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Trials & TRIBULATIONS

To notice, or not to notice, that is the question

An issue that is certain to be resolved by the New York State Court of Appeals in the near future, based upon the varying results amongst the appellate divisions, is whether a defendant that appears in a lawsuit, but then subsequently defaults in the course of that litigation, is entitled to be notified of the return date for a default motion.

Although the defendant was not provided notice of a default motion, the Appellate Division, Second Department, in *Paulus v. Christopher Vacirca, Inc.*, __ AD2d __, 2015 NY Slip Op. 02944 (2d Dep't April 8), kept the underlying default intact because the defendant did not show a reasonable excuse for not answering the complaint, but vacated the money judgment.

As a matter of first impression, the Second Department ruled that the defendant was entitled to "oppose entry of a default judgment to the limited extent of contesting the sufficiency of the proof of facts submitted by the respondents [plaintiffs] in support of the motion, and contesting damages," Slip Op. at *7.

FACTS

The case arose from a 2005 remodeling job the defendant did for the plaintiff. Two months after the work commenced and was completed, the plaintiffs began to experience flooding and damage to their home and personal property, *Id.* at *1. A lawsuit was commenced against the defendant and his company in 2006 for breach of contract and negligence.

More than a year after the commencement of the lawsuit, the plaintiff obtained the first default judgment based upon the defendant's failure to answer the complaint, *Id.* However, the Supreme Court vacated the default judgment based upon inadequate service.

After the default was vacated, the defendant filed a dismissal motion, and five of the six causes of action against the defendant were dismissed. The defendant was instructed to answer the remaining cause of action within 30 days, however, he failed to answer and plaintiff obtained a default judgment against him for \$27,500, *Id.*

Not surprisingly, defendant moved to vacate the judgment

because plaintiff failed to provide any notice – as required pursuant to CPLR §3215(g)(1) – regarding the default motion. According to CPLR §3215(g)(1), when a defendant appears in an action but subsequently defaults, they are "entitled to at least five days' notice of the time and place" of the upcoming default motion, *Id.* at *2.

The Supreme Court, relying upon a decision from the Appellate Division, Third Department, denied the defendant's motion to vacate because he failed to establish his entitlement to relief pursuant to CPLR §5015(a)(1), by demonstrating the existence of a reasonable excuse for his failure to answer the complaint and the existence of a meritorious defense.

The Supreme Court also found that the defendant was not entitled to vacatur of the default judgment because the plaintiff's failure to comply with the provisions of CPLR §3215(g)(1) did not render the resulting judgment a nullity and did not relieve the defendant from demonstrating a meritorious defense, *Id.* The defendant subsequently appealed to the Second Department.

DECISION

The Second Department found that there was no dispute that plaintiff did not provide the five-day notice as required by CPLR §3215(g)(1), but instead noticed the defendant pursuant to CPLR §3215(g)(3), which only applies when a default judgment "based upon nonappearance is sought against a natural person in an action based upon nonpayment of a contractual obligation," *Id.* at *3. Under CPLR §3215(g)(1), notice is provided by mailing the summons to the person's place of residence. The Second Department found that procedure inappropriate, since it pertained only to defendants who never appeared in the litigation.

Since the defendant appeared, CPLR §3215(g)(1) applied and he was entitled "to at least five days' notice of the time and place" of the motion for leave to enter a default judgment. That notice requirement is consistent with the mandates of CPLR §2103(3), which requires that papers served on any party to a litigation must also be served on the party who has appeared in the action, whether

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or not that party has subsequently defaulted, *Id.* at *2.

The intent of providing notice allows the defendant who has appeared in the action an opportunity to move to be relieved of his or her underlying default prior to entry of the judgment, as well as to raise objections to the sufficiency of the proof offered in support of the motion for leave to enter a default judgment and to the proposed judgment itself.

The defendant appeared in the underlying action when he moved to dismiss the complaint and was clearly entitled to notice of the motion for leave to enter a default judgment pursuant to CPLR §3215(g)(1), *Id.* at *3. Since the defendant was also represented by counsel, the motion papers were required to have been served upon his attorney. Moreover, providing a defendant with an additional copy of the summons is not tantamount to providing a return date for the default motion, *Id.*

However, the Second Department determined that “the failure to provide proper notice of a motion can readily be viewed as a fundamental defect because it deprives the opposing party of a fair opportunity to oppose the motion,” *Id.* at *6.

Even though the defendant failed to show a basis to be relieved of the underlying default, a vacatur of the judgment itself was justified because the failure to provide the required notice deprived defendant of “both an opportunity to oppose entry of the judgment by contesting the sufficiency of the facts filed in support of the motion, and an opportunity to challenge the amount of damages sought by the plaintiffs,” *Id.*

While a defendant who has defaulted admits all “traversable allegations in the complaint, including the basic allegation of liability, the defendant does not admit the plaintiff’s conclusion as to damages,” *Id.* at *7. Accordingly, where judgment against a defaulting defendant is sought by motion to the court, a defendant is entitled to determine damages, cross examine witnesses, give testimony and offer proof of mitigation of damages.

Since the defendant failed to establish a basis to be relieved from his underlying default in failing to answer, the underlying default remained in place. For those reasons, the Second Department held that the failure to provide the defendant with the five-day notice was a jurisdictional defect that deprived the court of the authority to entertain a default motion. While this defect requires vacatur of the judgment, it does not entitle the defendant “to be relieved of the underlying default upon which judgment is sought and to defend the action on its merits,” *Id.*

Based upon this rationale, the Second Department found that the defendant may only be permitted to contest the sufficiency of the proof of facts submitted by the plaintiff in support of the default motion, and contest damages, *Id.* at *7.

SPLIT AMONGST APPELLATE DIVISIONS

Interestingly, this outcome would depend on where the litigation

was venued. For example, the Appellate Division, Third Department, previously identified that the failure to provide notice under §3215(g)(1) did not, by itself, justify disturbing a default judgment.

The Third Department, in *Fleet Fin. v. Nielsen*, 234 AD2d 728 (3d Dep’t 1996) (the decision relied upon by the Supreme Court in Paulus) found that the failure to provide the CPLR §3215(g)(3) notice did not, “standing alone,” warrant vacatur of a default judgment, because the lack of notice should not constitute a fatal defect where the defendant cannot show the existence of a meritorious defense.

The defendant homeowners, in *Fleet*, formally appeared in a foreclosure action by exchanging correspondence with the plaintiff’s attorney, but did not answer. The plaintiff obtained a default judgment of foreclosure and the defendant’s home was sold at a foreclosure sale based upon the homeowners’ inability to prove a meritorious defense.

Conversely, the Appellate Division, First Department, took a different approach in *Walker v. Forman*, 104 Ad3d 460 (1st Dep’t 2013). The defendant’s motion to strike the plaintiff’s pleadings for failure to comply with a discovery order was granted by the Supreme Court. The defendant obtained a judgment in his favor against the plaintiff for the sum of \$116,530, after an inquest that was not noticed to the defendant.

The First Department affirmed the order and concluded that the Supreme Court providently exercised its discretion in striking the plaintiff’s pleading based upon his intentional and unexcused failure to comply with the discovery orders.

However, the First Department reversed and vacated the judgment because “as appearing party whose pleadings were stricken, plaintiff was entitled to five days’ notice of the inquest ... The failure to give such notice requires a new inquest, on proper notice,” *Id.* at 460.

Finally, the Appellate Division, Fourth Department, ruled, in *Curto v. Diehl*, 87 AD3d 1374 (4th Dep’t 2011), that the failure to comply with the notice requirement of CPLR §3215(g)(1) deprives the court of the jurisdiction to entertain a motion for leave to enter a default judgment, thereby rendering the ensuing judgment null. Therefore, the default motion made without providing required notice is defective, requiring a vacatur of the judgment.

Certainly with the split amongst the departments in this state regarding the five-day notice requirement, it is only a matter of time before the New York State Court of Appeals – perhaps in Paulus – takes up this issue and provides uniformity with respect to what appears to be a straight forward statutory requirement.

In the meantime, if a matter is pending within the jurisdiction of the Third Department and a party is in default, a motion for leave to file a default judgment is not required to be on notice to the defaulting party despite the mandate of §3215(g)(1).

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