SHORT FORM ORDER

INDEX NO. 28586/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

JEANINE SIEGEL a/k/a JEANINE COPPOLA and PAUL COPPOLA,

Plaintiffs,

-against-

POLISH & SLAVIC FEDERAL CREDIT UNION,

Defendant.

ORIG. RETURN DATE: APRIL 2, 2008
FINAL SUBMISSION DATE: APRIL 24, 2008
MTN. SEQ. #: 001
MOTION: MD

ORIG. RETURN DATE: APRIL 2, 2008
FINAL SUBMISSION DATE: APRIL 24, 2008
MTN. SEQ. #: 002
CROSS-MOTION: MOT D

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Upon the following papers numbered 1 to 9 read on this motion FOR DEFAULT JUDGMENT AND CROSS-MOTION TO DISMISS OR COMPEL. Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers 4-6; Opposition to Cross-motion and Reply Affirmation in Support and supporting papers 7, 8; Affirmation in Reply and supporting papers 9; it is,

ORDERED that this motion by plaintiffs for an Order, pursuant to CPLR 3215, granting judgment by default against defendant in an amount to be determined at inquest, is hereby **DENIED** for the reasons set forth hereinafter; and it is further

ORDERED that this cross-motion by defendant for an Order, pursuant to CPLR 3211(a)(1) and (a)(8) and CPLR 3212, dismissing the

complaint in this action in its entirety and/or granting summary judgment in favor of defendant as to all causes of action asserted in the complaint, or in the alternative, for an Order, pursuant to CPLR 3012(d), compelling plaintiffs to accept defendant's answer, is hereby **GRANTED** to the extent provided hereinafter.

This action, originally commenced on or about January 30, 2007 in New York County, seeks to recover damages for personal injuries allegedly sustained by plaintiff JEANINE SIEGEL a/k/a JEANINE COPPOLA as a result of a motor vehicle accident that occurred in Queens County on or about February 24, 2004. On that date, a van driven by MAREK BOCHEN left the roadway and struck plaintiff SIEGEL, a pedestrian on the sidewalk, causing bodily injuries. By Order dated June 20, 2007 (Kaplan, J.), the Court granted a motion by defendant to change the venue of the instant action to Supreme Court, Suffolk County. Plaintiffs allege that in a separate lawsuit filed by plaintiffs against Mr. Bochen, among others, in Supreme Court, Queens County, Mr. Bochen testified that the van he was driving was actually titled to the defendant herein, POLISH & SLAVIC FEDERAL CREDIT UNION. As such, plaintiffs argue that defendant is vicariously, jointly and severally liable for the subject accident.

Plaintiffs have filed the instant application for a default judgment in favor of plaintiffs and against defendant based upon defendant's failure to timely respond to the complaint. Plaintiffs allege that defendant was served with the summons and complaint "in person" on February 21, 2007, and therefore had until March 13, 2007 to respond. The Court notes that the affidavit of service executed in connection therewith indicates that the summons and complaint were personally delivered to a "customer service representative" at the Ridgewood, New York, branch office of defendant. Plaintiffs allege that defendant served its answer on March 19, 2007, six days late. As such, by correspondence dated March 26, 2007, plaintiffs rejected the answer as untimely, and now seek a default judgment against defendant in an amount to be determined at inquest.

In response, defendant has filed a cross-motion to dismiss the complaint in this action in its entirety and/or to grant summary judgment in its favor as to all causes of action asserted in the complaint, or in the alternative, to compel plaintiffs to accept defendant's answer. With respect to defendant's alleged late answer, defendant contends that it has many branches and employees, with its main offices in Fairfield, New Jersey. Defendant claims that the only notice it received of the action was by first class mail on or about March

5, 2007; the copy of the summons and complaint served on the customer service representative was allegedly never received by anyone with authority to act on behalf of defendant. Accordingly, defendant argues that its answer was timely served pursuant to CPLR 312-a, the statute governing personal service by mail. Further, defendant argues that the service upon defendant, a not-for-profit corporation, was defective, in that the customer service representative was not authorized to accept service pursuant to CPLR 311.

Moreover, defendant alleges that it has a meritorious defense to this action, to wit: it does not hold legal and/or equitable title to the subject van, but merely held a lien and/or security interest in the van. Accordingly, defendant argues that it is exempt from liability for the accident pursuant to Vehicle and Traffic Law § 388. In support thereof, defendant has submitted business records of defendant, including a "Notice of Recorded Lien," which purportedly shows Mr. Bochen as the owner of the van, and defendant as an additional lienholder thereupon. Defendant alleges that it merely loaned Mr. Bochen the money used to purchase the van.

As discussed, plaintiffs seek a default judgment against defendant for failing to timely answer the complaint. In order to avoid the entry of a default judgment upon its failure to appear or to answer in a timely manner, a defendant is required to demonstrate a reasonable excuse for its default and a meritorious defense (CPLR 5015[a][1]; *see e.g. Miller v Shlomo, LLC*, 2008 NY Slip Op 2119 [2d Dept]). Here, the Court finds that defendant has proffered a reasonable excuse for its delay in answering, as it is unclear whether the "customer service representative" had the authority to accept service on behalf of defendant, and additionally, whether the summons and complaint served upon the customer service representative were ever forwarded to anyone with authority to act on behalf of defendant. The Court notes that CPLR 311 does not list "customer service representative" as a person upon whom personal service upon a corporation may be effectuated. The Court finds that the six-day delay in service of defendant's answer is *de minimis*, and that plaintiffs cannot be heard to claim prejudice as a result thereof. Plaintiffs waited until approximately one year after defendant's alleged default to file the instant application for a default judgment. Further, the Court finds that defendant has proffered a potentially meritorious defense to the action, as it claims that it does not hold legal and/or equitable title to the subject van, but merely held a lien against the title of the van and/or a security interest therein. Accordingly, plaintiffs' motion for an Order granting a judgment by default against defendant is **DENIED**.

With respect to that branch of defendant's cross-motion to dismiss pursuant to CPLR 3211(a)(1), where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; *see Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d 330 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]). In the instant application, it cannot be said that the documentary evidence submitted by defendant, including, among other things, the "Notice of Recorded Lien," resolve all factual issues as a matter of law. Accordingly, this ground cannot serve as a basis for dismissal.

Regarding that branch of defendant's cross-motion based upon CPLR 3211(a)(8), lack of personal jurisdiction, although defendant raised this as an affirmative defense in its answer, it failed to move for judgment on this ground within sixty (60) days after serving the pleading. As such, this objection has been waived (see CPLR 3211[e]; *Wiebusch v Bethany Mem'l Reform Church*, 9 AD3d 315 [2004]; *Aretakis v Tarantino*, 300 AD2d 160 [2002]).

Next, on a motion for summary judgment pursuant to CPLR 3212, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It has been held that "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue . . . or where the issue is even arguable" (*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65 [1987] [citations omitted]; *see also Andre v Pomeroy*, 35 NY2d 361, *supra*; *Henderson v New York*, 178 AD2d 129 [1991]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of*

the State Ins. Fund v Photocircuits Corp., 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the case at bar, the Court finds that factual issues exist that preclude the granting of summary judgment to defendant. Although defendant claims that it only held a lien and/or security interest against the title of the subject van, and has submitted some of its business records in support thereof, no party has submitted a certified copy of the actual title as it existed on the date of the accident, or an affidavit made by someone with personal knowledge of the state of title on that date. Defendant's business records, as well as the excerpt of the deposition testimony of Mr. Bochen, are not dispositive on this issue. Accordingly, on this record, the Court cannot grant judgment to defendant.

Pursuant to CPLR 3012(d), a court may 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 3012[d]; *Holloman v City of New York*, 2008 NY Slip Op 5480 [2d Dept]). As discussed hereinabove, defendant has proffered a reasonable excuse for the minimal delay in serving its answer. In addition, plaintiffs' counsel's letter of March 26, 2007 did not unequivocally reject defendant's answer, but rather indicated that plaintiffs were in the process of reviewing their decision to reject defendant's answer. Accordingly, defendant's cross-motion is **GRANTED** to the extent that defendant's answer, originally served upon plaintiffs on or about March 19, 2007, is deemed timely served, and plaintiffs are directed to accept defendant's answer as such.

The foregoing constitutes the decision and Order of the Court.

Dated: June 20, 2008

HON. JOSEPH FARNETI
Acting Justice Supreme Court