

Kapitus Servicing, Inc. v FI-Jacksonville, LLC

2021 NY Slip Op 32793(U)

December 21, 2021

Supreme Court, New York County

Docket Number: Index No. 653244/2019

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** **38M**

Justice

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KAPITUS SERVICING, INC., f/k/a COLONIAL FUNDING
NETWORK, INC. as servicing provider for PLATINUM
RAPID FUNDING GROUP, LTD.,

Plaintiff,

INDEX NO. 653244/2019

MOTION DATE 10/29/2021

MOTION SEQ. NO. 001

- v -

FI-JACKSONVILLE, LLC d/b/a FIBER INTERNATIONAL,
FIBER INTERNATIONAL, LLC d/b/a FIBER
INTERNATIONAL, and DAVID O'NEILL (a/k/a DAVID S.
O'NEILL),

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for STRIKE PLEADINGS.

Upon the foregoing documents, the motion of plaintiff Kapitus Servicing, Inc., f/k/a Colonial Funding Network, Inc. as servicing provider for Platinum Rapid Funding Group, LTD. ("Plaintiff") to strike the answer of defendants FI-Jacksonville LLC d/b/a Fiber International and Fiber International LLC d/b/a Fiber International and David S. O'Neill ("Defendants") is granted without opposition, in accord with the following memorandum decision.

Background

In this action to recover sums owed pursuant to an agreement for the purchase of future receivables, Plaintiff moves pursuant to CPLR 3126 to strike Defendants' answer for failure to comply with discovery orders and failure to appear for a discovery conference. Plaintiff commenced this action by filing a summons and complaint on June 3, 2019 (NYSCEF Doc No. 1). Defendants appeared in the action by filing an answer on July 17, 2019 (NYSCEF Doc No.

7). A preliminary conference was held on September 12, 2019, and Defendants failed to appear (NYSCEF Doc No. 13, 2019). An order issued following the September 12, 2019 conference directed that Defendants' failure to appear for future conferences "may result in a striking of the answer and/or entering a default judgment pursuant to NYCRR 202.27" (*id.*). Following adjournments due to the ongoing COVID-19 pandemic, a further conference was held on May 5, 2021 (NYSCEF Doc No. 15). Defendants also failed to appear at the May 5, 2021 conference, and the court issued an order that directed Defendants to respond to all outstanding discovery no later than June 18, 2021 and further directed that "[a] status conference will be held on July 7, 2021 at 12:00 p.m. by Microsoft Teams appearance arranged by the court. Failure by defendants to appear will result in entry of a default pursuant to 22 NYCRR 202.27" (*id.*). Both parties appeared for at a further status conference held on August 31, 2021, and an additional status conference was scheduled for November 3, 2021. Plaintiff filed this motion on October 25, 2021, seeking an order striking Defendants' answer for failure to appear at court conferences and to respond to discovery demands served by Plaintiff. Defendants then failed to appear at the November 3, 2021 conference.

Discussion

CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126; *see, Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept] [pleading properly stricken where party engaged in discovery conduct that was "dilatory and obstructive, and thus contumacious"], *lv denied* 88 NY2d 802 [1996]). A party's failure to satisfy his or her discovery obligations, particularly after a court order has been issued, "may constitute the dilatory and obstructive, and thus contumacious, conduct" (*id.*; *see also, Reidel v*

Ryder TRS, Inc., 13 AD3d 170 [1st Dept 2004]). A party may tender a reasonable excuse to overcome a showing of willfulness (*Menkes v Delikat*, 148 AD3d 442 [1st Dept 2017]); but failure to offer a reasonable excuse for noncompliance with discovery requests gives rise to an inference of willful and contumacious conduct that warrants the striking of a pleading (*Turk Eximbank-Export Credit Bank v Bicakcioglu*, 81 AD3d 494 [1st Dept 2011]). “The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court” (*Lazar, Sanders, Thaler & Assocs., LLP v Lazar*, 131 AD3d 1133, 1133 [2d Dept 2015]; *see, Maxim, Inc. v Feifer*, 161 AD3d 551, 554 [1st Dept 2018]).

On this motion, Defendants have displayed willful and contumacious conduct by failing to appear for several court conferences as outlined here and by failing to timely and fully respond to Plaintiff’s discovery demands (NYSCEF Doc No. 27, Harrison affirmation in support ¶¶ 8-15). Striking the Defendants’ answer pursuant to CPLR 3126 is therefore appropriate. Striking the answer is also warranted under 22 NYCRR 202.27, which provides that “[a]t any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and . . . [i]f the plaintiff appears but the defendant does not, the judge may grant judgment by default or order an inquest” (22 NYCRR 202.27 [a]). The motion is therefore granted.

Accordingly, it is

ORDERED that the motion to strike is granted, and the answer of defendants FI-Jacksonville LLC d/b/a Fiber International and Fiber International LLC d/b/a Fiber International and David S. O’Neill filed on July 17, 2019 (NYSCEF Doc No. 7) is hereby stricken pursuant to CPLR 3126 and 22 NYCRR 202.27, and the Clerk of the Clerk is directed to enter a default

judgment in favor of plaintiff Kapitus Servicing, Inc., f/k/a Colonial Funding Network, Inc. as servicing provider for Platinum Rapid Funding Group, LTD. and against defendants FI-Jacksonville LLC d/b/a Fiber International and Fiber International LLC d/b/a Fiber International and David S. O’Neill on the issue of liability; and it is further

ORDERED that Plaintiff is directed to submit a proposed judgment for the court’s consideration by electronic filing and email to SFC-Part38-Clerk@nycourts.gov. If the judgment seeks an award of damages that is different from the sum certain set forth in the verified complaint, Plaintiff is directed to submit an affidavit of a person with knowledge of the damages sought, supported by any necessary documentation, with the proposed order.



<u>12/21/2021</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>
		<input type="checkbox"/> DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>
			<input type="checkbox"/>
			NON-FINAL DISPOSITION
			GRANTED IN PART
			<input type="checkbox"/> OTHER
			SUBMIT ORDER
			FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE