

Gyure v Friars N.A. Inc.

2023 NY Slip Op 34259(U)

December 8, 2023

Supreme Court, New York County

Docket Number: Index No. 151269/2023

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

Justice

-----X
MICHAEL GYURE,
Plaintiff,
- v -
THE FRIARS NATIONAL ASSOCIATION INC., JOHN AND
OR JANE DOES, BEING MEMBERS OF FRIARS
NATIONAL ASSOCIATION INC. EXECUTIVE COMMITTEE
AND BOARD OF DIRECTORS
Defendant.
-----X

INDEX NO. 151269/2023
MOTION DATE 05/17/2023
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for JUDGMENT - DEFAULT.

Upon the foregoing documents, Plaintiff Michael Gyure's ("Plaintiff") motion for an Order, pursuant to CPLR 3215, granting default judgment against Defendant The Friars National Association Inc. ("Friars") is denied. The cross-motion of Defendants Friars and "John and/or Jane Doe 1-5" (together "Defendants") for an Order compelling Plaintiff to accept Defendants' Notice of Appearance and file a complaint, is granted.

I. Background and Procedural History

Plaintiff commenced this action by filing a Summons with Notice of Electronic Filing upon Defendant Friars through the Secretary of State on March 29, 2023 (NYSCEF Doc. 2). Counsel for Defendants asserts that on May 14, 2023, as attorney for Friars in a separate case, he discovered the existence of this action when he searched NYSCEF for documents pertaining to that other pending matter (NYSCEF Doc. 10 at ¶ 3). Subsequently, on May 16, 2023, Defendants' counsel filed a Notice of Appearance on NYSCEF (NYSCEF Doc. 11). That same

day, Defendants' counsel asked Plaintiff's counsel for a copy of the Complaint (NYSCEF Doc. 12).

On May 17, 2023, Plaintiff filed the instant motion for an Order granting default judgment against Friars "for their failure to file an answer or otherwise move to dismiss this action within the time required by the CPLR" (NYSCEF Doc. 5 at ¶ 2). In support of his motion, Plaintiff filed the Affirmation of Plaintiff's counsel, Robert Hantman, Esq. (NYSCEF Doc. 5).

On May 30, 2023 Defendants brought a Cross-Motion requesting an Order compelling Plaintiff to accept Defendants' Notice of Appearance and to direct Plaintiff to file a complaint (NYSCEF Doc. 9). Defendants also filed an Affirmation of Defendants' counsel, Lino J. De Masi, Esq. in opposition to Plaintiff's motion for default judgment and in support of Defendants' cross-motion (NYSCEF Doc. 10). On June 4, 2023 Plaintiff's counsel filed an Affirmation in opposition to Defendants' cross-motion, and in further support of Plaintiff's motion for a default judgment (NYSCEF Doc. 14). On June 6, 2023 Defendants' counsel filed a Reply Affirmation in further support of Defendants' cross-motion and in opposition to Plaintiff motion (NYSCEF Doc. 19).

II. Plaintiff's Motion for Default Judgment

An applicant for default judgment against a defendant must submit: (i) proof of service of the summons and complaint or summons and notice (ii) proof by affidavit made by the moving party of the facts constituting the claim, and (iii) proof of the defaulter's failure to appear (*Mullins v DiLorenzo*, 199 AD2d 218 [1st Dept 1993]). However, it is well established that an attorney's affidavit is "insufficient to support entry of judgment pursuant to CPLR 3215," and "in the absence of either a verified complaint or an affidavit by the party, the entry of judgment by default is erroneous" (*Mullins v DiLorenzo*, 199 AD2d 218, 220 [1st Dept 1993]).

Here, in support of the motion for default judgment Plaintiff has filed only the Affirmation of his attorney, Robert Hantman, Esq. (NYSCEF Doc. 5). To date, Plaintiff has failed to file either a verified complaint or a party affidavit in support of his motion. Accordingly, Plaintiff's motion for default judgment against Friars is denied.¹

III. Defendants' Cross-Motion

Defendants' cross-motion requesting an Order compelling Plaintiff to accept Defendants' Notice of Appearance and to file a complaint is granted.

a. Disqualification of Defendants' Counsel is Premature

Preliminarily, Plaintiff's argument, first made on reply, that Defendants' counsel has no authority to appear in this action because of the May 26, 2023 appointment of a receiver over Defendants' assets (NYSCEF Doc. 15), is unavailing (NYSCEF Doc. 14 at ¶ 3). Plaintiff fails to provide any case law in support of this assertion and fails to provide any justification as to why the appointment of a receiver over Defendants' assets has any bearing on Defendants' counsel's authority to appear in this action.

Plaintiff's argument that Defendants' counsel's law firm should be disqualified from the issues of this case due to a principal of the firm being an expected material witness in this case, is similarly unavailing. While Rule 3.7 of the Rules of Professional Conduct "generally prohibits an attorney from acting as an advocate before a tribunal where it is likely that the attorney will be called as a witness on a significant issue other than on behalf of the client," it is well settled that "[i]n determining whether to disqualify an attorney on the ground that he or she will likely be a witness, the court is guided, but not bound by, the standards set forth in Rule 3.7... and whether

¹ Having dismissed Plaintiff's motion for default judgment for failure to file a verified complaint or a party affidavit in support of the motion, the Court need not consider Defendants' reasonable excuse for the default or potential meritorious defenses to Plaintiff's claims.

to disqualify an attorney rests in the sound discretion of the Court” (*Harris v Sculco*, 86 AD3d 481 [1st Dept 2011]). As no complaint has been filed in this action and discovery has not yet taken place, the Court finds that disqualification of Defendants’ counsel is premature at this stage.

b. Defendants’ Cross-Motion to Compel Acceptance of Defendants’ Notice of Appearance and the Filing of the Complaint is Granted

Pursuant to CPLR 3012, “[i]f the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time period provided in subdivision (a) of rule 320 for an appearance. Service of the complaint shall be made within twenty days after service of the demand.” CPLR 320(a) states that when a summons is served on a defendant by delivering it to an official of the state authorized to receive service on the defendant’s behalf, the appearance shall be made within thirty (30) days after service is complete. However, CPLR 3012(d) states that “[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.”

In this case, Defendants’ Affirmation in Opposition to Plaintiff’s motion and in support of Defendants’ cross-motion asserts that, to date, the New York Secretary of State’s Division of Corporations (“NYSS”) has not sent process to Defendants of either the Summons with Notice or any complaint, if one exists (NYSCEF Doc. 10 at ¶ 8). Further, the Affirmation of Ralph Fasano (NYSCEF Doc. 13), a Law Clerk for Defendants’ Counsel, states that “on May 23 2023...[he] called the Secretary of State’s office, and spoke with a representative from the Secretary of State, Division of Corporations in relation to finding out the status of a Summons with Notice that was served on the Secretary of State’s office as a representative of the Friars Club on March 29, 2023...[and] was informed that numerous summonses were not being processed due to the fact

that there was an office backlog, and the representative further informed [him] that the NY Secretary of State was currently processing summonses dated March 15 2023” (NYSCEF Doc. 13 at ¶ 3).

Here, Defendants’ attorney entered a Notice of Appearance, on May 16, 2023, two days after discovering the existence of the present action (NYSCEF Doc. 10 at ¶¶ 3-4). While Defendants’ counsel asserts that the Notice of Appearance filed on May 16, 2023 includes a demand for a complaint, the only request in the Notice of Appearance is for “service of all papers in this action [to] be served upon the undersigned at the office stated below” (NYSCEF Doc. 11). The document does not include a demand for a Complaint. However, CPLR 3012(b) states that “[i]f the complaint is not served with the summons...[and] no demand is made, the complaint shall be served within twenty days after service of the notice of appearance.”

Defendants’ Notice of Appearance was entered 48 days after service of the Summons and before a motion for default judgment was filed (NYSCEF Doc. 10 at ¶ 18). In light of the relatively short delay, and prompt action by Defendants upon learning of the subject suit, the Court finds that Defendants have a reasonable excuse for their delay in appearing in this matter and no substantial prejudice would result from ordering acceptance of Defendants’ Notice of Appearance. In light of the foregoing, Defendants’ motion to compel acceptance of their Notice of Appearance is granted, and Defendants’ Notice of Appearance will be deemed served upon service of this Decision and Order. Pursuant to CPLR 3012(b), Plaintiff shall serve a complaint upon Defendants within 20 days of entry of this Decision and Order.

Accordingly, it is hereby,

ORDERED that Plaintiff Michael Gyure’s motion for entry of a default judgment against Defendant The Friars National Association Inc. is denied, in its entirety; and it is further

ORDERED that Defendants' cross-motion to compel Plaintiff to accept the filing of Defendants' Notice of Appearance is granted, and Defendants' Notice of Appearance dated May 16, 2023 (NYSCEF Doc. 3) shall be deemed served upon service of a copy of this Decision and Order with notice of entry thereof; and it is further

ORDERED that counsel for Defendants shall, within thirty (30) days of entry of this Decision and Order, serve a copy of this Decision and Order on all parties to this action, with notice of entry; and it is further

ORDERED that within twenty (20) days of service of this Decision and Order upon Plaintiff, Plaintiff shall serve a copy of the Complaint on all Defendants to this action; and it is further

ORDERED that the parties are directed to appear for a preliminary conference with the Court on February 7, 2024 at 9:30 a.m., in 60 Centre Street, Room 442, New York, New York. If the parties submit a proposed Preliminary Conference Order prior to the date of the conference via e-mail to SFC-Part33-Clerk@nycourts.gov, there will be no need to appear at the February 7, 2024 preliminary conference; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

12/8/2023
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: