

Rock Cr. Capital, LLC v Finkelstein

2025 NY Slip Op 31458(U)

April 17, 2025

Supreme Court, New York County

Docket Number: Index No. 152709/2022

Judge: Niicholas W. Moyne

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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. NICHOLAS W. MOYNE PART 41M

Justice

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ROCK CREEK CAPITAL, LLC AS ASSIGNEE OF SALLIE
MAE BANK,

Plaintiff,

INDEX NO. 152709/2022

MOTION DATE 10/11/2024

MOTION SEQ. NO. 001

- v -

PERRI FINKELSTEIN, MARC FINKELSTEIN

Defendants.

**DECISION + ORDER ON
MOTION**

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

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

Plaintiff, ROCK CREEK CAPITAL, LLC AS ASSIGNEE OF SALLIE MAE BANK, commenced the underlying action against defendants, PERRI FINKELSTEIN and MARC FINKELSTEIN, to recover amounts owed pursuant to an executed promissory note. Plaintiff now moves for an order, pursuant to CPLR § 3215, directing entry of a default judgment against defendants in the amount of \$34,777.55, plus interest and costs.

On April 25, 2022, plaintiff served defendant PERRI FINKELSTEIN with the summons and complaint for this action, and mailed the same on June 10, 2022, in accordance with the method of service proscribed by CPLR § 308 (NYSCEF Doc. No. 2, 9). On May 21, 2022, plaintiff served defendant MARC FINKELSTEIN with the summons and complaint for this action, and mailed the same on June 10, 2022, in accordance with the method of service proscribed by CPLR § 308 (NYSCEF Doc. No. 4, 9). The applicable time period in which defendants ought to have answered or otherwise appeared has passed and defendants have failed to do so.

On October 7, 2024, “despite the passing of one year from the date of default”, plaintiff filed its application seeking entry of a default judgment (NYSCEF Doc. No. 5). However, this application, filed more than two years after the defendants’ default, is well outside the statutory period to seek entry of a default judgment (*see* CPLR § 3215).

Pursuant to CPLR § 3215 (c), if a plaintiff fails to take proceedings for the entry of judgment within one year after the default the court shall not enter judgment but shall dismiss the complaint as abandoned, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. The language of CPLR § 3215 (c) requiring dismissal is not discretionary, but mandatory, with the statute excepting cases where sufficient cause has been shown (*Deutsche Bank Natl. Tr. Co. v Cruz*, 173 AD3d 610, 610 [1st Dept 2019]). Therefore, to establish sufficient cause the plaintiff must set forth a reasonable excuse for the delay and demonstrate that it has a meritorious cause of action (*Selective Auto Ins. Co. of New Jersey v Nesbitt*, 161 AD3d 560 [1st Dept 2018]; *HSBC Bank USA, N.A. v Slone*, 174 AD3d 866, 867 [2d Dept 2019]).

Plaintiff’s counsel asserts that the failure to file for judgment within the one-year was caused by “a delay in obtaining the required Affirmation of Facts,” which was “caused by the fact the account was purchased by Plaintiff prior to the issuance and implementation of the new Affirmations requirements” (NYSCEF Doc. No. 6). The court does not find this excuse compelling considering the 22 NYCRR § 202.27-a affirmation requirements for default judgments in consumer credit actions has been effective as of October 2014 and includes essentially the same affidavit requirements as the Consumer Credit Fairness Act, effective May 2022 (22 NYCRR § 202.27-a[d], compare UCS-CCR4-6). Accordingly, these requirements had therefore long been established by the time the promissory note was transferred, sold, and/or

assigned to plaintiff in March 2021, by the time this action was commenced and/or served in May 2022, and by the time plaintiff could and should have sought entry of a default judgment (NYSCEF Doc. No. 1).

Plaintiff's counsel further alleges that the delay was caused by the COVID-19 pandemic and "internal reassignments of the case that coincided with our case management software system," resulting in "relevant case information [being] inadvertently omitted from the automated reminders relied upon" (NYSCEF Doc. No. 6). The court also finds these reasons to be insufficient excuses for delay as this action was initiated two years after the onset of COVID-19. Considering, plaintiff was provided plenty of time to adjust to the constraints of the pandemic, which were not so limiting by the time of the service of the pleadings.

Further, while a court has the discretion to accept law office failure as a reasonable excuse, such excuse must be supported by detailed allegations of fact explaining the failure (*Ibrahim v Nablus Sweets Corp.*, 161 AD3d 961, 963 [2d Dept 2018]; *CEO Bus. Brokers, Inc. v Alqabili*, 105 AD3d 989, 990 [2d Dept 2013] [allegations of law office failure may not be vague, conclusory, or unsubstantiated]). Accordingly, these allegations offered by plaintiff's counsel are insufficient to demonstrate a reasonable excuse for waiting over two years after defendants' default to seek entry of judgment based on such (*see Zayas v Montefiore Med. Ctr.*, 188 AD3d 551, 552 [1st Dept 2020]). In light of the absence of a reasonable excuse, it is unnecessary to consider whether plaintiff sufficiently demonstrated a potentially meritorious cause of action (*CEO Bus. Brokers, Inc. v Alqabili*, 105 AD3d 989, 990 [2d Dept 2013]).

Accordingly, it is hereby

ORDERED that the motion by plaintiff, ROCK CREEK CAPITAL, LLC AS ASSIGNEE OF SALLIE MAE BANK, is DENIED and the above-entitled action and complaint are dismissed, without costs or disbursements; and it is further

ORDERED that plaintiff, ROCK CREEK CAPITAL, LLC AS ASSIGNEE OF SALLIE MAE BANK, serve a copy of this order with notice of entry on both defendants and on the Office of the County Clerk, who is directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website).

This constitutes the decision and order of the court.


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4/17/2025
DATE

NICHOLAS W. MOYNE, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN
 DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
 REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: