

Muharram v Diallo

2023 NY Slip Op 34202(U)

November 28, 2023

Supreme Court, Kings County

Docket Number: Index No. 515082/2022

Judge: Francois A. Rivera

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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 28th day of November 2023

HONORABLE FRANCOIS A. RIVERA

-----X
TAMER MUHARRAM,

Plaintiff,

DECISION & ORDER

-against-

Index No. 515082/2022

THIERNO DIALLO,

Defendant.

-----X

Recitation in accordance with CPLR 2219 of the papers considered on the notice of motion filed by defendant Thierno Diallo on September 8, 2023: under motion sequence number one for an order: (1) pursuant to CPLR Section 3215(c) dismissing the verified complaint of Tamer Muharram upon the ground that the plaintiff has failed to take proceedings for entry of a default judgment within one year of the default; and (2) in the alternative granting the defendant an extension of time to answer or otherwise move in response to the verified complaint. Plaintiff has opposed the motion.

- Notice of motion
- Affirmation in support
 - Exhibits A-B
- Affirmation in opposition
 - Exhibits A-C
- Affirmation in reply

BACKGROUND

On May 24, 2022, plaintiff commenced the instant action for damages for personal injuries by filing a summons and verified complaint (hereinafter the commencement papers) with the Kings County Clerk' office (KCCO). On June 13, 2022, plaintiff's process server delivered the commencement papers to a co-tenant of the defendant and the defendant's residence. On

June 17, 2022, plaintiff's process server mailed a copy of the commencement papers addressed to the defendant at the exact location where the papers were personally delivered. The process server's affidavit of service was filed with the KCCO on June 22, 2022. Prior to the filing of the instant motion, the defendant had neither appeared in the action nor filed an answer to the verified complaint.

LAW AND APPLICATION

CPLR 308(1) and (2) provides the following: Personal service upon a natural person shall be made by any of the following methods:

1. by delivering the summons within the state to the person to be served; or,
2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision (a) of section two hundred thirty-two of the domestic relations law; CPLR 308(2) requires that the delivery to a person of suitable age and discretion occur at the actual place of business, dwelling place or usual place of abode of the person to be served. Another requirement is mailing to either the recipients last known residence or place of business with the delivery occurring within twenty days of each other. The plaintiff must also file proof of the service with the clerk of the court designated in the summons within twenty days of the delivery or the mailing. The proof of service must identify the person of suitable age and discretion and state the date, time and place of service.

CPLR 320(a) provides that a party is not required to answer a complaint until he or she is served with the summons (*Howard B. Spivak Architect, P.C. v. Zilberman*, 59 AD3d 343, 344 [1st Dept 2009]). Pursuant to CPLR 320, a defendant appears by serving an answer or notice of

appearance, or by making a motion which has the effect of extending time to answer (*Russo v. Bhatti*, 52 Misc. 3d 1215(A), 41 N.Y.S.3d 721 (N.Y. Sup. Ct. 2016)).

In accordance with CPLR 308 (2) service would have been deemed completed ten days after the filing of the process server's affidavit with the KCCO, namely July 2, 2022. However, July 2, 2022, was a Saturday and Monday July 4, 2022, was a National Holiday. Therefore, the time for the defendant to answer did not began to run until July 5, 2022.

The defendant seeks an order dismissing the verified complaint as abandoned pursuant to CPLR 3215(c).

CPLR 3215(c) provides as follows:

Default not entered within one year. If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

It is not necessary for a plaintiff to obtain a default judgment within one year of the default to avoid dismissal pursuant to CPLR 3215(c) (*see Wells Fargo Bank, N.A. v. Daskal*, 142 AD3d 1071 [2nd Dept 2016]; *see also U.S. Bank N.A. v. Dorestant*, 131 AD3d 467, 469, [2nd Dept 2015]). A plaintiff is not even required to specifically seek a default judgment within a year (*Id.*) As long as proceedings are being taken, and these proceedings manifest an intent not to abandon the case but to seek a judgment, the case should not be subject to dismissal (*Wells Fargo Bank, N.A. v. Daskal*, 142 AD3d 1071 [2nd Dept 2016] citing *Brown v. Rosedale Nurseries*, 259 A.D.2d 256, 257 [1st Dept 1999]).

One year from July 5, 2022, would be July 5, 2023. For a motion to dismiss pursuant to CPLR 3215(C), the defendant would need to show that the plaintiff did not take any proceedings after July 5, 2023. The defendant filed the instant motion on September 8, 2023, approximately

65 days after July 5, 2023. It is noted that the verified complaint in this action is verified by the plaintiff. It therefore may serve as an affidavit in accordance with CPLR 105(u).

Although the general rule is that in order to vacate a default, a party must demonstrate a reasonable excuse for the default and a potentially meritorious defense (see CPLR 5015 [a] [1]), the sufficiency of an excuse is not as significant where the default is only a short period (see *Vallario v 25 W. 24th St. Flatiron, LLC*, 149 AD3d 791, 792-793 [2nd Dept 2017]; *Chakmakian v Maroney*, 78 AD3d 1103, 1104 [2nd Dept 2010]).

Here, the 65-day period between when the plaintiff was supposed to take proceedings against the defendant and when the defendant moved to dismiss the complaint pursuant to CPLR 3215 (C) is brief, and the defendant does not allege that the plaintiff's delay was intentional or part of a pattern of neglect (*P&H Painting, Inc. v Flintlock Constr. Servs., LLC*, 179 A.D.3d 1086 [2nd Dept 2020] citing *Vallario v 25 W. 24th St. Flatiron, LLC*, 149 AD3d at 793). Moreover, considering the lack of prejudice to the defendant resulting from the plaintiff's short delay in taking proceedings against the defendant, the existence of a potentially meritorious action, and the strong public policy favoring resolution of cases on the merits, the Court declines to dismiss the plaintiff's complaint pursuant to CPLR 3215(c). Considering the foregoing, defendant's request, made in the alternative, for an extension of time to interpose an answer to the verified complaint is granted.

CONCLUSION

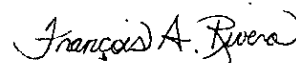
The branch of the motion by defendant Thierno Diallo for an order pursuant to CPLR Section 3215(c) dismissing the verified complaint of Tamer Muharram is denied.

The branch of the motion by defendant Thierno Diallo for an order granting the defendant an extension of time to answer or otherwise move in response to the verified complaint is granted.

The defendant Thierno Diallo shall serve an answer to plaintiff's verified complaint on or before December 18, 2023.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

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