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## **New York Law Journal**

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### **Discover Bank v. Eschwege, 2007/5562 Decided: March 5, 2008**

Justice John F. O'Donnell

ERIE COUNTY  
Supreme Court

Appearances:

Eric M. Berman, P.C.

Kevin M. Knab, Esquire, of counsel Attorney for Plaintiff

Law Offices Of Kenneth Hiller

Kenneth R. Hiller, Esquire, of counsel Attorney for Defendant

**Justice O'Donnell**

#### **MEMORANDUM**

Defendant has moved to vacate a default judgment entered against her.

There is no dispute defendant defaulted on a credit card debt to plaintiff, Plaintiff originally sued defendant in November 2004. Defendant interposed an answer but plaintiff took a default judgment in February 2007. That judgment was vacated by order in April 2007.

Plaintiff brought a new action in June 2007. Defendant was allegedly served by "nail and mail" in July 2007. Defendant admits receiving a mailing in September 2007, but denies previous receipt. Defendant, acting pro se, contacted plaintiff's counsel to advise of the earlier dismissal. Plaintiff obtained a default judgment on November 19, 2007.

Defendant claims the default was unintentional and that the action is time barred.

The court finds defendant's default was excusable.

The parties agree that pursuant to the credit card agreement, disputes are governed by the laws of the State of Delaware. Plaintiff argues that the substantive laws of that state apply, but New York law applies procedurally.

The Delaware statute of limitations is three years. The New York statute is six years.

Plaintiff relies upon Education Resources Institute Inc. v. Piazza, 17 AD2d 513. In that case, the court found the longer statute of limitations of the creditor's home state allowed recovery against a New York debtor. As defendant points out, that case did not involve a specific agreement to apply the Delaware law. Plaintiff is not entitled to pick and choose which Delaware statute applies, and the claim is time barred.

Defendant's motion will be granted.

Submit order in accordance with this memorandum.

Supreme Court Justice O'Donnell