STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THOMAS J. COREY

Plaintiff

vs.

MEMORANDUM DECISION

STILLWATER HOLDINGS, LLC
WILLIAM R. GOODHUE and
LYNDA A. GOODHUE

Index No. 4476/07

Defendants

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **DUKE, HOLZMAN, YAEGER & PHOTIADIS, LLP**
Attorneys for Plaintiff
Charles C. Ritter, Esq., of Counsel

ZDARSKY, SAWICKI & AGOSTINELLI, LLP
Attorneys for Defendants
Joseph E. Zdarsky, Esq., of Counsel

CURRAN, J.

Defendants William R. Goodhue and Lynda A. Goodhue (collectively "the Goodhues") have moved by Order to Show Cause to vacate a default judgment granted against them on July 16, 2007 and filed August 1, 2007.[1]

On March 14, 2006, plaintiff and defendant Stillwater Holdings, LLC ("Stillwater") entered into an agreement whereby Stillwater was to purchase from plaintiff a

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[1] After obtaining the Order to Show Cause, defendant Stillwater Holdings LLC filed a Chapter 11 bankruptcy petition on September 19, 2007.

business known as "Lord Chumley's Restaurant" in Buffalo, New York. The transaction included the premises (consisting of five parcels of real property) and all "personal property" of the business.

On August 21, 2006, to cover a shortfall in the purchase money in connection with that sale, the parties to this action executed a promissory note whereby defendants agreed to pay plaintiff the sum of $150,000 with interest at 8%. The note was to be paid in one "balloon" payment of $153,000 due on November 21, 2006. The note is secured by a mortgage on the Goodhues' home located in East Amherst, New York.

On May 10, 2007, plaintiff commenced this action via a motion for summary judgment in lieu of complaint alleging a default in the payment due on November 21, 2006. Neither the summons nor the notice that accompanied the motion indicate the time within which defendants were to respond to the papers. However, the summons set forth a return date of June 14, 2007. It is undisputed that these initial papers were served on defendants.

On June 20, 2007, plaintiff filed what appears to be a "corrected" or amended summons (although it is not identified as such) which states that defendants must answer the complaint within 20 or 30 days but did not state when papers responsive to the motion were due. The Notice attached to those papers also indicates a new return date of July 12, 2007. The corrected/amended papers were not personally served on defendants and there is no indication that any application for leave to amend the summons was made as required by CPLR 305 (c).

The matter came before the Court on July 12, 2007 and no appearance was made on behalf of defendants. Accordingly, summary judgment was granted by default. On September 14, 2007, defendants brought an order to show cause seeking to vacate the default

judgment based upon: (1) mis-communication and/or law office failure; (2) the meritorious defense of fraud/misrepresentation; and (3) various jurisdictional grounds.

With regard to the default, defendants admit that they were served with the initial set of papers, but state that they turned the papers over to their prior attorney, who they believed was protecting their interests in the matter. The Goodhues further state that if they had been made aware that their prior attorney was not going to represent them, they would have retained another attorney to defend them.

Concerning the meritorious defense, defendants assert that they were induced to sign the note at issue in this action in reliance upon certain material misrepresentations made by plaintiff at the time of closing with respect to plaintiff's title to the properties that were to be transferred, the existence and extent of a New York State sales tax liability associated with the business, and the existence of known building code violations associated with the premises.

Defendants also assert that the initial summons in the action is jurisdictionally defective as it fails to advise that failure to respond to the papers will result in a judgment being taken against them by default. Defendants further assert that the initial notice of motion served on them did not contain a return date and they were never served with the "amended" papers, nor were they ever advised of the July 12, 2007 return date. Defendants claim that the "corrected" summons is still defective as it is the type normally used with a complaint, not a summary judgment motion in lieu of complaint. Finally, defendants note that judgment by default was improper as plaintiff did not comply with CPLR § 3215 (3) (I) which requires additional notice to be mailed to the Goodhues.

In opposition to the motion, plaintiff asserts that the papers were properly served, defendants had actual notice of the return date, and that in any event, all jurisdictional defenses have been waived. Plaintiff has submitted the affidavit of its former attorney stating that on June 26, 2007, defendants' prior attorney, on behalf of defendants, countersigned a letter agreeing that "service of motion papers on defendants May 16 and May 22, 2007 is deemed sufficient and defendants hereby waive any jurisdictional defenses arising therefrom." Plaintiff's prior attorney also asserts that on July 11, 2007, defendants' prior attorney contacted her and advised that defendants had no defense to the motion. Plaintiff also states that defendants have no meritorious defense or reasonable excuse for the delay and denies any fraud. Plaintiff further asserts that even if fraud were committed, it is not a proper defense to the note.

In reply, the Goodhues claim that subject matter jurisdiction cannot be waived, thereby rendering the purported waiver ineffectual. Further, the Goodhues state that they never gave their prior attorney authority to waive or authorize any correction of defects, including in the papers or in service. Finally, the Goodhues contend that fraud is a defense to an action on a promissory note.

It is well-established that a party seeking to vacate a default judgment is required to demonstrate both a reasonable excuse for the default and a meritorious defense to the action" (*Knupfer v Hertz Corp.*, 35 AD3d 1237 [4th Dept 2006]).

Based upon the record before the Court, it appears defendants believed that their prior attorney was protecting their interests in the matter and were unaware that their prior attorney purportedly waived any defects or irregularities in the papers. Similarly, it appears that

defendants were unaware that their prior attorney was not going to oppose the motion on their behalf. Accordingly, defendants have established a reasonable excuse for the default.

With regard to the meritorious defense, "even where an agreement contains a general merger clause, the Court of Appeals has held that the parol evidence rule does not bar admission of proof of fraudulent misrepresentations in an action to rescind the contract" (*GTE Automatic Elec. Inc. v Martin's Inc.*, 127 AD2d 545, 546 [1st Dept 1987], *citing Sabo v Delman*, 3 NY2d 155 [1957]). Similar to the note in *GTE*, the note at issue in the present action does not contain a merger clause nor is there any language to bar parol evidence of fraudulent misrepresentations (*see GTE Automatic Elec.*, 127 AD2d at 546). Defendants have set forth in their papers specific representations made by plaintiff or his agents upon which they allege they relied in executing the promissory note.

It is well settled that the "quantum of proof required to prevail on a motion to vacate a default order or judgment is not as great as is required to oppose summary judgment" (*Bilodeau-Redeye v Preferred Mut. Ins. Co.*, 38 AD3d 1277 [4th Dept 2007]). Accordingly, in light of the strong public policy that actions be resolved on their merits, the brief delay involved, the defendants' lack of willfulness, and the absence of prejudice to the plaintiff, defendants' motion to vacate the default judgment against the Goodhues is granted (*see New York and Presbyt. Hosp. v Am. Home Assur. Co.*, 28 AD3d 442 [2d Dept 2006]; *Mass. Asset Fin. Corp. v DiLaura*, 299 AD2d 948 [4th Dept 2002]).

Defendants shall settle an order with Plaintiff, and a pretrial conference shall take place on January 31, 2008 at 2:00 p.m.

DATED: December 12, 2007

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HON. JOHN M. CURRAN, J.S.C.