

**Colonial Funding Network, Inc . v Austin James
Assoc., Inc.**

2018 NY Slip Op 32614(U)

October 12, 2018

Supreme Court, New York County

Docket Number: 161779/2015

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY

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

-----X
COLONIAL FUNDING NETWORK, INC., INDEX NO. 161779/2015
Plaintiff, MOTION DATE 08/31/2018
- v - MOTION SEQ. NO. 001

AUSTIN JAMES ASSOCIATE, INC., CURTIS HERMAN
Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

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.

Plaintiff, Colonial Funding Network, Inc. ("Colonial Funding") filed its Summons and Verified Complaint in this action on November 16, 2015. (NYSCEF 1). Plaintiff completed service of the summons and complaint on all Defendants on November 25, 2015. (NYSCEF 24). On January 20, 2016 Plaintiff did an additional mailing of the summons and complaint to all

Defendants in compliance with CPLR § 3215(g)(3). (NYSCEF 25). To date, Defendants have not answered or otherwise appeared. On July 31, 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). Indeed, the instant motions were filed more than two years after the alleged defaults. Plaintiff contends there is “sufficient cause” for its failure to meet the statutory 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 audit of the legal department at an unspecified date in 2017 that Plaintiff concluded that a motion for default judgment had not been timely filed. (Athanasopoulos Affirmation NYSEF 18, Carlson Affidavit NYSCEF 19)

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 Dep’t 2007) (emphasis added; citations omitted); *see also Giglio v. NTIMP, Inc.*, 86 A.D.3d 301, 301 (2nd Dep’t 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 (1st Dep’t 2015).

The Court does not find the excuse offered by Plaintiff, a failure of communication within its internal legal department and with external counsel, to be persuasive. *See Colonial Funding Network, Inc. v. On Demand Delivery, Inc.*, 2018 WL 4278390 (Sup. Ct. New York County, September 7, 2018) (denying motion for default judgment by Colonial Funding under substantially the same circumstances as presented in the instant case); *Colonial Funding Network, Inc. v. Floor Play, LLC*, 2018 WL 4005862 (Sup. Ct. New York County, August 22, 2018) (same). 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 (1st Dep’t 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 (1st Dep’t 2000) (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)

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.


JOEL M. COHEN, J.S.C.

10/12/2018
DATE

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