

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

NJUETTA ALLOU

Plaintiff,

-against-

CAC LEASING, INC., INTERNATIONAL LEASE
AND FINANCE CO., OLYMPIA TRAILS BUS
COMPANY and FRED JOHNSON

Defendant

Index No: 8303/97

Motion Date: 3/21/07

Motion Cal. No.: 1

Motion Seq. No.: 3

The following papers numbered 1 to 7 read on this motion by defendant, CAC LEASING, INC.(hereinafter CAC), for an Order vacating its default in appearing and permitting it to serve an answer and defend on the merits

PAPERS
NUMBERED

Order to Show Cause-Affidavits-Exhibits	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Replying Affidavits.....	

Upon the foregoing papers it is ordered that this motion is denied.

This action arose out of an automobile accident which occurred in 1994. Plaintiff commenced the action in 1997 and moved for a default judgment as against the defendants, CAC and Johnson, who did not appear in the action. The motion was granted without opposition by Order dated October 29, 1997. After the co-defendants, International Lease and Finance Co. and Olympia Trails Bus Company were granted summary judgment in their favor dismissing the complaint an inquest was held on January 2, 2002. The plaintiff was awarded \$25,000.00 as damages and a judgment thereon was entered on April 4, 2006.

CAC now moves for an Order granting leave to renew/reargue the denial of defendant's Order to Show Cause based upon newly discovered evidence, vacating the judgment in favor of defendant or vacating its default and permitting it to interpose an answer and defend on the merits.

The defendant has not identified what Order to Show Cause was denied and which it seeks to reargue or renew upon newly discovered evidence and, thus, this branch of the motion is denied.

A defendant seeking to vacate a judgment entered upon its default in appearing and answering a complaint must demonstrate both a reasonable excuse for the default and the existence of a meritorious defense (see CPLR 5015[a][1]; Mount Sinai Hosp. of Queens v. Hertz Corp., 3 AD3d 523, 524 [2004]; Thattil v. Mondesir, 275 AD2d 408 [2000]; Manigat v. Louis, 262 AD2d 289 [1999]). The defendant has failed to establish either in this case.

The plaintiff submitted two affidavits of service of the summons and complaint upon CAC which were filed in court. The first affidavit asserts that the defendant, CAC, was served on April 17, 1997 pursuant to CPLR 311 by delivering a copy of the summons and complaint to Paul Schneitz, managing agent. The second affidavit asserts that CAC was served pursuant to Business Corporation Law § 306 on April 21, 1997 by delivering two copies of the summons and complaint to the Secretary of State.

A properly executed affidavit of service is prima facie proof of the facts contained therein (see, Rox Riv 83 Partners v. Ettinger, 276 AD2d 782 [2000]; Fairmount Funding Ltd. v Stefansky, 235 AD2d 213 [1997]; Skyline Agency, Inc. v. Ambrose Coppotelli, Inc., 117 AD2d 135, 139 [1986].) Charles Schwartz' CAC vice-president, conclusory unsubstantiated denial of receipt of service of process by either method, (see Sando Realty Corp. v Avis, 209 AD2d 682 [1994]; Genway Corp. v. Elgut, 177 AD2d 467 [1991]; Colon v. Beekman Downtown Hospital, 111 AD2d 841 [1985]) is insufficient to rebut the presumption of proper service created by an affidavit of service and does not constitute a reasonable excuse for its default (see General Motors Acceptance Corp. v. Grade A Auto Body, 21 AD3d 447 [2005]; 96 Pierrepont, LLC v. Mauro, 304 AD2d 631 [2003]; Truscello v. Olympia Constr., 294 AD2d 350, 351 [2002]).

Moreover, no excuse is even offered for the inordinate delay of over 9 years in seeking to vacate its default in appearing in this action despite having been served with the plaintiff's motion for a default judgment, the Order with Notice of Entry granting the default judgment and the notice of inquest (see Bekker v. Fleischman, 35 AD3d 334 [2006]; Trotman v. Aya Cab Corp., 300 AD2d 573 [2002]. Such conduct indicates an intentional default (see, Eretz Funding v. Shalosh Assoc., 266 AD2d 184, 185 [1999]). In addition, insofar as this application is made pursuant to CPLR 5015(a)(1) more than 9 years after service of the Order with Notice of Entry granting the default judgment as to liability, it must be denied as untimely (see Gainey v. Anorzej, 25 AD3d 650 [2006]).

Nor has the defendant established a meritorious defense. The defendant's unsubstantiated claim that International Lease & Finance Co., a co-defendant, and not CAC was the owner of the vehicle is insufficient without submission of the documentary evidence mentioned in the papers (see Fekete v. Camp Skwere, 16 AD3d 544 [2005]). Although both defense counsel and the defendant refer to various Exhibits, no exhibits were included in the motion papers. In addition, Judge Lonschein, in the Order dated, February 12, 1998 granted the co-defendants' motion for summary judgment dismissing the complaint insofar as it was asserted against them on the ground that they did not own the vehicle involved in the accident.

To the extent that the defendant's motion is made pursuant to CPLR 5015 (a) (2) "newly discovered evidence", the motion must still be denied. CPLR 5015 (a) (2) provides in pertinent part that a party may be relieved from a judgment obtained on default based upon "...newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404". The defendant has failed to identify and submit the newly discovered evidence and failed too demonstrate that the evidence could not have been discovered earlier.

Dated: April 6, 2007
D# 30

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J.S.C.