

Ferrari Fin. Servs., Inc. v Paterno

2023 NY Slip Op 30718(U)

March 6, 2023

Supreme Court, Kings County

Docket Number: Index No. 516996/2022

Judge: Francois A. Rivera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of March 2023.

HONORABLE FRANCOIS A. RIVERA

-----X
FERRARI FINANCIAL SERVICES, INC., a
Delaware limited liability company,

Plaintiff,

DECISION & ORDER
Index No. 516996/2022

-against-

VICTOR PATERNO,

Defendant
-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed by plaintiff Ferrari Financial Services, Inc. (hereinafter FFS) on November 4, 2022, under motion sequence no. 3, for an order restoring the matter to the active calendar. This motion is unopposed.

- Notice of Motion
- Affirmation in Support
- Exhibit A to C

PROCEDURAL BACKGROUND

By summons, notice of motion and annexed exhibits (hereinafter the commencement papers) electronically filed with the Kings County Clerk's office (KCCO) on June 13, 2022, under motion sequence no. 1, FFS had moved pursuant to CPLR 3213 for summary judgment in lieu of complaint against defendant Victor Paterno (hereinafter defendant or Paterno).

By order to show cause filed with the KCCO on August 31, 2022, under motion sequence no. 2, FFS moved for an order of seizure pursuant to CPLR 7102 directing Paterno to immediately return possession of a specific vehicle to FFS, and enjoining Paterno from removing the subject vehicle from Kings County, New York.

On October 19, 2022, the return date set for oral argument of motion sequence nos. 1 and 2, neither FFS nor Paterno appeared. Both motions were marked off for non-appearance.

By the instant motion filed under sequence no. 3, FFS seeks an order: (1) vacating its default based on its failure to appear for oral argument, restoring motion sequence nos. 1 and 2, and (3) deeming motion sequence number one and two as fully submitted.

On February 27, 2023, the return date set for oral argument on motion sequence no. 3, the Court granted FFS's unopposed motion to vacate its default, thereby restoring motion sequence nos. 1 and 2 to active status. These restored motions were deemed to be fully submitted.

MOTION PAPERS

Motion Sequence No. 1: CPLR 3213 Motion in Lieu of Complaint

The motion papers, under sequence one includes the following documents. The summons, the notice of motion for summary judgment in lieu of complaint, an affirmation in support, a memorandum of law in support and six annexed exhibits labeled A through F. Exhibit A is a copy of a contract between FFS and Paterno. Exhibit B is described as a payment history between the parties. Exhibit C is denominated as a demand letter. Exhibit D is a copy of the complaint filed in an action between the parties

and adjudicated in the Circuit Court of the 15th Judicial Circuit in Palm Beach County, Florida (hereinafter the Florida Action). Exhibit E is a true and accurate copy of the summons of the Florida Action served on Paterno. Exhibit F is a copy of the Final Judgment in the Florida Action.

According to FFS's memorandum of law in support, the instant motion was brought pursuant to CPLR 3213 for the purpose of domesticating the Florida Default Final Judgment annexed as exhibit F. FFS contends that Paterno entered into a Retail Installment Contract for the sale of a 2020 Ferrari and that he defaulted on the agreement by, among other things, failing to make regular monthly payments when due.

Paterno did not appear or submit opposition to motion sequence number one.

Motion Sequence No. 2: CPLR 7102 Order to Show Cause for an Order of Seizure

The motion papers on FFS's order to show cause, under sequence two, includes the following documents. The order to show cause, an affirmation in support for an order of seizure, another affirmation in support, and ten annexed exhibits labeled A through F. The annexed exhibits include the same six exhibits that were filed under motion sequence one. FFS also filed separately duplicate copies of exhibit C through and including F.

Paterno did not appear or submit opposition to motion sequence no. 2.

LAW AND APPLICATION

CPLR 3213 provides in pertinent part as follows:

“Motion for summary judgment in lieu of complaint. When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date.”

CPLR 3213 is a hybrid procedure incorporating certain elements of an action and certain elements of motion practice (*Goldstein v Saltzman*, 13 Misc 3d 1023 [NY Sup 2006], citing *Flushing Nat. Bank v Brightside Mfg. Inc.*, 59 Misc 2d 108 [Sup Ct., Queens County 1969]).

As with a plenary action, jurisdiction is obtained over an individual defendant by serving the defendant with the summons, notice of motion and supporting papers in a method prescribed in CPLR Article 3. The minimum amount of time the plaintiff must give the defendant to oppose the motion for summary judgment in lieu of complaint is determined by the amount of time the defendant would have to appear in the action if the defendant had been served with a summons and complaint or summons with notice (*Goldstein*, 13 Misc 3d 1023).

CPLR 3213 provides, the minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending

upon the method of service. Thus, in a 3213 motion, the minimum amount of time the plaintiff must give the defendant to appear and oppose the motion is dependent upon the date and method of service, (*see generally* Siegel, NY Prac. § 291 [6th ed.]).

If the defendant is a natural person who is served pursuant to CPLR 308 (2) or (4) the minimum amount of time between service of the summons and motion papers and the return date is forty days. CPLR 320 (a) gives a defendant served in this manner thirty days from completion of service to appear. Service is complete ten days after the affidavit of service is filed with the county clerk.

The commencement papers filed under motion sequence no. 1 set the return date for July 15, 2022. The notice of motion of said papers advised Paterno that pursuant to CPLR 2214 (b) all answering papers were to be served not less than seven days prior to the return date.

Timothy Botti, plaintiff's licensed process server (hereinafter Botti) alleged service of the commencement papers upon Paterno as follows. On June 16, 2022, Botti delivered the papers to Paterno's residence by personally giving them to John Doe, a person of suitable age and discretion who would not give his name. Thereafter, on June 17, 2022, Botti mailed the commencement papers to Paterno at the same residence. Thereafter, on June 23, 2022, the affidavit of service of the commencement papers was filed with the KCCO.

In accordance with CPLR 308 (2) FFS completed service upon Paterno on July 3, 2022, ten days after filing the affidavit of service. In accordance with CPLR 320 (a), Paterno had until August 3, 2022, that is thirty days after July 3, 2022, to answer the

CPLR 3213 motion. FFS, however, made the instant motion returnable on July 15, 2022, 2020 and directed Paterno to serve his answering papers by no later than July 8, 2022.

In effect, FFS directed Paterno to answer the commencement papers before Paterno had been served with them and before the time to answer them had even begun. FFS did not give Paterno the statutorily required time to appear and respond to the motion. A failure to give a defendant the statutorily mandated time to appear and answer a motion for summary judgment in lieu of complaint compels not only a denial of the motion but also a dismissal of the action (*see* CPLR 3213; *see also* McKinney's Cons. Laws of NY, Book 7B, CPLR 3213:9; *see also* *Mashantucket Pequot Gaming Enterprise v. Lin*, 27 Misc 3d 216, 222 [Sup Ct, Kings Cty 2010]). FFS's motion for summary judgment in lieu of complaint is denied, and the action is dismissed. The dismissal, however, is not on the merits and is without prejudice.

By order to show cause filed with the KCCO on August 31, 2022, under motion sequence number two, FFS moved for an order of seizure pursuant to CPLR 7102. The Court directed personal service of the order to show cause upon Paterno by October 6, 2022.

Timothy Botti, plaintiff's licensed process server (hereinafter Botti) alleged the following facts about the service of the order to show cause. On October 10, 2022, at approximately 1:06 p.m., he attempted to serve Paterno at a specific address¹ in Rockaway Park but there was no answer to the door. On October 11, 2022, at

¹ The specific address where service was attempted was described as Paterno's residence. It is noted that the commencement papers were also allegedly served at Paterno's residence. However, the address of Paterno's residence as set forth in the affidavit of service of the commencement papers is different from the address as set forth in the affidavit of service of the order to show cause.

approximately 9:00 a.m., he again attempted to serve Paterno at the same specific address in Rockaway Park and once again there was no answer to the door. On October 12, 2022, at approximately 6:55 p.m., he again attempted service at the same location and once again there was no answer to the door. He then by firmly and conspicuously affixed the order to show cause and accompanying papers to the front door of the same specific address.

On October 17, 2022, Botti then mailed the order to show cause to the same specific address in a securely sealed and postpaid wrapper with the words "PERSONAL AND CONFIDENTIAL" written on the same envelope, and not indicating on the outside that it is from an attorney or concerns an action against the person to be served and depositing the same into an official depository maintained by the Government of the United States, City and State of New York. Thereafter, on October 17, 2022, the affidavit of service of the order to show cause was filed with the KCCO.

The method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with (*Matter of Hennessey v DiCarlo*, 21 AD3d 505, 505, [2d Dept 2005]; see *Matter of Nunziato v Messano*, 87 AD3d 647, 647 [2d Dept 2011]). The Court had directed personal service of the order to show cause upon Paterno by October 6, 2022. Here, FFS served Paterno in accordance with CPLR 308 (4) and did not complete service of the order to show cause upon Paterno until October 27, 2022, ten days after filing the affidavit of service. Accordingly, the Court lacks jurisdiction over the motion.

CONCLUSION

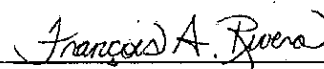
The motion by Ferrari Financial Services, Inc. for an order: (1) vacating its default based on its failure to appear for oral argument, and (2) restoring motion sequence nos. 1 and 2 to active status, and (3) deeming motion sequence number one and two as fully submitted is granted.

The summons with notice of motion for summary judgment in lieu of complaint filed by Ferrari Financial Services, Inc., under motion sequence number one, as asserted against defendant Victor Paterno is denied and the instant hybrid motion action is dismissed.

The order to show cause by Ferrari Financial Services Inc filed under motion sequence no. 2 seeking an order of seizure pursuant to CPLR 7102 directing, inter alia, that Victor Paterno immediately return possession of a specific vehicle to it is denied for lack of jurisdiction over the motion.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.