Pinnacle Fed. Credit Union v Cammarata
2024 NY Slip Op 35460(U)
September 6, 2024
Supreme Court, Westchester County
Docket Number: Index No. 60425/2023
Judge: David F. Everett
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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PINNACLE FEDERAL CREDIT UNION,

Plaintiff,

-against-

JUSTIN D. CAMMARATA,

Defendant.

---X

INDEX NO. 60425/2023

DECISION/ORDER
Motion Seq. 3 and 4

EVERETT, J.

Upon consideration of the papers filed in the New York State Courts Filing System (NYSCEF) Doc Nos. 27-42, relative to the motion by defendant to dismiss the action for failure to obtain jurisdiction (CPLR 3211 [a] [8]), alternatively, to vacate defendant's default in serving an answer and compelling plaintiff to accept the service of an answer (CPLR 3012 [d]; motion # 3); and the cross motion for a default judgment and an inquest (CPLR 3215), the Court determines as follows:

Background and Arguments

The following background was stated in the October 6, 2023, Decision and Order (J. Marx):

> On May 1, 2023, Plaintiff commenced the instant action, seeking to recover the monies claimed to be owed under a finance agreement for the purchase of a used 2013 BMW 3228xi. Plaintiff alleges three (3) causes of action. The first two sound in breach of contract and account stated. The third cause of action seeks counsel fees pursuant to the financing agreement. Plaintiff seeks judgment on the first 2 causes of action in the amount of $22,412.42, which it alleges is the balance due after the sale of the vehicle following re-possession. The third cause of action seeks counsel fees in the amount of $3,361.86.

In the affirmation in support (NYSCEF Doc No. 28), defendant's attorney asserts that the affidavit of service filed alleges service on defendant by affixing a copy of the summons and complaint to 980 Wilmot Road, Scarsdale, in Westchester County, on May 10, 2023; that as defendant avers (NYSCEF Doc No. 30), he no longer resided in Scarsdale when the alleged service took place because he had moved out of 980 Wilmot Road in January of 2021, more than a year prior to the alleged service; that, in any event, the process server only attempted service twice on weekday evenings before resorting to affixing the summons and complaint to the door on the third attempt; that, if it is found that defendant was properly served, defendant should be permitted to file an answer, pursuant to CPLR 3012 (d).

With respect to dismissal beyond service, defendant's attorney argues that the statute of limitations for a motor vehicle retail installment contract is four years (UCC § 2-725 [1]), which runs from the time of the breach, or in this action January 11, 2018, but the action was not commenced until May 1, 2023; that even with the Covid-19 stay, the action is beyond the statute of limitations; that the statute of limitations for the second cause of action alleging a consumer debt account, has a three year statute of limitations (CPLR 214-i); and that plaintiff repossessed the car in 2018 but, as a secured party seeking a deficiency, has not met its burden of demonstrating that the car was sold in a commercially reasonable manner.

In the affirmation in opposition and in support of the cross motion (NYSCEF Doc No. 35), plaintiff's attorney notes that plaintiff advised defendant that plaintiff would accept defendant's answer; that defendant owned that property where service was attempted, where defendant's ex-wife resides; that defendant had his mail forwarded and the mail was not returned; that defendant does not provide documentary proof with his affidavit; that the process server did attempt to serve defendant on the evenings of May 8 and 9, 2023, and on the morning of May 10, 2023; that the service was followed by a mailing; and that defendant does not provide a good faith excuse for failing to anwer.

With respect to dismissal beyond service, plaintiff's attorney argues that on February 26, 2019, defendant voluntarily surrendered the vehicle financed by plaintiff, as noted in the surrender letter (NYSCEF Doc No. 38); that the car was sold, and a deficiency letter for $17,429.92 was sent to defendant (NYSCEF Doc No. 39); that the action was commenced within the four years of the statute of limitations on May 1, 2023; and that defendant does not specify a defense to the claim for the deficiency balance due to the accelerated loan balance, plus various charges, and less the sum of $9,100.00, which was received upon the auction sale and ultimate disposition of the vehicle (NYSCEF Doc No. 36).

In response (NYSCEF Doc 42), defendant's attorney argues that the cross motion is procedurally defective; that as previously raised in the motions for default judgment, which were denied, plaintiff again failed to show proof of compliance with the mailing requirement in CPLR 3215; that Loren Pigman's (Pigman) affidavit on behalf of plaintiff lacks evidentiary value, including a demonstration that the car was not accepted in full satisfaction of the loan; that Pigman's affidavit does not include the date of the default, as previously stated; that plaintiff has not put forward that the records were made contemporaneously by someone with a duty to record them (CPLR 4518); that plaintiff has not submitted any evidence of the fair market value of the car or how the car was sold to determine if the sale was commercially reasonable; and that plaintiff does not provide any case law that the statute of limitations runs from the deficiency notice.

Defendant's attorney contends that plaintiff did not argue that jurisdiction was not obtained, but instead addresses the request to vacate the default and acceptance of a late answer; that plaintiff has failed to rebut the meritorious defense of statutes of limitations and commercially reasonable sale; and that plaintiff has failed to show how it would be prejudiced by a late answer.

Dismissal - Lack of Jurisdiction – Service by Affix and Mail (CPLR 308 [4])

CPLR 3211 (a) (8) provides that a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that: … the court has not jurisdiction of the person of the defendant."

CPLR 308 (4) provides:

> Personal service upon a natural person shall be made by any of the following methods:
> …
> 4. where service under paragraphs one [personal delivery] and two [to a person of suitable age and discretion] cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person 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 affixing 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 affixing or mailing, whichever is effected later; service shall be complete ten days after such filing….

In *Mid-Island Mtge. Corp. v Drapal* (175 AD3d 1289, 1289-1290 [2d Dept 2019]), the Court explained:

> Service pursuant to CPLR 308 (4), known as "affix and mail" service, "may be used only where service under CPLR 308 (1) or (2) cannot be made with 'due diligence' " (*Estate of Waterman v Jones*, 46 AD3d 63, 65 [(2d Dept) 2007]; *see Coley v Gonzalez*, 170 AD3d 1107, 1108 [(2d Dept) 2019]). "While the precise manner in which due diligence is to be accomplished is not rigidly prescribed, the requirement that due diligence be exercised must be strictly observed, given the reduced likelihood that a summons served pursuant to [CPLR 308 (4)] will be received" (*Greene Major Holdings, LLC v Trailside at Hunter, LLC*, 148 AD3d 1317, 1320 [(3d Dept) 2017] [internal quotation marks and citation omitted]). A mere showing of several attempts at service at either a defendant's residence or place of business may not satisfy the "due diligence" requirement before resort to affix and mail service (*see County of Nassau v Long*, 35 AD3d 787 [(2d Dept) 2006]; *County of Nassau v Yohannan*, 34 AD3d 620, 620-621 [(2d Dept) 2006]). " '[D]ue diligence' may be satisfied with a few visits on different occasions and at different times to the defendant's residence or place of business when the defendant could reasonably be expected to be found at such location at those times" (*Estate of Waterman v Jones*, 46 AD3d at 66).

In *Countrywide Home Loans, Inc. v Smith* (171 AD3d 858, 859 [2d Dept 2019]), the Court did not vacate a default judgment where the "process server's affidavit reflect[ed] that he visited the property where service was effectuated on different days of the week and at different times when the defendant could reasonably be expected to be home, including a weekend, spoke to a neighbor who confirmed that the defendant resided at the property, and used a database search which revealed that the property was also the defendant's place of business." The Court concluded that such efforts "satisfied the due diligence requirements of CPLR 308 (4) (*see HSBC Mtge. Corp. [USA] v Hollender*, 159 AD3d [884] at 884 [2d Dept 2018]; *Deutsche Bank Natl. Trust Co. v White*, 110 AD3d 759, 760 [(2d Dept) 2013]; *Singh v Gold Coin Laundry Equip.*, 234 AD2d 358, 358 [(2d Dept) 1996])." (*id.*)

Default Judgment (CPLR 3215)

CPLR 3215 (a) provides: "When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him." In a motion for leave to enter a default judgment against a defendant based on the failure to answer or appear, a plaintiff must submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defendant's default (*Bank of N.Y. Mellon v Van Roten*, 181 AD3d 549, 550 [2d Dept 2020]).

CPLR 3215 (f) requires the applicant for a judgment by default to submit proof "by affidavit made by the party" of the facts constituting the claim, and provides that "[w]here a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney." (*See DLJ Mtge. Capital, Inc. v United Gen. Tit. Ins. Co.*, 128 AD3d 760, 762 [2d Dept 2015].)

Extension of Time to Answer (CPLR 3012 [d]; 2004)

CPLR 3012 (d) provides: "Upon 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."

CPLR 2004 provides: "Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed."

Resolution on the Merits

There is a strong public policy in favor of resolving cases on the merits (*see Miyahara v Majsak*, 117 AD3d 812, 813 [2d Dept 2014]; *Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 877 [2d Dept 2005]).

Conclusion

Plaintiff has shown that the attempts to serve defendant should have resulted in defendant receiving notice, as he was the owner of the property at the time of service. Plaintiff has agreed to waive the jurisdictional question and accept defendant's late answer. As there is a strong public policy to resolve issues on the merits, the Court will direct plaintiff to accept defendant's late answer.

While plaintiff shows a cognizable claim, plaintiff does not show that a default judgment should be entered against defendant, who has stated questions of fact including regarding how the motor vehicle was sold and whether the sale was commercially reasonable.

Plaintiff does not set forth opposition to defendant's argument that the second cause of action, alleging a consumer debt account, is barred by the statute of limitations. Thus, that cause of action is dismissed.

The remaining contentions do not require a different result.

Accordingly, it is,

ORDERED that defendant's motion to dismiss the action for failure to obtain jurisdiction (CPLR 3211 [a] [8]), is denied; and it is further

ORDERED that defendant's motion to dismiss with respect to the second cause of action alleging a consumer debt account, is granted; and it is further

ORDERED that defendant's motion to compel plaintiff to accept service of defendant's answer is granted; and it is further

ORDERED that defendant's answer in the form filed in NYSCEF (Doc No. 29) shall be deemed served on the date this Decision and Order is filed in NYSCEF; and it is further

ORDERED that plaintiff's cross motion for a default judgment and inquest is denied; and it is further

ORDERED that the parties shall file a Preliminary Conference Order in NYSCEF on or before October 2, 2024.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
September 6 , 2024

ENTER:

HON. DAVID F. EVERETT, J.S.C.

Filed in NYSCEF