

Trisk v Simon Wallet, Inc.
2022 NY Slip Op 31423(U)
April 29, 2022
Supreme Court, New York County
Docket Number: Index No. 658856/2021
Judge: Lisa Headley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA HEADLEY PART 28M
Justice

ADAM TRISK, Plaintiff, - v - SIMON WALLET, INC., SIMON TIEMTORE, JOSH BOWEN Defendant.
INDEX NO. 658856/2021
MOTION DATE 03/28/2022
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22 were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents, it is hereby ordered that plaintiff's motion seeking a default judgment against defendants and for an inquest of damages pursuant to CPLR § 3215 is denied. Defendants' cross-motion for an extension of time to answer and to compel plaintiff to accept their answer, is granted. Plaintiff filed a reply.

In support of the motion, plaintiff's attorney submits that on December 7, 2021, an email was sent to Christopher Wilkinson of the Perkins Coie law firm, who represented the defendants in a prior proceeding, and inquired whether he would be representing defendants and accept service on their behalf. Plaintiff's attorney further submits that after weeks of communications, Mr. Wilkinson never confirmed that his firm would be representing any of defendants in the action, and was forced to serve all defendants directly and such service on all defendants was completed. Still further, plaintiff's attorney submits that defendants were required to respond to the complaint no later than February 2, 2022 and the defendants have not answered the complaint and such time to do so has expired and they are now in default. Plaintiff submits an affidavit which does not speak to the service of the complaint, but to alleged facts of the case only.

In opposition to the plaintiff's motion for a default judgment, defendants cross-move to extend the time to respond and to compel plaintiff to accept the filed answer. Defendants argue that they have a reasonable excuse and a meritorious defense, and as such, plaintiff's request for a default judgment should be denied. Here, defendant, Simon Tiemtore, indicates in his affidavit, that he thought his corporate counsel was looking into the matter. Defendant Tiemtore also indicates that he did not attempt to evade service of the complaint as he was traveling out of the state from December 21, 2021 through January 4, 2022, the dates on which plaintiff allegedly attempted to serve him at my home. Defendant, Josh Bowen, in his affidavit, states that he was told by counsel that the matter was being "taken care of," and he thought this meant that the firm would take appropriate action to respond or resolve plaintiff's complaint. Defendant Bowen further states that he and defendant Tiemtore engaged Kula Law, P.C., when it became clear that Perkins Coie LLP was not the right firm to handle the within matter. Defendant Bowen also states that plaintiff's counsel rejected the request for withdrawal of the default motion and an extension of time to respond to the Complaint by their counsel. Defendants allege they have a meritorious defense to plaintiff's complaint which alleges claims in violation of New York Labor Law, in that defendants allege that plaintiff has received all of the wages and compensation to which he is entitled. Therefore, defendants request that plaintiff's motion be denied in its entirety, and that the plaintiff be compelled to accept defendant's Answer pursuant to *CPLR §3012(d)*.

CPLR §3215 (a) provides, in part, that "[w]hen a defendant has failed to appear, plead or proceed to trial ... the plaintiff may seek a default judgment against him." On a motion for a default judgment under *CPLR §3215* based upon a failure to answer the complaint, a plaintiff demonstrates entitlement to a default judgment against a defendant by submitting: (1) proof of service of the summons and complaint; (2) proof of the facts constituting its claim; and (3) proof of the defendant's default in answering or appearing. See, *CPLR §3215(f)*; *Matone v Sycamore Realty Corp.*, 50 A.D.3d 978 (2d Dep't 2008); *Allstate Ins. Co. v Austin*, 48 A.D.3d 720 (2d Dep't 2008); see also, *Liberty County Mut. v Ave. I Med., P.C.*, 129 A.D.3d 783 (2d Dep't 2015). Moreover, the law is settled that in order to avoid the entry of a default judgment the defendant must demonstrate a reasonable excuse for the default and establish the existence of a potentially meritorious defense. See, *Hageman v. Home Depot USA, Inc.*, 25 A.D.3d 760 (2d Dep't 2006); *Gazetten Contr., Inc. v. HCO, Inc.*, 45 A.D.3d 530 (2d Dep't 2007). The determination of what constitutes a reasonable excuse lies in the discretion of the court.

See, *Hodges v. Sidal*, 48 A.D.3d 633 (2d Dep't. 2008). See also, *Rbe Northern Funding Inc. v. Stone Mountain Holdings LLC*, No. 0177132008, 2011 WL 11721065 (N.Y. Sup. Ct. Apr. 18, 2011). Here, defendants have set forth a reasonable excuse in that they believed that their corporate counsel would take appropriate action upon receipt of the plaintiff's complaint. Defendants further contend that when they became aware of plaintiff's motion for a default judgment, defendants' corporate counsel contacted plaintiff's counsel to seek an extension of time to respond. Still further, defendants contend that plaintiff refused to withdraw the default motion unless the defendants agreed to pay \$6,000 to cover plaintiff's costs and fees in connection with serving the complaint and within motion. In addition, current counsel contacted plaintiff's counsel seeking an extension of time to respond and for withdrawal of the default motion and current counsel states their request was similarly rejected and on March 7, 2022, defendants electronically filed an Answer. Further, defendants set forth a potential meritorious defense in that they allege that the plaintiff has been paid all of his entitled wages and compensation.

Therefore, in light of the strong policy in favor of resolving cases on the merits, the motion for a default judgment is denied. See, *Jeffrey L. Rosenberg & Assocs. V. LaJaunie*, 35 A.D.3d 668 (2d Dep't. 2006). Further, the defendant's answer attached to their opposition is deemed served.

Accordingly, it is hereby

ORDERED that the plaintiff's motion for default judgment against defendants Simon Wallet, Inc. doing business as Simba, Simon Tientore, and Josh Bowen is DENIED; and it is further

ORDERED that the defendants' Answer attached to their opposition is deemed served; and it is further

ORDERED that the parties are to complete the attached proposed preliminary conference order and submit same to Part 28 for approval by the court; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, the movant-plaintiff shall serve a copy of this decision/order upon the defendants with notice of entry.

This constitutes the Decision and Order of the Court.

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4/29/2022
DATE

Lisa S Headley
LISA HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: