

**Colonial Funding Network, Inc. v On Demand  
Delivery, Inc.**

2018 NY Slip Op 32190(U)

September 6, 2018

Supreme Court, New York County

Docket Number: 651763/2016

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 45

Justice

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INDEX NO. 651763/2016

COLONIAL FUNDING NETWORK, INC.,

MOTION DATE 08/10/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

ON DEMAND DELIVERY, INC., ERICKA SWANK, JAMES SWANK

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for JUDGMENT - DEFAULT

Upon the foregoing documents:

Plaintiff seeks entry of default judgments against the Defendants. Its motion comes well beyond the one-year period set forth in CPLR §3215(c) for seeking such relief after the purported default. Plaintiff has not shown sufficient cause for failing to make its motion in a timely manner. Accordingly, the motion is denied and the complaint is dismissed as abandoned.

Factual Background

Plaintiff, Colonial Funding Network, Inc. ("Colonial Funding") filed its Summons and Complaint in this action on April 4, 2016. (Complaint at 1 [NYSCEF 1]). The Complaint alleges that on October 6, 2015, Plaintiff entered into an Agreement with On Demand Delivery, Inc d/b/a On Demand Delivery ("On Demand Delivery") for the purchase of \$34,247.50 of future receivables for which Plaintiff's purportedly paid \$35,000.00<sup>1</sup>. (Id at ¶¶ 7-8). Plaintiff alleges that On Demand Delivery deposited \$7,355.00 of receivables into Plaintiff's account, and

<sup>1</sup> According to the agreement annexed as Exhibit 1 to this motion, Plaintiff paid \$25,000 for the receivables.

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thereafter stopped making any additional deposits, leaving a balance of \$26,892.50 worth of receivables due and owing under the Agreement. (*Id* at ¶ 15). Additionally, the Agreement provides for \$7,500 in “default” and “blocked account” fees to be added to the Defendants’ balance in the event Defendants altered or stopped depositing receivables. (*Id* at ¶ 17).

According to the Complaint, Ericka Swank and James Swank (“Swank Defendants”), the co-owners of On Demand Delivery, executed a guaranty of On Demand Delivery’s contractual obligation, which they have failed to honor.

### ***Procedural History***

Plaintiff represents that it completed service of the Summons and Complaint on all Defendants on April 21, 2016. On August 15, 2016 Plaintiff did an additional mailing of the Summons and Complaint to all Defendants in compliance with CPLR §3215 (g)(3). To date, Defendants have not answered or otherwise appeared. (Athanasopoulos Affirm. in Support [NYSCEF 8], ¶4.) On July 18, 2018 Plaintiff filed the instant motion for default.

Plaintiff acknowledges that the statutory deadline for obtaining a default judgment is one year from the date of the default, and that it failed to make its motion in a timely manner. *See* CPLR §3215(c). In fact, as described below, Plaintiff missed the deadline by over 1 year with respect to On Demand Delivery and 10 months with respect to the Swank Defendants. Plaintiff contends there is “sufficient cause” for its failure to meet the one-year deadline, and that the complaint therefore should not be dismissed under CPLR §3215(c).

Plaintiff’s purported explanation for its failure to file the instant motion within one year of the alleged default is that there were personnel changes in its internal legal department, and a change of external counsel, between July 2017 and February 2018. Plaintiff’s general counsel (who was hired at the end of June 2017) asserts that it was not until the completion of an internal

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audit of the legal department at an unspecified date that Plaintiff concluded that a motion for default judgment had not been timely filed. Carlson Affidavit (NYSCEF # 9) ¶1-2.

***Legal Standard***

Default judgments against both individuals and corporations are governed by CPLR §3215. Under CPLR §3215(a), a plaintiff may seek a default judgment “[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed. . . .”

CPLR §3215(c) sets forth the deadline for taking proceedings for the entry of a default motion. CPLR §3215(c) states, in relevant part:

If 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.

***Legal Analysis***

Plaintiff’s Motion for Default Judgments seeks the entry of a default against all Defendants pursuant to CPLR §3215.

*A. Default sought against On Demand Delivery*

Personal Service was purportedly completed on Defendant On Demand Delivery on April 21, 2016. Under CPLR §320(a), Defendant had 20 days from the date of service to answer the Complaint or otherwise appear. The time for On Demand Delivery to appear lapsed on or about May 11, 2016. Under CPLR §3215(c), the time for Plaintiff to seek a default judgment against On Demand Delivery lapsed on or about May 11, 2017. The instant motion was not filed until July 18, 2018, over 1 year past the statutory deadline.

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Failure to comply with CPLR §3215(c) requires dismissal of the Complaint unless sufficient cause is shown why the Complaint should not be dismissed. *Id.* (absent sufficient cause, the court “*shall* dismiss the complaint as abandoned”) (emphasis added). “It is plaintiff’s burden to show a lack of intent to abandon the action *and* to demonstrate both a reasonable excuse for the period of non-prosecution and merit to the action.” *Sports Legends, Inc. v Carberry*, 38 A.D.3d 470, 470 (1st Dept 2007) (emphasis added; citations omitted); *see also Giglio v NTIMP, Inc*, 86 A.D.3d 301, 301 (2<sup>nd</sup> Dept 2011) (a showing of sufficient cause requires “both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious.”). The determination of whether an excuse is sufficient in any given instance is committed to the sound discretion of the motion court. *Seide v. Calderon*, 126 A.D.3d 417, 417 (1<sup>st</sup> Dept 2015).

The Court does not find the excuse offered by Plaintiff – basically, a failure of communication within its internal legal department and with external counsel - to be persuasive. *See Colonial Funding Network, Inc. v. Floor Play, LLC*, 2018 WL 4005862 (August 22, 2018 N.Y. Sup) (denying belated motion for default judgment by Colonial Funding under substantially the same circumstances as presented in the instant case). Under the terms of CPLR §3215(c), excusing a party from compliance with the one-year deadline for seeking a default judgment is the exception rather than the rule. A failure of a party or its counsel to keep track of the case, without extenuating circumstances more compelling than those present here, does not constitute sufficient cause. *See, e.g., Herzbrun v. Levine*, 23 A.D.2d 237, 238 (1<sup>st</sup> Dept 1965) (the fact that plaintiffs moved out of the country and “lost contact” with their attorney did not constitute sufficient cause under CPLR §3215(c)); *cf. e.g., Smith v. Arce*, 78 A.D.3d 612 (1<sup>st</sup> Dept 2000)

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(sufficient cause was found where delay was explained by law office failure in the aftermath of the sudden death of lawyer's child).

Accordingly, dismissal of the complaint is mandated under CPLR §3215(c)

*B. Default sought against Swank Defendants*

Similarly, service on the Swank Defendants was complete on April 22, 2016. As they are individually named Defendants, under CPLR §3215(g), prior to seeking a default, Plaintiff mailed a copy of the pleadings to the Swank Defendants' last known address. This second method of service was completed on August 15, 2016. Therefore, the time for the Swank Defendants to respond to the Complaint lapsed on or about September 5, 2016. Under CPLR §3215(c), Plaintiff had until September 5, 2017 to obtain a default against the Swank Defendants for their failure to answer the Complaint or otherwise appear. The instant motion for a default judgment was filed 10 months past the statutory deadline.

The excuse offered by Plaintiff for the failure to take proceedings for the entry of a Default Judgment against the Swank Defendants is the same excuse offered as to Defendant On Demand Delivery and is rejected for the same reasons.

**[Remainder of page intentionally left blank. Continued on Next Page]**

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Therefore, it is:

**ORDERED** Plaintiff's Motion for Default Judgments is denied; it is further

**ORDERED** Plaintiff's Complaint is dismissed as abandoned, without prejudice and without costs; and it is further

**ORDERED** Plaintiff is directed to serve Defendants with a copy of this Order together with Notice of Entry.

**HON. JOEL M. COHEN  
J.S.C.**

  
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JOEL M COHEN, J.S.C.

9/6/2018  
DATE

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE