

Colonial Funding Network, Inc. v Floor Play, LLC

2018 NY Slip Op 32059(U)

August 21, 2018

Supreme Court, New York County

Docket Number: 653431/2016

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN

PART

Justice

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INDEX NO. 653431/2016

COLONIAL FUNDING NETWORK, INC.,

MOTION DATE 06/27/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

FLOOR PLAY, LLC, JHON SUAREZ

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents:

Plaintiff seeks entry of default judgments against the Defendants. Its motion comes well beyond the one-year period set forth in CPLR §3215(c) for seeking such relief after the purported default. Plaintiff has not shown sufficient cause for failing to make its motion in a timely manner. Accordingly, the motion is denied and the complaint is dismissed as abandoned.

Factual Background

Plaintiff, Colonial Funding Network, Inc. ("Colonial Funding") filed its Summons and Complaint in this action on June 29, 2016. (Complaint at 1 [NYSCEF 1]). The Complaint alleges that on May 8, 2015 Plaintiff entered into an Agreement with Defendant Floor Play, LLC d/b/a Floor Play ("Floor Play") for the purchase of \$48,100.00 of future receivables for which Plaintiff's paid \$37,000.00. (Id at ¶¶ 6-7). Plaintiff alleges that Floor Play deposited \$14,858.00 of receivables into Plaintiff's account, and thereafter stopped making any additional deposits, leaving a balance of \$33,242.00 worth of receivables due and owing under the Agreement. (Id at

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¶ 14). Additionally, the Agreement provides for \$7,500 in “default” and “blocked account” fees to be added to the Defendants’ balance in the event Defendants altered or stopped depositing receivables. (*Id* at ¶ 16). According to the Complaint, Defendant Jhon Suarez, the owner of Floor Play, executed a guaranty of Floor Play’s contractual obligation, which he has failed to honor.

Procedural History

Plaintiff represents that it personally served both Defendants on August 12, 2016 with the Summons and Complaint pursuant to CPLR §§308 and 311. On October 14, 2016 Plaintiff did an additional mailing of the Summons and Complaint to both Defendants in compliance with CPLR §3215 (g)(3). To date, Defendants have not answered or otherwise appeared.

(Athanasopoulos Affirm. in Support [NYSCEF 20], ¶4.) On June 27, 2018 Plaintiff filed the instant motion for default.

Plaintiff acknowledges that the statutory deadline for obtaining a default judgment is one year from the date of the default, and that it failed to make its motion in a timely manner. *See* CPLR §3215(c). In fact, as described below, Plaintiff missed the deadline by approximately 10 months with respect to Defendant Floor Play and 8 months with respect to Defendant Suarez. Plaintiff contends there is “sufficient cause” for its failure to meet the one-year deadline, and that the complaint therefore should not be dismissed under CPLR §3215(c).

Plaintiff’s purported explanation for its failure to file the instant motion within one year of the alleged default is that there were personnel changes in its internal legal department, and a change of external counsel, between July 2017 and February 2018. Plaintiff’s general counsel (who was hired at the end of June 2017) asserts that it was not until the completion of an internal

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audit of the legal department at an unspecified date that Plaintiff concluded that a motion for default judgment had not been timely filed. Carlson Affidavit (NYSCEF # 21) ¶1-2.¹

Legal Standard

Default judgments against both individuals and corporations are governed by CPLR §3215. Under CPLR §3215(a), a plaintiff may seek a default judgment “[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed. . . .”

CPLR §3215(c) sets forth the deadline for taking proceedings for the entry of a default motion. CPLR §3215(c) states, in relevant part:

If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.

Legal Analysis

Plaintiff’s Motion for Default Judgments seeks the entry of a default against both Defendants Floor Play and Jhon Suarez pursuant to CPLR §3215.

A. Default sought against Floor Play

Personal Service was completed on Defendant Floor Play on August 12, 2016. Under CPLR §320(a), Defendant had 20 days from the date of service to answer the Complaint or otherwise appear. The time for Floor Play to appear lapsed on or about September 2, 2016.

¹ The Court notes that Plaintiff filed papers (or attempted to) on September 28, 2017 requesting the Clerk to enter a default judgment. (NYSCEF 7-16.) According to the NYSCEF docket listing, the papers were “Returned for Correction” and never refiled. Plaintiff does not reference those papers or explain their relevance, if any, to Plaintiff’s entitlement to a default judgment, and thus they are not considered for purposes of this motion. The instant motion addresses only the question of whether there was sufficient cause for Plaintiff’s failure to file its motion for default prior to June 27, 2018 (which, as explained herein, there was not).

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Under CPLR §3215(c), the time for Plaintiff to seek a default judgment against Floor Play lapsed on or about September 2, 2017. The instant motion was not filed until June 28, 2018, nearly 10 months past the statutory deadline.

Failure to comply with CPLR §3215(c) requires dismissal of the Complaint unless sufficient cause is shown why the Complaint should not be dismissed. *Id.* (absent sufficient cause, the court “*shall* dismiss the complaint as abandoned”) (emphasis added). “It is plaintiff’s burden to show a lack of intent to abandon the action *and* to demonstrate both a reasonable excuse for the period of non-prosecution and merit to the action.” *Sports Legends, Inc. v Carberry*, 38 A.D.3d 470, 470 (1st Dept 2007) (emphasis added; citations omitted); *see also Giglio v NTIMP, Inc*, 86 A.D.3d 301, 301 (2nd Dept 2011) (a showing of sufficient cause requires “both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious.”). The determination of whether an excuse is sufficient in any given instance is committed to the sound discretion of the motion court. *Seide v. Calderon*, 126 A.D.3d 417, 417 (1st Dept 2015).

The Court does not find the excuse offered by Plaintiff – basically, a failure of communication within its internal legal department and with external counsel - to be persuasive. Under the terms of CPLR §3215(c), excusing a party from compliance with the one-year deadline for seeking a default judgment is the exception rather than the rule. A failure of a party or its counsel to keep track of the case, without extenuating circumstances more compelling than those present here, does not constitute sufficient cause. *See, e.g., Herzbrun v. Levine*, 23 A.D.2d 237, 238 (1st Dept 1965) (the fact that plaintiffs moved out of the country and “lost contact” with their attorney did not constitute sufficient cause under CPLR §3215(c)); *cf. e.g., Smith v. Arce*,

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78 A.D.3d 612 (1st Dept 2000) (sufficient cause was found where delay was explained by law office failure in the aftermath of the sudden death of lawyer's child).

Accordingly, dismissal of the complaint is mandated under CPLR §3215(c)

B. Default sought against Jhon Suarez

Similarly, Defendant Suarez was personally served on August 12, 2016. As he is an individually named Defendant, under CPLR §3215(g), prior to seeking a default, Plaintiff mailed a copy of the pleadings to Mr. Suarez' last known address. This second method of service was completed on October 14, 2016. Therefore, the time for Defendant Suarez to respond to the Complaint lapsed on or about November 4, 2016. Under CPLR §3215(c), Plaintiff had until November 4, 2017 to obtain a default against Defendant Suarez for his failure to answer the Complaint or otherwise appear. The instant motion for a default judgment was filed 8 months past the statutory deadline.

The excuse offered by Plaintiff for the failure to take proceedings for the entry of a Default Judgment against Defendant Suarez is the same excuse offered as to Defendant Floor Play and is rejected for the same reasons.

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Therefore, it is:

ORDERED Plaintiff's Motion for Default Judgments is denied; it is further

ORDERED Plaintiff's Complaint is dismissed as abandoned, without prejudice and without costs; and it is further

ORDERED Plaintiff is directed to serve Defendants with a copy of this Order together with Notice of Entry.

8/21/2018

DATE


JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE