

M & T Bank v Home Tyles, Inc.
2024 NY Slip Op 35377(U)
September 27, 2024
Supreme Court, Erie County
Docket Number: Index No. 808055/2023
Judge: Emilio Colaiacovo
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STATE OF NEW YORK
SUPREME COURT: ERIE COUNTY

M & T BANK,

Plaintiff,

Decision & Order

-vs-

Index #: 808055/2023

HOME TYLES, INC., JOEL M.
FISCHBEIN a/k/a JOEL FISCHBEIN,
MAYER BERKOWITZ a/k/a MEYER
BERKOWITZ a/k/a MAY BERKOWITZ,

Defendants.

AARON R. WALKOW, ESQ.

Attorney for Plaintiff

ERIC S. LANDAU, ESQ.

Attorney for Defendant

Joel M. Fischbein a/k/a

Joel Fischbein

Colaiaacovo, J.

The motion pending before the Court was brought by Defendant Fischbein requesting the Court vacate the November 20, 2023, Order granting a default judgment against Mr. Fischbein. Defendants Home Tyles and Berkowitz have not joined in Fischbein's motion. Defendant Fischbein maintains that he was not served properly with the "complaint document" and that he is entitled to dismissal for lack of personal jurisdiction due to the alleged improper service. See generally Fischbein Affidavit; Landau

Affirmation at par. 15 & 25. As Fischbein never answered the Complaint, and upon M & T's motion for a default judgment, an Order granting default judgment was entered against Mr. Fischbein on November 20, 2023. Plaintiff M & T Bank argues that Fischbein's motion must be denied in its entirety as it complied with all statutory service requirements and because Defendant has failed to assert that he has a meritorious defense to the action.

The Court's decision is as follows.

DECISION

A defendant seeking to vacate a default judgment pursuant to CPLR §5015(a)(1) must demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action. Clover M. Barrett, PC v. Gordon, 90 AD3d 973 (2d Dept. 2011); Muir v. Coleman, 98 AD3d 569 (2d Dept. 2012); Lane v. Smith, 84 AD3d 746 (2d Dept. 2011). The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court. Ennis v. Lema, 305 AD2d 632 (2d Dept. 2003).

It is undisputed that Fischbein knew of the Summons and Complaint by July 10, 2023, as evidenced by his own admission that upon return from being away from his primary residence during the week of July 3, 2023, he "discovered the complaint document on the premises' floor." Fischbein

Affidavit at par. 5 & 6. Despite being aware of the Complaint, Mr. Fischbein did not file an Answer, did not move to file a late Answer, and did not retain counsel at this time, and failed to appear for the November 17th motion argument that resulted in the default judgment being granted. Mr. Fischbein's only argument regarding service is that he assumed "that the process server would make another attempt to serve me properly should the initial service have been deemed incomplete." Id. at par. 7. Mr. Fischbein's does not even deny that he lacked knowledge of the lawsuit. Instead, he mistakenly relies on an erroneous interpretation of the service requirements.

New York case law and public policy generally favor the resolution of cases on the merits. However, fidelity to the law should always be the Court's first priority. Although lack of proper service and lack of knowledge of the lawsuit would certainly qualify as a reasonable excuse for the failure to Answer, Mr. Fischbein's assertion that he was not served properly is frankly unbelievable considering all the other evidence before the Court. With the public policy principle in mind, but weighed against the evidence before the Court, the Court finds that Mr. Fischbein has failed to provide a reasonable excuse in support of his pending motion to vacate the default judgment. Furthermore, the Court finds that M & T completed service upon Mr. Fischbein in accordance with New York's "nail and mail" statute.

Given that the Court has found that Mr. Fischbein has failed to provide a reasonable excuse for his failure to Answer the lawsuit, and that M & T effectuated service upon him in accordance with New York's service requirements, the Court does not need to delve into whether Mr. Fischbein has a meritorious defense to this action. However, even if the Court were to explore the issue, it would not be able to go far as Mr. Fischbein has not presented any defense to the underlying action.

Based on the forgoing, Defendant Fischbein's motion to vacate the default Judgment is hereby DENIED.

This shall constitute the Decision of the Court.

Dated: September 21, 2024
Buffalo, New York



Hon. Emilio Colaiacovo, J.S.C.