

LAW CURRENTS An informational newsletter from Richard A. Klass, Esq.



You Snooze, You Lose!

The subcontractors brought an action against the general contractor and its principal alleging breach of an oral contract made in January 2007 for failing to pay for construction services rendered on a building located in Flushing. The action was dismissed as to the individual and the subcontractors' request for a default judgment against the general contractor was denied. The subcontractor then brought an action against the contractor who hired them alleging breach of the oral contract; however, they were unable to collect on the judgment because the corporation was out of business.

Queens County action

The subcontractors then brought an action in the Supreme Court, Queens County only against the property owner, alleging unjust enrichment for the contracting services rendered by them. Despite service of the Summons and Complaint in 2011, the plaintiffs did not seek the entry of a default within one year thereafter.

Kings County action

The subcontractors then brought yet another action in the Supreme Court, Kings County against the general contractor, contractor and

property owner, alleging both breach of contract and unjust enrichment. A default judgment was granted in their favor against all of the defendants except for the property owner. The property owner moved for dismissal of the action, which was granted.

Back to Queens

In 2017, the subcontractors moved for a default judgment against the property owner in the 2011 action.

In response to the motion, the property owner retained **Richard A. Klass, Your Court Street Lawyer**. The property owner cross-moved, pursuant to CPLR 3215(c), for dismissal of the action based upon the failure to take proceedings for entry of judgment within one year after the default. By Order dated April 6, 2018, the Supreme Court denied the motion for a default judgment and granted the cross-motion for dismissal of the action. The Court held that "plaintiff's counsel fails to proffer a reasonable excuse for its delay in timely making the instant application. After reviewing the extensive procedural history of the case and companion cases, it remains unclear why plaintiffs waited almost two years after [the court] dismissed their identical claim in Kings County to seek a default judgment against the defendant in this action."

The Court further rejected the claim made in opposition to the cross-motion that the matter should not be deemed abandoned.

Specifically, the court held, “While plaintiffs may contend they were in settlement negotiations and other litigation activity with the defendant, those activities ceased in May of 2015 when the matter was dismissed. In addition, plaintiffs fail to explain why it commenced a second action including the defendant in Kings County after it had already commenced the instant action or why they then let the instant matter linger over five and half years.”

Failure to take proceedings within one year after default

The subcontractors appealed the Supreme Court Order to the Appellate Division, Second Department. In affirming the Order and dismissing the appeal, the appellate court held, in *Karamuco v Gavriel Plaza, Inc.*, 172 AD3d 832, 833 [2d Dept 2019]:

“CPLR 3215(c) provides that ‘[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned . . . unless sufficient cause is shown why the complaint should not be dismissed’” (*Myoung Ja Kim v Wilson*, 150 AD3d 1019, 1020, quoting CPLR 3215[c]). This statute is strictly construed, as “[t]he language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory, inasmuch as courts ‘shall’ dismiss claims (CPLR 3215[c]) for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned” (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 307-308; see *Ibrahim v Nablus Sweets Corp.*, 161 AD3d 961, 963; *HSBC Bank USA, N.A. v Grella*, 145 AD3d 669, 671).

The statute further provides, however, that the failure to timely seek a default may be excused if “sufficient cause is shown why the complaint should not be dismissed” (*HSBC Bank USA, N.A. v Grella*, 145 AD3d at 671, quoting CPLR 3215[c]; see *Ibrahim v Nablus Sweets Corp.*, 161 AD3d 961, 963). To establish the sufficient cause required by CPLR 3215(c), “the party opposing dismissal must demonstrate that it had a reasonable excuse for the delay in taking proceedings for entry of a default judgment and that it has a potentially meritorious action” (*Aurora Loan Servs., LLC v Hiyo*, 130 AD3d 763, 764; see *Ibrahim v Nablus Sweets Corp.*, 161 AD3d at 963; *Wells Fargo Bank, N.A. v Bonanno*, 146 AD3d 844, 845-846). The determination of whether an excuse is reasonable is committed to the sound discretion of the motion court (see *Bank of N.Y. Mellon v Izmirligil*, 144 AD3d 1067, 1069; *Baruch v Nassau County*, 134 AD3d 658, 659).”

Here, the plaintiffs took no proceedings for the entry of a default judgment within one year following the defendant’s default, and they failed to establish a reasonable excuse for their delay in moving for leave to enter a default judgment. Accordingly, the lawsuit was dismissed.

— Richard A. Klass, Esq.

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Richard A. Klass, Esq., maintains a law firm engaged in civil litigation at 16 Court St., 28th Fl., Brooklyn, NY. He may be reached at (718) COURT•ST or RichKlass@courtstreetlaw.com with questions. Prior results do not guarantee a similar outcome.

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