

**De Lage Landen Fin. Servs., Inc. v Kozupsky &
Lebowitz, LLP**

2012 NY Slip Op 30325(U)

February 6, 2012

Supreme Court, New York County

Docket Number: 112166/10

Judge: Judith J. Gische

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

JUDITH J. GISCHKE, J.S.C.

PRESENT:

PART 10

Justices

Index Number : 112186/2010
DE LAGE LANDEN FINANCIAL
vs.
KOZUPSKY & LEBOWITZ LLP
SEQUENCE NUMBER : 002
DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | **No(s)** _____

Answering Affidavits — Exhibits _____ | **No(s)** _____

Replying Affidavits _____ | **No(s)** _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED

FEB 08 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

FEB 06 2012

Dated: Feb 6, 2012

J. J. Gischke
JUDITH J. GISCHKE, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 10**

DE LAGE LANDEN FINANCIAL SERVICES, INC.,

Plaintiff,

-against-

KOZUPSKY & LEBOWITZ, LLP f/k/a
KOZUPSKY & ASSOCIATES, LLP.

Defendant.
_____X

DECISION/ORDER
Index No.: 112166/10
Seq No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

FILED

Papers

Numbered

Plt's n/m w/ JET affirm, exhs FEB. 08 2012 1
AOS 2

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the Decision and Order of the court is as follows :

This is an action to enforce a money judgment entered against Defendant, Kozupsky & Lebowitz, LLP f/k/a/ Kozupsky & Associates, LLP ("Defendant"). Presently before the court is a motion by Plaintiff, De Lage Landen Financial Services, Inc. ("Plaintiff") for entry of a default judgment against Defendant pursuant to CPLR § 3215. A prior motion for the same relief was denied by the court, without prejudice, to renew upon proper service within 90 days from date of entry. Said motion order was decided in the court's decision dated April 15, 2011, and entered on April 19, 2011 ("prior order"). The motion at bar has been submitted to this court unopposed, and consequently, it will be decided on default.

In the court's prior order, Plaintiff was granted permission to renew its motion within 90 days from the date of entry of the prior order. Plaintiff's time to properly serve the defendant was also extended. Thus, to comply with the prior order, Plaintiff should have re-served the defendant and filed its motion to renew on or before July 18, 2011. Plaintiff, however, filed the current motion with the court on October 28, 2011, which is approximately three (3) months after the deadline imposed by the court. Plaintiff asserts that its failure to timely re-serve is attributable to law office failure and should be excused.

Under certain circumstances, law office failure provides a reasonable excuse for why a party failed to comply with an order. (see Goldman v. Cotter, 10 A.D.3d 289, 291 [1st Dept 2004]). It is within the sound discretion of the court, however, to determine whether the submitted excuse is sufficient. (see id. [a law firm employee's misconduct was reasonable excuse for plaintiff's default]; Navarro v. A. Trenkman Estate, Inc., 279 A.D.2d 257, 258 [1st Dept 2001]; Travelers Property Casualty Company of America v. Consolidated Edison, 2008 NY Slip Op 33458U [N.Y. Sup. Ct. 2008] [unsuccessfully attempting to properly serve an affirmation in opposition was a reasonable excuse for default]).

In her affirmation, Plaintiff's attorney, Jaclyn Thomas, states that Plaintiff's prior motion for default judgment pursuant to CPLR § 3215(a) against Defendant was previously denied for insufficient service. Attorney Thomas states, however, that service upon a limited liability partnership ("LLP") is governed by CPLR § 310-a (CPLR § 310-a; Salvatore v. Kumar, 12 Misc. 3d 1157A [N.Y. Supp. Ct. 2006]). While personal service by delivery to any managing or general agent of the LLP in the state is good service,

* 4]
CPLR § 310-a(c) also allows for service of papers on the Secretary of State pursuant to LLP § 121-1505.

LLP § 121-1505 authorizes service on the Secretary of State as an agent for a registered LLP, or any person authorized by the Secretary of State, by personally delivering two copies of documents and a statutory fee of \$40. Attorney Thomas highlights that the affidavit of service previously provided to the court shows service under LLP § 121-1505, which appears to have been overlooked by the court. Thus, Attorney Thomas contends the Plaintiff properly served the Defendant pursuant to CPLR § 310-a (c) in the first place. Attorney Thomas contends that she, nevertheless, tried to re-serve Defendant through a managing or general agent in the intervening time but was unsuccessful. She contends this accounts for the delay in bringing this motion again.

Plaintiff has established that it personally delivered two copies of documents to the Secretary of State paid the statutory fee. Plaintiff has also established that its failure to timely renew was unintentional and that it was trying to comply with the court's order by re-serving the defendant, even though the original service was properly done. Since Plaintiff has served this motion on Defendant and Defendant has not opposed it or asserted any claim of prejudice, the court finds that Plaintiff has set forth a reasonable excuse for its delay in re-moving. The court will excuse the delay in making this motion and proceed to decide it on the merits.

Though proof of service of the complaint and this motion has been filed, Defendant has failed to answer Plaintiff's complaint or respond to any motion submitted by Plaintiff thereafter. Pursuant to CPLR § 3215(a), when a defendant has failed to

appear or plead, the plaintiff may seek a default judgment against it. Defendant has not appeared in this action or answered the complaint. Its time to do so has expired and not been extended by the court. Therefore, Plaintiff is entitled to default judgment, provided it otherwise demonstrates that it has a *prima facie* cause of action. (Gagen v. Klpany Productions Ltd. , 289 A.D.2d 844 [3d Dept 2001]). A default in answering Plaintiff's complaint constitutes an admission of the factual allegations therein and the reasonable inferences which may be made therefrom. (Rokina Optical Co., Inc. v. Camera King, Inc. , 63 N.Y.2d 728 [1st Dept 1984]). Defendant also admits "all reasonable inferences that flow from" those allegations. (Woodson v. Mendon Leasing Corp. , 100 N.Y.2d 62, 71 [2003]).

An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim [Zelnick v. Blderman Industries U.S.A. Inc. , 242 A.D.2d 227 (1st Dept 1997); and CPLR § 3215(f)] or a complaint verified by a personal with actual knowledge of the facts surrounding the claim [Hazim v. Winter , 234 A.D.2d 422 (2d Dept 1996); and CPLR §105(u)].

Here, Plaintiff provides the affidavit of Jaclyn E. Thomas, Plaintiff's attorney. Plaintiff asserts two causes of action against Defendant: the first cause of action based on breach of the lease agreement between Plaintiff and Defendant ("COA1"). The second cause of action seeks to enforcement of the Pennsylvania judgment Plaintiff obtained on June 21, 2010 ("COA2").

Enforcement of the Pennsylvania Judgment

Plaintiff alleges that the Pennsylvania Judgment was entered against

Defendant on default in the court of Common Pleas, Chester Court, Pennsylvania on June 21, 2010 for failure to appear or answer. Plaintiff seeks \$30,990.46 plus interest, including reasonable attorney's fees. The underlying basis for the relief requested is a final judgment entered in favor of Plaintiff against Defendant in the court of Common Pleas, Chester Court, Pennsylvania. A judgment from a sister state qualifies as an instrument for the payment of money only. (Fiore v. Oakwood Plaza Shopping Center , 78 N.Y.2d 572 (1991). "So long as jurisdiction has been obtained, a defendant's default in the rendering [jurisdiction] will not nullify the res judicata effect of the judgment and the full faith and credit doctrine still applies." (In re Rehabilitation of Frontier Ins. Co. 27 A.D.3d 274 [1st Dept 2006]) The judgment was entered in Pennsylvania on June 21, 2010. It has not been appealed and it has not been satisfied, despite due demand therefore. Accordingly, Plaintiff's second cause of action is granted.

Breach of Contract

Alternatively, Plaintiff claims it is entitled to a default judgment on its first cause of action, seeking judgment upon the equipment lease agreement (the "Agreement"). Plaintiff alleges that Defendant breached a written equipment lease agreement executed in 2007. Pursuant to the terms of the Agreement, Defendant contracted to lease equipment from Plaintiff for a period of sixty (60) months at \$520.00 per month, plus applicable tax. Although Defendant agreed to pay all lease payments reflected in the Agreement, Defendant failed to make monthly payments. Consequently, Defendant went into default. Upon default, the total amount due under the Agreement has been accelerated, in which Plaintiff is owed \$30,990.46 plus interest. COA1 is duplicative of the Pennsylvania Judgment and seeks the same relief as COA2.

Based on the foregoing, and for the reasons articulated, Plaintiff De Lage Landen Financial Services, Inc.'s motion for default judgment pursuant to CPLR § 3215 is granted as to the second cause of action. Plaintiff is entitled to money judgment against Defendant in the principal amount of Thirty Thousand, Nine Hundred and Ninety dollars, and Forty-six cents (\$30,990.46) together with interest from June 21, 2010, plus costs and disbursements, as taxed by the Clerk of the Court. The Breach of Contract cause of action is hereby severed and dismissed, for it is duplicative of Plaintiff's action to enforce the Pennsylvania Judgment.

Conclusion

In accordance herewith, it is hereby :

ORDERED that Plaintiff De Lage Landen Financial Services, Inc.'s motion pursuant to CPLR § 3215 for default judgment on its second cause of action based on the Pennsylvania Judgment against Defendant Kozupsky & Lebowitz, LLP f/k/a Kozupsky & Associates, L.P. is granted; and it is further

ORDERED that the Clerk shall enter a money judgment in favor of Plaintiff De Lage Landen Financial Services, Inc., against Defendant Kozupsky & Lebowitz, LLP f/k/a Kozupsky & Associates, L.P. , in the principal amount of Thirty Thousand, Nine Hundred and Ninety dollars, and Forty-six cents (\$30,990.46) together with interest thereon from June 21, 2010, plus costs and disbursements of this action , as taxed by the Clerk of the Court and Plaintiff shall have execution thereof; and it is further

ORDERED that Plaintiff De Lage Landen Financial Services, Inc.'s first cause of action, for breach of contract, is severed and dismissed as duplicative and redundant of the second cause of action; and it is further

* 8]
ORDERED that any requested relief not expressly addressed herein has
nonetheless been considered and is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
February 6, 2012

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED

FEB 08 2012

NEW YORK
COUNTY CLERK'S OFFICE