

AM Elec. Enters., LLC v Straschnowa
2024 NY Slip Op 35277(U)
March 8, 2024
Supreme Court, Nassau County
Docket Number: Index No. 607857/2017
Judge: Francis Ricigliano
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS PART 26

Present: HON. FRANCIS RICIGLIANO
Justice of the Supreme Court

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AM ELECTRIC ENTERPRISES, LLC, and
ALBERTO MARASCIO,

Plaintiffs,

-against-

RITA STRASCHNOWA, a/k/a RITA SORKIN,
RITA SORKIN, VLADISLAV TOLYSTYKH,
LEONID KRYLOV, I DREAM AUTO GROUP, LLC,
TEANECK CAR WASH, ROYAL TOWING &
RECOVERY, INC., JOHN DOES "1" THROUGH "10,"

Defendants.
-----X

DECISION & ORDER

INDEX NO.: 607857/2017

Motion Seq. 1

The following e-filed documents were reviewed in the consideration of this motion:

Notice of Motion, Affirmations, Exhibits, etc. 15 - 25, 33, 34.

By Notice of Motion (Motion Sequence No. 1), dated June 21, 2023, plaintiffs move for an Order (1) granting a default judgment against defendants RITA STRASCHNOWA, a/k/a RITA SORKIN, RITA SORKIN, VLADISLAV TOLYSTYKH, LEONID KRYLOV, I DREAM AUTO GROUP, LLC, and ROYAL TOWING & RECOVERY, INC., pursuant to CPLR 3215; (2) extending the time for plaintiffs to bring the instant motion for a default judgment *nunc pro tunc*; (3) extending the time for plaintiffs to file the requisite proofs of service until April 16, 2023, the date they were actually filed; and (4) for counsel fees and costs.

As per plaintiffs' Memorandum of Law submitted in support of the motion, plaintiffs do not seek a default judgment with respect to defendant TEANECK CAR WASH. As per a stipulation of discontinuance with prejudice as to defendants RITA STRASCHNOWA, a/k/a RITA SORKIN, RITA SORKIN, VLADISLAV TOLYSTYKH, which was e-filed subsequent to

plaintiffs' filing of the instant motion, plaintiffs' motion is deemed moot as to each of the same.

In regard to that portion of plaintiffs' motion which concerns defendants LEONID KRYLOV, I DREAM AUTO GROUP, LLC, and ROYAL TOWING & RECOVERY, INC., CPLR 3215 provides a plaintiff may take a default judgment against a defendant who fails to appear and answer the Complaint within one year of the default. At the same time, CPLR 3215 (c) provides that, if a plaintiff fails to take a default judgment within one year of the default, the court shall dismiss the Complaint as abandoned, either on motion or on its own initiative. It has been held that the use of the word "shall" in CPLR 3215 (c) is compulsory, and indicates the court must dismiss such claims as abandoned. *Giglio v. NTIMP, Inc.*, 86 AD3d 301, 926 NYS2d 546 (2d Dept 2011). However, CPLR 3215 (c) also provides that the failure to timely seek a default judgment on an unanswered Complaint may be excused "if sufficient cause is shown why the Complaint should not be dismissed." "The determination of whether an excuse is reasonable in any given instance is committed to the sound discretion of the motion court." *Giglio*, 86 AD3d at 308, citing *Staples v. Jeff Hunt Devs., Inc.*, 56 AD3d 459 (2008); *Costello v. Reilly*, 36 AD3d 581 (2007); *Ewart v. Maimonides Med. Ctr.*, 239 AD2d 543 (1997). In *Staples*, 56 AD3d at 460, the court found plaintiff's claim of law office failure was not a reasonable excuse for a five-year delay in moving for leave to enter a default judgment. In *Costello*, 36 AD3d at 581, the court found plaintiff's claim of law office failure was not a reasonable excuse for a delay of more than four years in seeking leave to enter a default judgment.

In this case, plaintiffs filed the Summons and Complaint on August 4, 2017. Plaintiffs thereafter did not file a Request for Judicial Intervention or take any other action to place this matter on the Court's calendar until they filed the instant motion on June 7, 2023, approximately 5 years and 10 months years after they filed the Summons and Complaint. In support of the motion, plaintiffs' counsel affirms that service of the Summons and Complaint was made on defendant Leonid Krylov on October 7, 2017, defendant I Dream Auto Group, LLC, on October 12, 2017, and defendant Royal Towing & Recovery, Inc., on October 16, 2017. Accepting these representations regarding service as true, the one year

for plaintiffs to take a default judgment as to each would have expired on various dates in October 2018, approximately 4 years and 10 months prior to the instant motion.

In further support of the motion, plaintiffs' counsel also asserts the delay in seeking a default judgment is not attributable to the plaintiffs themselves but to counsel, as he and his wife were beset by a myriad of medical issues, as well as the COVID-19 panic. Plaintiffs' counsel also offers to submit a letter setting forth those issues in more detail for *in camera* inspection.

Plaintiffs' motion is decided as follows.

First, having examined the Affidavits of Service, the Court notes that although defendant Leonid Krylov was ostensibly served via "leave and mail" service pursuant to CPLR 308 (4), the Affidavit of Service is not notarized, it does not indicate efforts were made to serve the defendant personally with the statutorily required due diligence before service was made pursuant to CPLR 308 (4), and the Affidavit of Service was not filed within 20 days of the later of the leaving or mailing, which is required to complete service pursuant to CPLR 308 (4). In regard to defendant Royal Towing & Recovery, Inc., while plaintiffs' counsel affirms service was made on October 12, 2017, they have filed several different copies of the same Affidavit of Service which indicates service was *not* made on the defendant, as defendant had moved and not left a forwarding address.

Notwithstanding these issues with service, and despite plaintiffs' counsel's offer to submit a letter detailing his and his wife's various medical issues for *in camera* inspection, the Court simply cannot say granting the instant application for leave to enter a default judgment after a delay of 4 years and 10 months, and after having taken no action to request a preliminary conference or otherwise place this matter on the Court's calendar for approximately 5 years and 10 months, would be a provident exercise of the Court's discretion. Among other things, plaintiff's counsel has not represented that he was entirely unable to file a motion for a default judgment within the requisite one year or any time sooner than the 4 years and 10 months of the instant motion, or that he was unable to have another attorney due so in his stead.

Accordingly, it is hereby

ORDERED, that portion of plaintiffs' motion which seeks leave to enter a default judgment as to defendants LEONID KRYLOV, I DREAM AUTO GROUP, LLC, and ROYAL TOWING & RECOVERY, INC., etc., is DENIED; and it is further

ORDERED, that plaintiffs' Complaint is dismissed with prejudice pursuant to CPLR 3215 (c), and the Clerk of the Court is directed to mark this matter disposed.

This constitutes the Decision and Order of this Court.

Dated: March 8, 2024

ENTER:



HON. FRANCIS RICIGLIANO, J.S.C.

ENTERED

Mar 11 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE