LVNV Funding, LLC v Darmola
2017 NY Slip Op 31033(U)
May 17, 2017
Civil Court of the City of New York, Bronx County
Docket Number: CV-11720-09/BX
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 34-C

LVNV FUNDING, LLC APO SEARS

Plaintiff,

-against-

KAYODE O DARMOLA

Defendant,

HON. SABRINA B. KRAUS

DECISION & ORDER
Index No.: CV-11720-09/BX

BACKGROUND

This action was commenced by **LVNV FUNDING, LLC APO SEARS** (Plaintiff) against **KAYODE O DARMOLA** (Defendant) seeking $3,233.94 plus interest, based on the allegation that Defendant entered into a credit card agreement with Plaintiff's predecessor in interest and failed to pay amounts due under said account.

PROCEDURAL HISTORY

The summons and complaint are dated January 12, 2009, and were filed on January 27, 2009.

Defendant appeared by counsel on March 25, 2009, and filed an answer asserting defenses including lack of personal jurisdiction, violations of the Fair Debt Collection Act and failure to state a cause of action.

On September 27, 2011, Plaintiff filed a Notice of Trial.

A trial date was set for November 22. 2011.1 Defendant failed to appear on said date, and the matter was marked for submission to the Inquest Clerk.

On January 3, 2012, Plaintiff's counsel wrote to his adversary advising of the November 22, 2011 default and that Plaintiff intended to submit a request for a default judgment to the clerk of the court. Defendants's attorney responded by letter dated January 19, 2012, stating no notification of the November court date had been received by Defendant, asserting that the claim had been resolved with a debt consolidation company and attaching related documentation, including alleged proof of a $1500 payment to said consolidation company. The Index Number referenced by counsel on said letter however is 151128/09, a number which is not a valid Index Number for any 2009 Bronx Civil Court action.

On February 17, 2012, the clerk entered a judgment against Defendant on default in the amount of $5,017.08. The computer case summary indicates the judgment was entered upon default of a stipulation of settlement, but that appears to be an incorrect entry, the judgment was submitted to the inquest clerk pursuant to the court's direction after Defendant's failure to appear for the November 22, 2011 trial date.

On December 5, 2016, Defendant submitted a *pro se* request to the court to sign an order to show cause to vacate the inquest clerk marking and stay entry of a judgment. The court (Alpert, J) declined to sign the order to show cause, noting that Defendant was represented by counsel.

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1 This date is not reflected in the computer case summary maintained by the court clerk but it is reflected on the file jacket.

On December 7, 2016, Defendant submitted a *pro se* request to the court to sign an order to show cause to vacate the inquest clerk marking and stay entry of a judgment. The court (Alpert, J) signed the order to show cause which had a return date of December 27, 2016. Defendant failed to appear on the return date and the motion was denied based upon his failure to appear.2

On December 29, 2016, Defendant made his third *pro se* application for the court to sign an order to show cause. This time the relief sought was to vacate the default judgment and restore the case to the trial calendar. The order to show cause was signed by the court (Sharpe, J) and was returnable on January 19, 2017. The motion was adjourned to March 30, 2017. On March 30, 2017, Defendant failed to appear, but submitted a request for an adjournment of the motion stating that he would be out of the country. Defendant requested the motion be adjourned to the second week of May 2017.

The motion was adjourned to May 11, 2017. On that day, the motion was submitted.

DISCUSSION

Upon submission of the papers herein, and the court's review of the procedural history of this action, the court elected to confirm the registration of Defendant's attorney. Having done so the court found that Defendant's attorney registration shows that counsel is deceased. A copy of the registration is annexed hereto and incorporated herein.

Upon information and belief, Mr. Okeke died on December 18, 2013.3

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2 There is no indication as to why the court entertained the application by Defendant *pro se* or why the such relief was sought, years after the entry of the judgment.

3 https://www.forevermissed.com/victor-n-okeke#about appears to be a website that was set up in the memory of Mr. Okeke and lists his date of death as December 18, 2013.

CPLR § 321(c) provides:

> Death, removal or disability of attorney. If an attorney dies, becomes physically or mentally incapacitated, or is removed, suspended or otherwise becomes disabled at any time before judgment, no further proceeding shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs.

N.Y. C.P.L.R. 321 (McKinney).

Here, counsel passed **after** the entry of the default judgment. The automatic stay provision of the statute would not therefore be applicable. Additionally, the attorney client relationship between Defendant and his counsel, terminated upon the death of the attorney (*Sergent v New York Cent. & H.R.R. Co. et al* 209 NY 360; *Glamm v Allen* 57 NY2d 87). It is not clear from the record as to whether defendant is aware of his attorneys death, but it is clear that since December 2016 has attempted to proceed pro se.

As such the court considers Defendant to be properly proceeding *pro se*, and will address the merits of the underlying motion.

CPLR § 5015(a)(1)permits a default to be vacated upon excusable default and meritorious defense. Every application to vacate a default judgment under CPLR 5015(a) is discretionary in nature and requires the court to consider the particular facts of the case at bar, include the equities effecting each party (*Nash v Port Authority of New York and New Jersey* 22 NY3d 220). "To vacate a default a party must demonstrate a justifiable excuse for the default and a meritorious defense. There must be a sufficient factual showing to support such claims *(Mandell v Stein* 183 AD2d 488)."

Here Defendant has not shown excusable default. His attorney was advised by Plaintiff of the November 22, 2011 trial date and Plaintiff's intention to apply for a default based on Defendant's failure to appear. Other than to send a letter to counsel and the court, Defendants's attorney took no action in regards to the default.

Moreover the alleged payment was not submitted to Plaintiff, nor negotiated through Plaintiff's counsel, but was made payable to a third party debt consolidation company, was for a different account number and to settle a different balance.

Based on the foregoing, Defendant has failed to allege either an excusable default, or a meritorious defense sufficient to vacate the judgment herein. The motion is denied and all stays are vacated.

This constitutes the decision and order of the court.

Dated: Bronx, New York
May 17, 2017

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Hon. Sabrina B. Kraus, JCC

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