

**Monsey New Sq. Trails Corp. v U.S. Rest. & Catering
Servs. Co. Inc.**

2016 NY Slip Op 32962(U)

October 4, 2016

Supreme Court, Rockland County

Docket Number: 031092/2016

Judge: Thomas E. Walsh II

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
MONSEY NEW SQUARE TRAILS CORP.,

Plaintiff,

-against-

U.S. RESTAURANT & CATERING SERVICES CO. INC., UDAYA
BHANU PRAKASH a/k/a UDAYA UDAYA-BHANA,
and ROKA KARNA,

Defendant(s).

-----X
Thomas E. Walsh, II, A.J.S.C.

DECISION AND ORDER

Index No.: 031092/2016

(Motion #1)

The following papers, numbered 1 to 5, were considered in connection with Defendant's Order to Show Cause filed May 24, 2016 (signed by this Court on May 25, 2016), seeking an Order vacating the Judgment by Default entered on May 4, 2016 by the Rockland County Clerk, pursuant to Civil Practice Law and Rules § 5015(a), and staying enforcement of the Judgment pending a decision on the Order to Show Cause, and for such other and further relief as this Court may seem just and proper:

PAPERS

NUMBERED

| | |
|--|---|
| ORDER TO SHOW CAUSE/AFFIRMATION OF ALAN BRILL, ESQ./AFFIDAVIT OF UDAYA PRAKASH IN SUPPORT/EXHIBITS (A-E) | 1 |
| AFFIRMATION OF DAVID FRIED, ESQ. IN OPPOSITION/AFFIDAVITS/EXHIBITS (A-E) | 2 |
| AFFIRMATION OF DAVID BERKLEY, ESQ. IN SUPPORT OF DEFENDANT'S ORDER TO SHOW CAUSE/EXHIBIT A | 3 |
| AFFIRMATION OF DAVID FRIED, ESQ. IN OPPOSITION TO ATTORNEY BERKLEY'S AFFIRMATION IN SUPPORT/EXHIBITS (A-H) | 4 |
| REPLY AFFIRMATION OF ALAN BRILL, ESQ./EXHIBIT F | 5 |

Upon the foregoing papers, the Court now rules as follows:

This is an action for property damage as a result of a motor vehicle accident which occurred on November 30, 2015 at 2:43 a.m. on North Main Street and the intersection

of Williams Avenue in the Town of Ramapo. In the accident a bus owned by Plaintiff and driven by Jean S. Volcy, was struck with a 2003 Suzuki driven by Defendant ROKA KARNA. Defendant UDAYA UDAYA-BHANAN a/k/a UDAYA BHANU PRAKASH (hereinafter PRAKASH) is the registered owner of the vehicle.

Defendants seek to vacate a Judgment by Default entered by the Clerk of the Court on May 4, 2016 against Defendants in the amount of \$240,716.59. Defendant PRAKASH seeks to vacate the Judgment based on the Rockland County Clerk improperly accepting and filing the judgment in action where the case does not involve a sum certain. Defendant PRAKASH states that he was served with a Summons and Complaint in the instant action on April 4, 2016. According to Defendant PRAKASH's Affidavit immediately upon service he contacted and forwarded the Summons and Complaint to his real estate attorney and his insurance carriers. [Def. Affd. P. 1. Para.2]. Defendant PRAKASH believed as a result of forwarding the documentation to his insurance carrier, Liberty Mutual Insurance Company that they would handle the defense in the instant action. No Answer was ever filed by counsel for Liberty Mutual Insurance Company on behalf of Defendant PRAKASH. Subsequently, on May 4, 2016, Plaintiff submitted a Judgment to the Rockland County Clerk for a default against Defendant PRAKASH. The application for judgment was made without an inquest before the undersigned.

Counsel for Defendant PRAKASH argues that not only was the judgment improperly granted, as the amount due in this matter is not a sum certain, but Defendant PRAKASH has a meritorious defense and an excusable delay. As to excusable delay, Defendant PRAKASH argues that he was tending to a family members illness in India at the time he was served, and he relied on communications with his insurance carrier that they would be defending him in the instant action. Defendant PRAKASH asserts that he was out of the country at the time of the accident, the vehicle involved in the accident and registered to him is a delivery vehicle for his restaurant Bombay Grill and that the driver, an employee of his, did

not have permission to be driving the vehicle outside the scope of his employment.

In support of his argument for excusable delay Defendant PRAKASH indicates that his mother became very ill in April 2016 and as a result he went to India. Defendant PRAKASH's mother subsequently died on May 6, 2016. According to Defendant PRAKASH, he was preoccupied with his mother's death during April 2016 and May 2016 and did not contact his insurance company, believing they were addressing the Summons and Complaint he forwarded them around April 4, 2016. [Pl. Aff. P. 2. Para.10]. Further, Defendant PRAKASH returned to the United States from India on May 12, 2016 and immediately retained counsel (Alan Brill, Esq.) On May 16, 2016. [Pl. Affd. P. 2. Para 11].

Plaintiff's attorneys concedes he was contacted on April 5, 2016 (a day after Defendant PRAKASH was served) by a Senior Claims Specialist for Liberty Mutual who indicated that their counsel would be representing Defendant PRAKASH in the instant action. Additionally, Plaintiff's counsel concedes he was contacted by Ricki Berger, Esq., who identified herself as Defendant PRAKASH's personal attorney, and engaged in discussion with her regarding the instant action. According to Plaintiff's counsel, both of these conversations occurred immediately after Defendant PRAKASH was served the Summons and Complaint, but prior to the default being granted. The Court notes that no Notice of Appearances were ever filed by either Ms. Berger or counsel for Liberty Mutual on behalf of Defendant PRAKASH. Counsel for Liberty Mutual joins in Defendant PRAKASH's application to vacate the instant judgment and adopted the facts and legal arguments of Mr. Brill. [Berkley Aff. Para 3]. Mr. Berkley's Affirmation contains legal argument supporting the Order to Show Cause filed by Mr. Brill, but fails to explain any specific law office failure that occurred that resulted in their failure to appear or answer in the instant action on behalf of Defendant PRAKASH.

Plaintiff opposes the instant motion, arguing that the Judgment obtained in May 2016 from the Rockland County Clerk was for "a sum by which computation be made certain," that Defendant PRAKASH's mother's death is not the reason he did not answer and that based

on the presumption of permissive use prevents Defendant's meritorious defense. Plaintiff's counsel asserts that the clerk has the authority to enter a default in a circumstance where there the claim is a sum certain or the amount can be arrived at by "mere arithmetical computation." [Fried Aff. para 6]. Counsel for Plaintiff further concedes that the situation of Defendant PRAKASH with the recent death of his mother is unfortunate, but that cannot be used as an excuse for the law office failure of Defendant PRAKASH's personal attorney or counsel for the insurance carrier. As to the meritorious defense raised by Defendant PRAKASH. Plaintiff's counsel asserts that Defendant PRAKASH has failed to provide substantial evidence to rebut the presumption of permissive use.

The court clerk lacks authority to enter a judgment in a circumstance in which the Plaintiff is not seeking a "sum certain" pursuant to Civil Practice Law and Rules § 3215(a). An application for default judgment may be sent to the court clerk when "the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain." [Civil Practice Law and Rules § 3215]. The courts have defined "sum certain" when there is no dispute about the amount due, as is seen in circumstances of money judgments and negotiable instruments. [Reynolds Sec. v. Underwrites Bank & Trust Co., 44 NY2d 568, 572 (1978); Gibbs v. Hoot Owl Sportman's Club, 257 AD2d 942, 943 (3d Dept 1999)]. If the amount is not a sum certain then application to the court is required. The Court of Appeals in Reynolds defined sum certain "a situation in which, once liability has been established, there can be no dispute as to the amount due...." rendering the clerk's role as a ministerial one. [Reynolds, 44 NYS2d at 572]. In a case in which the damages require extrinsic proof or the amount is not easily obtained based on the circumstances of the matter, then entry of judgment by the clerk is not authorized. [Verde Elec. Corp v. Federal Ins. Co, 50 AD3d 672 (2d Dept 2008); Congregation Chaim Barucha v. Friedman, 62 AD3d 933 (2d Dept 2009)].

In the instant action the fact that the Plaintiff can add up their costs and come up with a total does not satisfy the requirement of a "sum certain" as required by Civil Practice

Law and Rule § 3215(a). A review of the complaint filed by Plaintiffs in the instant action demonstrates that they approximated the amounts owed based on the accident, based on their use of the language "approximate." In a property damage action there are almost always issues as to extent of the damages to the vehicles and the other costs associated with motor vehicle accidents. Further, Plaintiff is seeking damages for the "value" of the bus involved in the accident and the income lost by Plaintiff as a result of the bus being out of commission. Neither of these amounts are objective. Different appraisers viewing a vehicle will always arrive at a different "value" of a vehicle. Additionally, the income lost due to the accident is a completely subjective amount that requires extensive extrinsic proof to demonstrate. The Court finds that the Judgment sought in this matter was not for a sum certain and therefore not properly submitted to the Rockland County Clerk pursuant to Civil Practice Law and Rules § 3215(a) and must be vacated.

The Court notes that since the Rockland County Clerk lacked authority to enter the judgment at issue, the Court need not address the reasonable excuse for default or the meritorious defense to the action raised by Defendant PRAKASH. Nonetheless, that it is clear to the Court that the reason for the default was not the actions of the Defendant, but instead the failures of counsel for Liberty Mutual Insurance. There seems to be no dispute from Mr. Berkley, counsel for Liberty Mutual Insurance, that the Defendant PRAKASH timely informed them of the Summons and Complaint. There is also no dispute to Plaintiff's contention that he was contacted by a claims agent from Liberty Mutual Insurance and that they informed Plaintiff that they would be defending Defendant PRAKASH in the instant action. Unfortunately, Mr. Berkley failed to make any argument pursuant to Civil Practice Law and Rules § 2005 to excuse the default in the instant action for law office failure. Additionally, Defendant PRAKASH both in his Affidavit and his counsel's Affirmation allude to the failures of counsel for Liberty Mutual Insurance, but shy away from placing the blame directly upon them. Mr. Berkley is correct in his Affirmation that there is a strong preference in the New York Courts that cases should be

decided on the merits rather than a default and the law also favors resolution of cases on the merits. [*Glass v. Janbach Props.*, 73 AD2d 106, 110 (2d Dept 1980)]. Therefore, even if the Court had found the Judgment was for a sum certain, in this circumstance the Court would have vacated the Judgment in the interest of justice.

Accordingly, it is hereby

ORDERED that Defendant's Order to Show Cause is granted in its entirety; and it is further

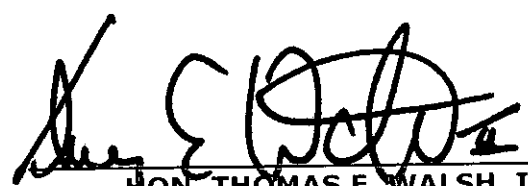
ORDERED that the Judgment by Default entered by the Clerk of the Court on May 4, 2016 is vacated; and it is further

ORDERED that Defendants shall file an Answer pursuant to Civil Practice Law and Rules § 320(a) within twenty days of the date of this Decision and Order; and it is further

ORDERED that counsel for the parties shall appear at a conference before the undersigned on **THURSDAY NOVEMBER 17, 2016 at 9:30 a.m.**

The foregoing constitutes the Decision and Order of this Court on Motion #1.

Dated: New City, New York
October 4, 2016


HON. THOMAS E. WALSH, II
Acting Justice of the Supreme Court

TO:

DAVID FRIED, ESQ.
THE LAW OFFICES OF DAVID FRIED, PC
Attorney for Plaintiff
(via e-file)

ALAN B. BRILL, ESQ.
ALAN B. BRILL, P.C.
Attorney for Defendant UDAYA BHANU-PRAKASH a/k/a UDAYA UDAYA-BHANA
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DAVID M. BERKLEY, Esq.
BURKE, CONWAY, LOCCISANO & DILLON
Attorney for Defendant UDAYA BHANU-PRAKASH a/k/a UDAYA UDAYA-BHANA
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