

<b>Elektra Fed. Credit Union v Brown</b>
2017 NY Slip Op 31103(U)
May 18, 2017
Supreme Court, New York County
Docket Number: 651596/2011
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

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ELEKTRA FEDERAL CREDIT UNION,

Plaintiff,

-against-

DARRIUS BROWN,  
Defendant.

-----X

DECISION AND  
ORDER

Index No.  
651596/2011

HON. ANIL C. SINGH, J.:

Plaintiff moves for entry of a default judgment against defendant pursuant to CPLR 3215, contending that defendant failed to comply with an order directing him to answer the complaint. Defendant opposes the motion and cross-moves to dismiss the action pursuant to CPLR 213 and 3215(c).

Plaintiff commenced this collection action by filing a summons and verified complaint on June 9, 2011. The complaint alleges that defendant Darrius Brown, as borrower, executed a promissory note with plaintiff Elektra Federal Credit Union, as lender, and defendant defaulted in making payments due. Plaintiff seeks damages in the sum of \$29,124.17, together with interest from February 16, 2011.

On January 3, 2012, plaintiff filed a motion for a default judgment. The motion was granted, and plaintiff was awarded a default judgment in an order

dated March 6, 2012.

On February 7, 2013, defendant, who was self-represented at the time, moved by order to show cause to vacate the default pursuant to CPLR 317, contending that he was never served. In an order dated March 6, 2013, the Court vacated the default judgment. The order stated that defendant “shall answer the complaint within 30 days of today” (NYSCEF Doc. No. 13). Despite the specific directive, defendant did not file an answer.

On February 27, 2017, plaintiff filed the instant motion to enter a default judgment based on the undisputed fact that defendant failed to answer. Counsel for plaintiff contends that it did not move for entry of a default judgment until now because “plaintiff file was misplaced” (Affirmation of Steven L. Rosenthal dated Feb. 23, 2017, p. 2).

Defendant Darrius Brown has submitted a sworn affidavit admitting that he did not file an answer. Brown does not dispute that the Court vacated the default judgment against him on March 6, 2013, and “on the papers I was to file an answer within thirty days” (Brown Aff., dated Mar. 13, 2017, p. 3, para. 2). He contends that on March 6, 2013, “while in front of the judge, the requirement of filing an answer was never explained to me” (*id.*). Further, Brown asserts that he only learned that he was required to answer the complaint when he was served with the

instant motion (id.).

### Discussion

CPLR 3215(c) provides that:

[I]f the 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, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.

Here, the default in answering occurred in April 2013. Accordingly, under CPLR 3215(c), the complaint was deemed abandoned as of April 2014, more than three years ago.

“Where, as here, a party moving for a default judgment beyond one year from the date of default fails to address any reasonable excuse for its untimeliness, courts may not excuse the lateness and ‘shall’ dismiss the claim pursuant to CPLR 3215(c)” (Giglio v. NTIMP, Inc., 86 A.D.3d 301, 308 [2<sup>nd</sup> Dept., 2011]).

The only explanation offered by plaintiff for the lengthy delay in moving for a default judgment is that the file was misplaced. Plaintiff’s tight-lipped explanation is not a reasonable excuse. The Court finds that plaintiff has not shown sufficient cause why the complaint should not be deemed abandoned and dismissed under CPLR 3215(c).

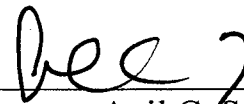
Accordingly, it is

ORDERED that the motion by plaintiff to enter a default judgment against defendant is denied; and it is further

ORDERED that the cross-motion by defendant to dismiss plaintiff's claim pursuant to CPLR 3215(c) is granted, and the complaint is dismissed without prejudice.

The foregoing constitutes the decision and order of the court.

Date: May 18, 2017  
New York, New York



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Anil C. Singh