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Advocate's VIEW

Case of the disappearing defendant: Default judgment for a sum certain and enforcement

Recent articles my colleagues have written focused on the intricacies and nuances of various provisions within the New York Civil Practice Law and Rules ("CPLR"). I now continue that trend, though my focus concerns the detailed, specific procedures in place to enter judgment for a sum certain and enforce that judgment against a non-appearing defendant.

The case is all too familiar: your client comes to you, invoices in hand, asking for your help to collect monies owed on a contract. At first your client's customer paid regularly, but now your client has not been able to reach its customer by telephone or mail. You follow up with the customer, sending a demand letter, but there is no response.

So, you file a lawsuit on behalf of your client and properly effect service of the summons and complaint, but the date you docketed for the answer comes and goes and the defendant has not appeared. You can now pursue a default judgment.

Navigating the path to a default judgment

CPLR 3215(a) sets forth a brilliant mechanism by which a plaintiff may seek a default judgment for a sum certain, *plus costs and interest*, against a non-appearing defendant by merely making an application with the county clerk. But be careful -- a plaintiff has only one year from the date of *default* to make the application.

An application for default judgment must include proof of service of the summons and complaint or summons with notice. *See* CPLR 3215(f). The plaintiff must also take care to follow an additional notice requirement when a default judgment is sought against: 1) a natural person for the non-payment of a contractual obligation, or 2) a



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corporation served pursuant to Business Corporation Law 306(b) (service on the secretary of state as agent). *See* CPLR 3215(g)(3)-(4).

This "additional notice," which is actually just a copy of the summons that was previously served, must be sent by mail to the natural person or corporation at least twenty days before a default judgment is entered.

See CPLR 3215(3)(i) (In the case of a natural person, "additional notice" is made by "mailing a copy of the summons by first-class mail to the defendant at his place of residence in an envelope bearing the legend 'personal and confidential' and not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt.") An affidavit detailing the service of additional notice and an affidavit of mailing of the notice must be filed with the application for default judgment. *See* CPLR 3215(g)(3)(i)-(ii).

An application for default judgment must also contain proof of the facts constituting the claim, the default, and the amount due. *See* CPLR 3215(f). When a verified complaint was initially filed, the verified complaint may be used to prove the facts constituting the claim and the amount due, and either the party or the party's attorney may submit an affidavit as to the default.

On the other hand, when a verified complaint was not initially filed, the party must file an affidavit attesting to "the facts

constituting the claim, the default and the amount due." *See id.*

It is also important to note a local nuance to the filing requirements. While CPLR 3215(f) provides that an applicant for a default judgment "shall file proof of service of the summons and the complaint," the Monroe County Clerk's office requires the affidavit of service to be filed *separately* with the clerk prior to filing the application for default judgment. This local nuance is especially pertinent when personal service is effectuated under CPLR 308(1) (allowing personal service on a natural person by delivering the summons to the person to be served), in that CPLR 308(1) does not generally require the filing of the affidavit of service.

Judgment enforcement mechanisms: The restraining notice

The first, and arguably the most important, judgment enforcement mechanism that may be utilized is the restraining notice. Once a default judgment has been entered, the judgment creditor may immediately issue a restraining notice to the judgment debtor, thereby prohibiting the judgment debtor from selling, assigning or transferring any assets. If, after the restraining notice has been served, the debtor does indeed sell, assign or transfer assets, the creditor will be entitled to assert a cause of action for fraudulent transfer.

A restraining notice is properly issued to a judgment debtor where it specifies "all of the parties to the action, the date that the judgment . . . was entered . . . [where] it was entered, the amount of the judgment . . . and the amount then due thereon, the

Continued on next page

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names of all parties in whose favor and against whom the judgment . . . was entered . . . and shall state that disobedience is punishable as a contempt of court, and it shall contain an original signature . . . [of the] attorney . . . [who] issued it.” See CPLR 5222(a).

Additionally, the restraining notice must contain the language set forth in CPLR 5222(b). A restraining notice is properly served upon a judgment debtor by personal service pursuant to CPLR 308 (providing for service of process upon a natural person) *or* by registered or certified mail, return receipt requested.

If the judgment creditor is serving a restraining notice upon a judgment debtor who is a natural person, the creditor is also required to provide the judgment debtor with a notice delineating certain types of money or property which may be exempt from collection, and to advise the

judgment debtor of the right to consult an attorney or to proceed in court pro se. (The requisite language for this notice is contained in CPLR 5222(e).) This notice must be mailed to the judgment debtor within four days of service of the original restraining notice. See CPLR 5222(d).

If the judgment creditor knows where the judgment debtor maintains a bank account, a restraining notice should immediately be issued to the bank. A restraining notice issued to the bank must include all of the same information that is set forth in the judgment debtor’s restraining notice and may be served in the same manner. See CPLR 5222(a). It must also include a statement that it is believed that the bank is in possession or custody of certain property in which the judgment debtor has an interest. See CPLR 5222(b).

When attempting to restrain a natural person’s bank account, the creditor must also attach to the bank’s restraining no-

tice: 1) a copy of the restraining notice; 2) an “exemption notice” (with language as set forth in CPLR 5222-a(b)(4)(a)); and 3) two “exemption claim forms” (with language as set forth in CPLR 5222-a(b)(4)(b) and the address sections completed). See CPLR 5222-a(b).

Once a bank account is properly restrained, a creditor may then execute upon the bank account by levy pursuant to CPLR 5232.

Navigating the CPLR to properly apply for the entry of a default judgment for an amount certain and to employ mechanisms to enforce that judgment can be daunting. It is important to carefully review all of the applicable rules pertaining to defaults and collections.

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