

Jetro Holdings LLC v City Wings Cafe Corp.
2018 NY Slip Op 32265(U)
September 17, 2018
Civil Court of the City of New York, Kings County
Docket Number: 5968/2017
Judge: Cenceria Edwards
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS

-----X
JETRO HOLDINGS LLC d/b/a HYCO RESTAURANT
SUPPLY Co.,

Plaintiff,

-against-

CITY WINGS CAFE CORP. and ZHEN ZHU,

Defendants.
-----X

Index No. 5968/2017

DECISION/ORDER

**RECITATION, AS REQUIRED BY CPLR 2219 (A), OF THE PAPERS CONSIDERED ON THE REVIEW
OF THIS MOTION FOR SUMMARY JUDGMENT.**

**PAPERS
NOTICE OF MOTION AND ANNEXED AFFIDAVITS**

**NUMBERED
1**

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Plaintiff, Jetro Holdings LLC, doing business as Hyco Restaurant Supply Co. (Jetro), commenced this action against Defendants, City Wings Cafe Corp. (City Wings) and Zhen Zhu (Zhu), on March 27, 2017, (with service of process complete and filed with the court on April 28, 2017) seeking to recover \$9,791.34 from an alleged breach of contract resulting from failure to pay for food supplied by Jetro, and for an alleged personal guarantee.

Jetro now moves for default judgment (filed June 5, 2018) against City Wings pursuant to Civil Practice Law and Rules § 3215 (a), claiming that it never answered the complaint; and severance of the action with respect to Zhu, since Jetro has yet to serve Zhu.

In support of its motion, Jetro submits an affidavit from Carl Talesnick, an officer of Jetro; a copy of the summons and complaint; an affidavit of service; copies of invoices; and a copy of a cancelled check.

DEFAULT JUDGMENT (CPLR 3215)

Under CPLR 3215, when “a defendant has failed to appear, plead or proceed to trial on an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him” (CPLR 3215 [a]). “If the plaintiff’s claim is for a sum certain or for a sum which computation can be made certain, application may be made to the clerk within one year after the default” (*Id.*). If the plaintiff fails to seek judgment within one year of default, “the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own motion, unless sufficient cause is shown why the complaint

should not be dismissed” (CPLR 3215 [c]; *see also Perricone v City of New York*, 62 NY2d 661, 464 NE2d 980 [1984]).

Assertions of law office failure must be supported by “a detailed and credible explanation of the default” (*People’s United Bank v Latini Tuxedo Mgt., LLC*, 95 AD3d 1285, 1286, 944 NYS2d 909, 909 [2d Dept 2012]). The Second Department has found vacatur based on law office failure appropriate where, in part, (1) the default was not lengthy, (2) the party requesting vacatur showed it did not intend to abandon the action, (3) lack of prejudice to the opposing party because of the delay, and (4) the delay was not willful (*Henry v Kuveke*, 9 AD3d 476, 479, 781 NYS2d 114 [2d Dept 2004]). Conclusory and unsubstantiated claims of law office failure do not rise to the level of a reasonable excuse (*Piton v Cribb*, 38 AD3d 741, 742, 832 NYS2d 274, 274 [2d Dept 2007]).

Plaintiff’s attorney moved for default judgment approximately one month beyond the statutory deadline and provided excuses: Plaintiff’s attorney affirmed her attempts to serve Defendant, Zhu, were unsuccessful and the initial default judgment motion was withdrawn to refile with documentary evidence to support its claim. Although Plaintiff’s counsel did not provide documentary evidence to support its delay in moving for default, the court finds Plaintiff’s assertions of law office failure are credible and reasonable in the interest of justice. Additionally, the court notes Plaintiff missed the statutory deadline to move for default judgment by only one month due to additional time necessary to include documentary evidence, which is de minimis and Defendant, City Wings, did not suffer any prejudice as it did not appear in the action despite proper and timely service upon the secretary of state (CPLR 311-a).

Moreover, Plaintiff’s officer, Carl Talensnick, averred it provided food products to Defendant and Defendants failed to pay the agreed upon sum demanded in the complaint, \$9,791.34. In further support of its motion, Plaintiff attached invoices and checks it received from Defendant, City Wings, making payments on the accounts. Under the circumstances herein, Jetro’s claim is meritorious; Plaintiff has demonstrated sufficient cause why the complaint should not be dismissed (CPLR 3215 [c]) and the default judgment granted against City Wings.

SEVERANCE/TIME TO SERVE SUMMONS AND COMPLAINT

“In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue” (CPLR 603).

A plaintiff has 120 days after the commencement of an action to serve defendant with the summons and complaint or seek the court’s permission to extend the time to serve the summons and complaint (CPLR 306-b). Under CPLR 306-b’s “good cause” standard, “a plaintiff must show reasonable diligence in attempting to effect service” before the court will exercise its discretion to grant an extension (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 [2001]). Here, good cause “does not include conduct usually characterized as ‘law office failure’” (*Id.* at 105). Under its “interest of justice” standard,

the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to the defendant (*Id.* at 105-106).

Plaintiff has not requested leave of the court to serve Defendant Zhu nor has Plaintiff demonstrated any attempts to serve Zhu. Counsel avers that her office failed to file this motion to vacate the default within the one-year limit because her office made several unsuccessful attempts to serve Zhu. Counsel did not move to extend her time to serve Zhu with the summons and complaint, nor has counsel demonstrated good cause or that extending the time to serve the summons and complaint will serve the interests of justice. Thus, the court does not have personal jurisdiction over Zhu and any matters regarding Zhu are not properly before this court (*see Hafkin v N. Shore Univ. Hosp.*, 279 AD2d 86 [2d Dept 2000] *aff'd Leader v Maroney, Ponzini & Spencer*, *supra*).

Jetro's request for severance is inappropriate since Zhu was not served in the action and the appropriate relief is an extension of time to serve Zhu with the summons and complaint, which Jetro failed to seek. Resultingly, the action against Zhu is dismissed and severing the defendants is moot.

Accordingly, it is

ORDERED, that Plaintiff's default judgment against Defendant City Wings Cafe Corp. is granted.

It is FURTHER ORDERED, Plaintiff's request to sever the action against Defendant Zhen Zhu is denied and the action against Zhu is dismissed.

This constitutes the Decision and Order of the Court.

Dated:
September 17, 2018

HON. CENCERIA EDWARDS