

**Rosenthal & Rosenthal, Inc. v Red N Blue Clothing  
Inc.**

2021 NY Slip Op 31561(U)

May 6, 2021

Supreme Court, New York County

Docket Number: 651305/2018

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

ROSENTHAL & ROSENTHAL, INC.,
Plaintiff,

- v -

RED N BLUE CLOTHING INC., LOUIS JACOBS, MARILYN
MAHLER, and JAMES JOSEPH,

Defendants.

-----X

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15,
16, 17, 18, 19, 20

were read on this motion to/for JUDGMENT - DEFAULT.

DECISION + ORDER ON MOTION

Upon the foregoing documents, the motion of plaintiff Rosenthal & Rosenthal, Inc.
("Plaintiff") for entry of a default judgment against defendants Red N Blue Clothing Inc. ("Red
N Blue") and James Joseph ("Joseph") is denied, and the action is dismissed.

Background

Plaintiff commenced this action on March 16, 2018 to recover sums owed under a
commercial factoring agreement (NYSCEF Doc 1). On or around January 2019, the parties
entered into a settlement agreement, which resolved the action in its entirety (Spagnuolo aff ¶
16). On May 10, 2018, a stipulation was filed with the court which extended defendants Louis
Jacobs' ("Jacobs") and Marily Mahler's ("Mahler") time to appear, answer or otherwise move
with respect to the summons and complaint (NYSCEF Doc 7). A second stipulation was filed on
May 23, 2018 that extended Jacobs' and Mahler's time to respond to June 28, 2018 (NYSCEF
Doc 8). On June 26, 2018, Plaintiff filed a notice of voluntary dismissal that dismissed the

claims against Jacobs and Mahler with prejudice (NYSCEF Doc 9). On February 22, 2019, Plaintiff filed a notice of voluntary dismissal that dismissed the claims against defendants Red N Blue and Joseph without prejudice (NYSCEF Doc 10). None of the defendants ever filed an answer in the action.

On March 4, 2021, Plaintiff filed the instant motion for entry of a default judgment. In an affidavit of Steven Spagnuolo, Vice President and Account Executive of Plaintiff, submitted in support of the motion, Spagnuolo attests that Plaintiff entered into a Settlement Agreement with all defendants in February 2019 (Spagnuolo aff, exhibit D, NYSCEF Doc 16). Pursuant to the terms of the Settlement Agreement, Red N Blue and Josephs agreed to pay Plaintiff a sum of \$110,000 in certain installments, which they purportedly failed to do. On the basis of this failure, Plaintiff moves pursuant to CPLR 3215 (i) for entry of a default judgment against Red N Blue and Joseph for their alleged default under the terms of the Settlement Agreement.

### Discussion

Where parties enter into a stipulation of settlement during the pendency of proceedings, CPLR 3215 (i) provides a means by which the plaintiff may seek entry of a judgment without further motion practice upon the defendant's failure to comply with the terms of the stipulation of settlement. CPLR 3215 (i) provides, in relevant part, the following:

**(i) Default judgment for failure to comply with stipulation of settlement.**

1. Where, after commencement of an action, a stipulation of settlement is made, providing, in the event of failure to comply with the stipulation, for entry without further notice of a judgment in a specified amount with interest, if any, from a date certain, the clerk shall enter judgment on the stipulation and an affidavit as to the failure to comply with the terms thereof, together with a complaint or a concise statement of the facts on which the claim was based.

Plaintiff seeks relief pursuant to CPLR 3215 (i) based on the following provision of the Settlement Agreement:

1. (c) Notwithstanding anything in this section to the contrary, in the event that the Deferred Settlement Sum is not paid in full on or before October 1, 2020, then and in that event, Rosenthal may enter (i) a judgment against Settling Defendants pursuant to Section 3218 of the New York Civil Practice Law and Rules for the full amount of the Deferred Settlement Sum, together with interest thereon compounded at 9% per annum from October 1, 2020, less any payments already made.

(Spagnuolo aff, exhibit D, NYSCEF Doc 16).

Plaintiff's reliance on CPLR 3215 (i) for relief in this action is misplaced. Pursuant to the plain language of the statute, CPLR 3215 (i) is only applicable where the stipulation of settlement provides for entry of judgment "without further notice." The Settlement Agreement in question does not contain such a provision (*Marine Bulkheading, Inc. v Mannino*, 150 AD3d 1096, 1097 [2d Dept 2017] ["the Clerk was not authorized to enter a default judgment pursuant to CPLR 3215 (i), since the parties' stipulation of settlement did not provide for entry of a judgment 'without further notice' to the defendant"]). Additionally, the Settlement Agreement specifically provides that Plaintiff may enter judgment pursuant to CPLR 3218, which provides for entry of judgment by confession. Where the parties have specifically provided for particular relief, it is not within the court's purview to alter the terms of the agreement to permit relief by a different means.

Moreover, relief pursuant to CPLR 3215 (i) is not available after an action has been discontinued, as in the present case. "When an action is discontinued, it is as if it had never been; everything done in the action is annulled and all prior orders in the case are nullified" (*Newman v Newman*, 245 AD2d 353, 354 [2d Dept 1997]; citing *Teitelbaum Holdings, Ltd. v Gold*, 48 NY2d 51, 56 [1979]). "[T]he court does not retain the power to exercise supervisory control over previously terminated actions and proceedings" (*DeLap v Serseloudi*, 184 AD3d 992, 991 [3d Dept 2020], *appeal dismissed* 36 NY3d 1080 [2021]). Hence, once an action has

been voluntarily dismissed, a new proceeding must be commenced to obtain relief pursuant to the terms of the Settlement Agreement (*Teitelbaum*, 48 NY2d at 51). Therefore, in light of the action having been voluntarily dismissed by Plaintiff, the motion for entry of a default judgment is denied and the action is dismissed.

Accordingly, it is

ORDERED that the motion for entry of a default judgment is denied; and it is further

ORDERED that the action is dismissed.

This constitutes the order and decision of the court.

ENTER:

*Louis L. Nock*

<u>5/6/2021</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>			<input type="checkbox"/>	FIDUCIARY APPOINTMENT