

**Cho v HJB of Bayside Corp.**

2023 NY Slip Op 34924(U)

May 4, 2023

Supreme Court, Queens County

Docket Number: Index No. 715421/20

Judge: Allan B. Weiss

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN. B. WEISS IA Part 2  
Justice

JENNY CHO,

Index No. 715421/20

Plaintiff,

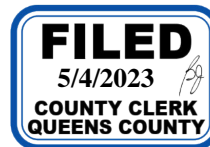
Motion Date: 12/21/22

-against

Motion Seq. Nos. 4-5

HJB OF BAYSIDE CORP., GUEERYUN YIM,  
And ANDREW J. HAN,

Defendants.



The following papers read on this order to show cause (motion sequence no. 4) by defendant Andrew J. Han (Han) to stay enforcement of the judgment pending determination of this motion, renew and vacate the default judgment against him for lack of personal jurisdiction and based on his reasonable excuse for default and a meritorious defense, or in the alternative, issue a protective order pursuant to CPLR 5240 and modify the execution pursuant to CPLR 5231(i) by reducing the amount of money garnished from his wages or postponing the garnishment of his wages until the end of his military tour; and a separate order to show cause (motion sequence no. 5) by defendant Gueeryun Yim (Yim) for similar relief staying execution of the default judgment, renewing and vacating the default judgment for reasonable excuse and meritorious defense, or in the alternative, issuing a protective order and postponing garnishment of her wages until this matter is determined.

Paper's  
Numbered

Order to Show Cause - Affidavits - Exhibits..... EF 58-70,  
74-76  
Notice of Motion - Affidavits - Exhibits..... EF 85-112,  
115-116

Notice of Cross Motion - Affidavits - Exhibits... EF  
Answering Affidavits - Exhibits..... EF 77-80

Upon the foregoing papers it is ordered that these motions are consolidated for purposes of disposition and are determined as follows:

This is an action to recover on a promissory note (the Note) in the sum of \$180,000.00 dated February 15, 2012, signed by Han, acting on behalf of the corporate defendant, HJB of Bayside Corp. (HJB). The Note was supported by two separate personal guaranties, both signed on February 15, 2012, by Han and his mother, Yim. Under the terms of the Note, the first monthly payments were expressly to pay back the interest first, at a rate of 15% per annum. The last month of interest, together with a balloon payment of the outstanding principal was to have been made on February 15, 2015. The Note also contains provisions granting additional interest of 18% per annum in the event of default, plus reasonable attorney's fees incurred in the enforcement of the Note.

Defendants commenced payments under the Note on March 15, 2012, with some subsequent payments made in varying amounts until their last payments on or about June 11, 2012, after which point no further payments were made. When the Note matured on February 15, 2015, the entire principal balance of \$180,000 remained unpaid, as well as the final five monthly installment interest payments. Plaintiff alleges that defendants then moved out of state, without a forwarding address, in an apparent attempt to evade creditors, but Yim has since returned to New York.

After commencing this action in September 2020, plaintiff timely served defendants Yim and HJB. With respect to Han, who was serving in the military at the time, the court's order dated March 17, 2021, directed substituted service, namely, by serving Han via his mother and by certified mail to his last known address (the Substituted Service Order). Plaintiff effectuated such service and filed proof thereof on March 31, 2021 and April 26, 2021, respectively.

Subsequently, by order dated September 13, 2021, plaintiff obtained a default judgment against defendants in the amount of \$193,500.00 on the underlying Note, with 18% interest from February 15, 2015 to the date of the entry. Plaintiff's request for attorney's fees under the Note was denied in the absence of proof substantiating such fees.

CPLR 5015[a][1] provides that "[t]he court which rendered a

judgment or order may relieve a party from it upon such terms as may be just ... upon the ground of: 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry." A motion to vacate a dismissal entered upon a default may be granted if the movant establishes that the default was excusable and that a meritorious cause of action or defense exists (see *Beltran v New York City Hous. Auth.*, 206 AD3d 873, 875 [2d Dept 2022]; *Scott v Ward*, 130 AD3d 903, 903 [2d Dept 2015]). The determination of whether a default shall be set aside is generally left to the sound discretion of the court (see *U.S. Bank N.A. v Losner*, 145 AD3d 935 [2016]).

The court first turns to Yim's order to show cause seeking to vacate the default judgment, such motion was made well past one year after the default judgment was entered or served upon her with notice of entry, and is thus untimely (CPLR 5015[a][1]). In any event, whether she has a reasonable excuse is not the proper analysis for a default that did not actually occur, insofar as Yim did oppose the underlying motion for default judgment, represented by her former attorney. Moreover, Yim's affidavit in support of her motion is inadmissible because she attests that she does not speak English, but fails to annex a translator's affidavit (CPLR 2101[b]; see *Gonzalez v Abreu*, 162 AD3d 748, 749 [2d Dept 2018]; *Welenc v Bd. of Directors of Polish and Slavic Fed. Credit Union*, 160 AD3d 683, 684 [2d Dept 2018]).

With respect to Han, who served his order to show cause on September 19, 2022 in compliance with the one-year deadline specified by CPLR 5015(a)(1), the court finds that the instant application is timely, contrary to plaintiff's assertions.

Han argues that the default judgment should be vacated because he was stationed in Georgia on active military duty when the action commenced and that his mother, Yim, concealed the existence of this action from him, such that he did not discover it until he returned home for Christmas break in December 2021. Yim's affidavits corroborate that she purposely hid this action from her son in order to not worry him.

Han's conclusory denial of receipt of the summons and complaint is insufficient to establish that he did not have actual notice of the action in time to defend it (CPLR 5015[a][1]; see *Dunn v Law Offices of Evans & Al-Shabazz, LLP*, 189 AD3d 776, 779 [2d Dept 2020]; *Progressive Cas. Ins. Co. v Excel Products, Inc.*, 171 AD3d 812, 814 [2d Dept 2019]). Han also argues that plaintiff

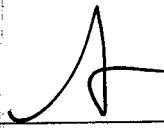
did not make an adequate showing that plaintiff's process server and investigators attempted to locate him, but such contentions are unavailing in light of the Substituted Service Order, which already determined that he could be served upon his mother and at the same address where he lived with his mother when not on active duty.

However, in the interest of justice and in light of Yim's statements that she purposely concealed this lawsuit from Han, the court hereby grants the branch of Han's order to show cause seeking to vacate the default judgment, conditioned upon the service of his answer, as amended to exclude the personal jurisdiction defense, within thirty (30) days of service of this order with notice of entry.

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, Yim's order to show cause is denied in its entirety and Han's order to show cause seeking to vacate the default judgment is granted solely to the extent discussed above, but is denied in all respects.

Dated: May 4, 2023

  
\_\_\_\_\_  
J.S.C.

