11, 2015 is hereby vacated, and it is further

ORDERED that the Marshall is hereby directed to cease all collection activities related to the default judgment entered on December 11, 2015.

Dated: Bronx, New York
August 3 , 2016

Hon. Julia I. Rodriguez, J.S.C.