

<b>Collins Cash Inc. v S &amp; K Mtn. Constr. Inc</b>
2022 NY Slip Op 32955(U)
August 31, 2022
Supreme Court, Kings County
Docket Number: Index No. 502259/2020
Judge: Richard J. Montelione
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At an IAS Term, Part DJMP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the \_\_\_<sup>th</sup> day of \_\_\_\_\_, 2022.

AUG 31 2022

P R E S E N T: HON. RICHARD J. MONTELIONE  
Justice.

-----X  
COLLINS CASH INC. d/b/a SMART BUSINESS FUNDING

DECISION and ORDER

Plaintiff,

Index No.: 502259/2020

-against-

S & K MOUNTAIN CONSTRUCTION INC

Defendant.

Mot. Seq. 1-2

The following e-filed papers read herein:

NYSEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	_____	<u>4-5, 11-12, 14</u>
Opposing Affidavits (Affirmations)	_____	<u>19, 22-23</u>
Affidavits/ Affirmations in Reply	_____	<u>24</u>

In this action seeking payment of fees allegedly earned by plaintiff for securing a business loan for the defendant, plaintiff moves for a default judgment pursuant to CPLR 3215 on its causes of action for breach of contract, and unjust enrichment, upon the grounds that the defendant, S & K Mountain Construction Inc, has defaulted in appearing and answering in this action.

Defendant cross moves in opposition to the motion and for an order dismissing the action on the grounds of improper service and lack of jurisdiction over the defendant, who has not done business in New York nor is otherwise connected to the State of New York.

The summons and complaint were served on defendant corporation at its place of business in Walla Walla, Washington on January 29, 2020. Defendant filed an answer

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pro-se on February 13, 2020. Plaintiff correctly contends that the defendant corporation could not appear in an action pro se and needed to be represented by an attorney or the answer would be a nullity. See CPLR 321(a).

In opposition, defendant filed a cross motion by its retained New York counsel, seeking to excuse the late answer and cross-moved to dismiss. Plaintiff's motion for a default (filed March 11, 2020) was made barely forty days from the service of the summons and complaint on January 29, 2020. Defendant's pro-se answer was filed on February 13, 2020, well within the twenty (20) days set forth in CPLR 320(a). Although the answer may be deemed a nullity as it was not filed by counsel, plaintiff did not file any rejection of the answer, or otherwise advise the out-of-state, pro-se litigant that the answer was defective until the default judgment motion was filed. The flaw in the answer was immediately corrected by virtue of the cross motion filed by counsel, a mere twelve days later, on March 23, 2020, seeking to, among other relief, direct the plaintiff to accept the answer.

In its cross-motion in opposition, defendant contends that it had no direct relationship with plaintiff, that plaintiff's action is based upon predatory lending practices, that the service of the summons and complaint was defective by virtue of a failure to give notice of e-filing, and that the defendant is not subject to the jurisdiction of the State of New York.

"A defendant seeking to vacate a default in answering a complaint pursuant to CPLR 5015(a) must show both a reasonable excuse for the default and the existence of a potentially meritorious defense" (*Natanel v Plaza Ins. Co.*, 200 AD3d 890, 891; see CPLR 5015[a][1]; *Elderco, Inc. v Kneski & Sons, Inc.*, 183 AD3d 703, 703). "Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (*Natanel v Plaza Ins. Co.*, 200 AD3d at 891 [internal quotation marks omitted]).

Here, given the totality of all relevant factors, including the lack of any evidence of willfulness by the defendant, who answered promptly, though technically ineffectually, the short delay in correcting the flawed filing of the answer, the lack of any demonstrable prejudice to the plaintiff whatsoever in the short delay, and the strong public policy in favor of resolving cases on the merits, the defendant established a reasonable excuse for its default (see *id.*; *Stango v Byrnes*, 200 AD3d 821, 823; *Garcia v City of New York*, 189 AD3d 788, 789; *P&H Painting, Inc. v Flintlock Constr. Servs., LLC*, 179 AD3d 1086, 1087). In addition, the defendant established a potentially meritorious defense to the action. *6 Crannell Street, LLC, et al., v Urban Green*

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*Equities, LLC*, 207 A.D.3d 603, 604, 170 N.Y.S.3d 476, 477 [2022]).

With regard to defendant's cross-motion, the complaint alleges that the work that the plaintiff did for defendant was performed in New York and defendant acknowledges that it had contacts with a New York firm attempting to aid in brokering the loan in issue. Additionally, defendant contends that the service of the summons and complaint was defective because the process server did not serve notice of electronic filing as required in Rule 202.5-b, and contends that the complaint should be dismissed under CPLR 2102 (c) and 22 NYCRR §202.5(d)(1)(v)(D).

"When a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015 (a)(4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015(a)(1)" (*Roberts v Anka*, 45 AD3d 752, 753). A New York Court may exercise jurisdiction, pursuant to CPLR 302, where:

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce...

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Here, defendant does not fit within any of the categories which would provide the court with a jurisdictional basis to hear to matter. CPLR 302. There is a contract that refers to a loan that was actually funded, and this agreement clearly provides as between the parties to the contract, and their "affiliates," which is undefined, shall arbitrate in Montgomery County, Maryland (NYSCEF No. 8). To the extent plaintiff can be seen as an "affiliate" or otherwise a third-party beneficiary under this contract (NYSCEF No. 8), plaintiff is precluded from commencing an action in New York under its specific terms. Notwithstanding the applicability of this contract, the plaintiff has not provided the court with any basis showing that defendant ever transacted business in New York which would allow for an action in breach of contract (*Cf. Skutnik v. Messina*, 178 A.D.3d 744).

Accordingly, it is

**ORDERED** that plaintiff's motion for a default judgement is denied in its entirety, and it is further

**ORDERED** that defendant's cross-motion is granted and the complaint is DISMISSED.

Any additional relief not explicitly granted herein is denied.

The foregoing constitutes the decision and order of the court.

ENTER



Hon. Richard J. Montelione, J.S.C.