

<b>Glasser v Dankberg</b>
2012 NY Slip Op 33816(U)
November 27, 2012
Supreme Court, New York County
Docket Number: 101727/2010
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

-----X  
DAVID GLASSER,

Plaintiff,

DECISION AND  
ORDER

-against-

JAY STUART DANKBERG,

Index No.  
101727/2010

Defendant.  
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**FILED**

DEC 03 2012

HON. ANIL C. SINGH, J.:

COUNTY CLERKS OFFICE  
NEW YORK

Plaintiff moves for a default judgment pursuant to CPLR 3212(a) contending that defendant failed to appear and answer the summons with notice. Defendant opposes the motion and cross-moves for an order: 1) dismissing this action on the grounds that plaintiff failed to serve a complaint in accordance with the demand for a complaint dated November 1, 2010 or, in the alternative, providing defendant with a reasonable time to serve/file an answer after service upon him of a verified complaint; 2) staying this action until plaintiff pays the costs involved with the January 20, 2011 dismissal by Judge Mendez in the Civil Court action David Glasser v. Jay Stuart Dankberg, index number 54194 CVN 2009; 3) directing plaintiff to serve any papers in the lawsuit at defendant's law office; and 4) finding *nunc pro tunc* that the "Demand for Complaint ... With Notice of Appearance"

dated November 1, 2010, was timely served as the affidavit of service was not filed with the County Clerk until at least October 26, 2011, thereby giving defendant at least until November 15, 2011 to serve a demand for a complaint. Plaintiff opposes the cross-motion.

Plaintiff David Glasser commenced this action by filing a summons with notice on February 8, 2010. Subsequently, plaintiff filed an amended summons with notice on October 5, 2010. The amended summons asserts causes of action for legal malpractice, quantum meruit, and unjust enrichment.

Plaintiff was personally served with the amended summons with notice on October 6, 2010.

On November 1, 2010, defendant served upon plaintiff a "Demand for Complaint Pursuant to CPLR 3012(d) With Notice of Appearance" (Cross-Motion, exhibit B).

Plaintiff David Glasser states in a sworn affidavit that he received the Notice of Appearance and Demand for Complaint. He states further that, within 48 hours of receipt thereof, by letter dated November 5, "I rejected Dankberg's 'Notice of Appearance,' etc., on the ground that it was untimely, stating 'You have already defaulted in this matter ... the deadline herein for you to either demand the complaint or serve a Notice of Appearance expired October 26'"(Glasser

Affidavit, Oct. 26, 2011, p. 2, para. 11).

It is undisputed that plaintiff neither filed nor served a complaint.

Plaintiff is moving now for a default judgment pursuant to CPLR 3215(g), contending that plaintiff has failed to timely answer or otherwise move in response to a pleading served upon him.

#### Discussion

CPLR 320(a) states in pertinent part:

The defendant appears by serving an answer or notice of appearance, or by making a motion which has the effect of extending the time to answer. An appearance shall be made within twenty days after service of the summons.... If the complaint is not served with the summons, the time to appear may be extended as provided in subdivision (b) of section 3012.

At the outset, it is important to note that defendant served a formal Demand for Complaint and Notice of Appearance upon plaintiff, even if it may have been served a few days beyond the twenty-day deadline.

In Taylor v. Taylor, 64 A.D.2d 592 [1<sup>st</sup> Dept., 1978], the First Department declined to enter a default judgment in favor of plaintiff under somewhat similar circumstances.

In Taylor, the plaintiff served a summons upon the defendant. Subsequently, defendant served a demand for a verified complaint. The demand

was rejected as untimely, and defendant was advised further that plaintiff would seek entry of a default judgment against him. Defendant then made a motion to restrain plaintiff from obtaining a default judgment and to compel service of the complaint. Special Term granted the relief requested on certain conditions.

The First Department agreed that plaintiff was not entitled to a default judgment, stating:

While it is true that the formal notice of appearance was not timely served (CPLR 320, subd [a]), nonetheless it is equally true that, by actively litigating the issue[s]... and submitting fully to the jurisdiction of the court, [defendant] had made an informal appearance in the action and was therefore technically not in default. Under these circumstances, [plaintiff] could not properly reject the demand for service of a verified complaint (CPLR 3012, subd [b]), and [defendant] could not be deemed in default.

(Taylor, 64 A.D.2d at 592) (internal citations omitted).

Likewise, it would be improper for this Court to disregard the fact that defendant served a Notice of Appearance and Demand for Complaint, even if the document was served slightly late.

Finally, the Court finds that defendant has stated no legal basis whatsoever for a stay of this lawsuit until plaintiff pays the costs involved with the Civil Court action.

Accordingly, it is

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

ORDERED that defendant's cross-motion is granted only to the extent that defendant shall be permitted to file and serve an answer to a verified complaint; and it is further

ORDERED that plaintiff is directed to serve a verified complaint upon defendant within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that defendant is directed to answer or move against the complaint within twenty days after service of the complaint; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on Jan 30<sup>th</sup>, 2013, at 9:30 AM.

The foregoing constitutes the decision and order of the court.

Date: 11/27/12  
New York, New York

Recf  
Anil C. Singh  
HON. ANIL C. SINGH  
SUPREME COURT JUSTICE

**FILED**  
DEC. 03 2012  
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