

Murray v Calhoun

2022 NY Slip Op 32365(U)

July 20, 2022

Supreme Court, New York County

Docket Number: Index No. 154578/2021

Judge: William Perry

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This opinion is uncorrected and not selected for official publication.

enough facts to enable a court to determine that a viable cause of action exists”)). A party in default “admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff’s conclusion as to damage” (*Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]). “To successfully oppose a motion for leave to enter a default judgment, a defendant must demonstrate a reasonable excuse for the default and a meritorious defense” (*Morrison Cohen LLP v Fink*, 81 AD3d 467, 468 [1st Dept 2011]).

According to the complaint, plaintiff loaned defendant \$27,160.56 over a three-month period in 2019 to help defendant when his prior stock brokerage firm, nonparty Laidlaw & Co. (UK) Ltd. (Laidlaw), failed to pay the commissions due to him (NYSCEF Doc No. 11, Lawrence R. Gelber [Gelber] affirmation, Ex B, ¶¶ 6-7). Defendant also agreed to work for nonparty Worden Capital, a stock brokerage firm, at a branch operated by plaintiff (*id.*, ¶ 9). Defendant promised repeatedly to repay plaintiff, and defendant’s lawyer advised plaintiff that defendant would repay the debt once defendant’s arbitration proceeding against Laidlaw was resolved (*id.*, ¶¶ 10-11). The debt has not been repaid, despite Laidlaw having paid defendant \$650,000 to settle a discrimination lawsuit he had commenced against it (*id.*, ¶¶ 12-14).

An affidavit of service sworn to on July 10, 2021 reveals that defendant was served by substituted service pursuant to CPLR 308 (2) on July 6, 2021 at 50 Dey Street, Apt. 656, Jersey City, New Jersey (NYSCEF Doc No. 12, Gelber affirmation, Ex C at 1). The summons and verified complaint were delivered to “Humberto Rincon (Concierge)” (Rincon) (*id.*). A copy of the summons and complaint were also mailed to defendant at that same address on July 7, 2021 (*id.*). Plaintiff filed the affidavit of service on July 19, 2021 (NYSCEF Doc No. 3), making service upon defendant complete 10 days thereafter (*see* CPLR 308 [2]).

Substitute service upon a doorman or concierge is proper under CPLR 308 (2) (*Hill v Dickinson LLP v Il Sole Ltd.*, 149 AD3d 471, 471 [1st Dept 2017]), provided that plaintiff's process server was denied access to the defendant's apartment before serving the building's doorman or concierge (*see Bank of Am., N.A. v Grufferman*, 117 AD3d 508, 508 [1st Dept 2014] [concluding after a traverse hearing that service upon a doorman at the defendant's building was proper]). The affidavit of service in this action indicates that the process server delivered the papers to Rincon after he was refused access to defendant's apartment.

Plaintiff's counsel also affirms that he spoke to counsel representing defendant in his action against Laidlaw and that defendant's counsel "has recently entered his appearance in this matter" (NYSCEF Doc No. 9, Gelber affirmation, ¶ 9), although no notice of appearance has been filed on NYSCEF.

Absent from the moving papers, however, is an affidavit of nonmilitary service, which is required before a default may be taken (*see Matter of Petre v Lucia*, 205 AD3d 438, 438 [1st Dept 2022]). In *Emigrant Mtge Co., Inc. v Daniels*, 2010 NY Slip Op 32720[U], *4 [Sup Ct, NY County 2010] [internal quotation marks and citation omitted]), the court explained that the a nonmilitary affidavit must establish that: "1) the defendant is not in the military service of either the United States or any ally; 2) the investigation was done after the default occurred; 3) the investigation was performed shortly before it was submitted to the court; and 4) the facts are put forth in a manner sufficient for the court's evaluation." The affidavit of service reflects that plaintiff's process server asked the person he spoke to, presumably Rincon, whether defendant was in active military service and received a negative reply (NYSCEF Doc No. 12 at 1). However, a "nonmilitary affidavit, included as part of the affidavit of service, is premature"

(*Bank of N.Y. Mellon v Deane*, 41 Misc 3d 494, 509 [Sup Ct, Kings County 2013] [collecting cases]). Accordingly, plaintiff has failed to meet his burden to obtain a default judgment.

Upon review of the record, the court finds that defendant has proffered a reasonable excuse and demonstrates a meritorious defense in opposition to the motion. (NYSCEF Doc No. 17). In keeping with established public policy that favors resolution of cases on the merits, the court grants defendant leave to file an answer, or otherwise respond thereto, as plaintiff has failed to demonstrate prejudice and defendant's failure to timely appear "was not of such magnitude as to defeat the well-settled policy favoring the disposition of actions on their merits rather than upon procedural mishaps". (See *Framapac Delicatessen, Inc. v Wolf*, 160 AD2d 168, 553 N.Y.S.2d 20, [1st Dept 1990]; *Shure v Village of Westhampton Beach, Inc.*, 121 AD2d 887, 503 N.Y.S.2d 802, [1st Dept 1986]). Accordingly, it is hereby

ORDERED that the motion brought by plaintiff David Murray to enter a default judgment against George Calhoun is denied; and it is further

ORDERED that defendant serve and file an answer to the complaint herein, or otherwise respond thereto, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

7/20/2022

DATE

WILLIAM PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

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