

Sky Bird Travel & Tours, Inc. v Cuka Tours, Corp.

2017 NY Slip Op 30296(U)

February 14, 2017

Supreme Court, New York County

Docket Number: 159540/2015

Judge: Cynthia S. Kern

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NYSCEF DOC. NO. 62

RECEIVED NYSCEF: 02/15/2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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SKY BIRD TRAVEL AND TOURS, INC.,

Plaintiff,

DECISION/ORDER
Index No. 159540/2015

-against-

CUKA TOURS, CORP., QEREM CUKOVIQ and
SUZANA CUKOVIQ,

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff commenced the instant action to recover sums due for airline tickets it sold to defendants. Defendants Qerem Cukoviq and Suzana Cukoviq (the “moving defendants”) now move for an Order pursuant to CPLR §§ 2221(d) and (e) granting them leave to renew and reargue a decision issued by this court denying their prior motions to vacate a default judgment against them and, upon renewal and/or reargument, for an Order vacating the default judgment. For the reasons set forth below, the moving defendants’ motion is granted.

The relevant facts are as follows. Defendant Cuka Tours, Corp. (“Cuka”) is a travel agency. Defendant Qerem Cukoviq was the CEO of Cuka. In its complaint, plaintiff alleges that defendant Suzana Cukoviq operated Cuka, although she states in her affidavit that she was a secretary for Cuka with “no executive discretion in the corporate affairs thereof.” On September 28, 2015, plaintiff commenced the instant action through service of a summons and complaint alleging that plaintiff sold airline tickets to defendants for which defendants failed to pay. Defendants failed to timely answer or otherwise appear in the action and thus plaintiff moved for a default judgment against defendants on or about December 1, 2015, which the court granted. On or about September 7, 2016, defendants Qerem Cukoviq and Suzana Cukoviq separately moved to vacate the default judgment entered against them. In a decision and order

dated October 19, 2016 (the "Decision"), the court denied the motions on the ground that defendants Qerem Cukoviq and Suzana Cukoviq had failed to provide a reasonable excuse for their failure to timely answer plaintiff's complaint.

The court first turns to the moving defendants' motion for leave to renew this court's Decision. A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and...shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR § 2221(e)(2)-(3).

In the present case, the moving defendants' motion for leave to renew this court's Decision is granted as the moving defendants have submitted affidavits stating that they were not served with the summons and complaint, which is a new fact not offered on the prior motion that would change the court's determination. Specifically, the moving defendants state in their affidavits that, although they own the premises located at 798 Richmond Road, Staten Island, New York (the "premises") where they were allegedly served with process on September 28, 2015, they were renting the premises to two other individuals from September 2015 to August 2016 and thus did not receive service. The moving defendants have also submitted the lease for the premises, which is dated September 30, 2015 but does not state when the lease term commences and is written in the past tense.

Upon renewal, the court grants the moving defendants' motion to vacate the default judgment entered against them. It is well-settled that a party seeking to vacate a default judgment under CPLR § 5015(a)(1) must establish a reasonable excuse for the default and a meritorious defense to the underlying action. *Mercado v. Allstate Life Ins. Co.*, 193 A.D.2d 476 (1st Dept 1993); *Arred Enterprises Corp. v. Indemnity Ins. Co.*, 108 A.D.2d 624 (1st Dept 1985). There is a "strong public policy...for resolving disputes on their merits, and toward that end a liberal policy has been adopted with respect to opening default judgments in furtherance of justice so that parties may have their day in court." *Picinic v. Seatrain Lines, Inc.*, 117 A.D.2d 504, 508 (1st Dept 1986).

In the present case, upon renewal, the moving defendants' motions to vacate the default judgment are granted. The moving defendants have provided a reasonable excuse for the default as they state in their affidavits that they were not served with process as they were not residing at the premises where they were allegedly served. The moving defendants have also provided a meritorious defense to the underlying action. Defendant Qerem Cukoviq states in his affidavit that "all actions undertaken were in furtherance and within the scope of" Cuka's corporate purpose and that he has not perpetrated any fraud, used Cuka as an alter ego or commingled Cuka's assets with his personal assets. Defendant Suzana Cukoviq reiterates the same statements in her affidavit and further states that she was a secretary without any executive authority over Cuka's corporate affairs.

Plaintiff's argument that the court should deny the moving defendants' motion for leave to renew the court's Decision on the ground that the moving defendants could have stated that they were not served with process on the prior motions is unavailing. The moving defendants were *pro se* litigants at the time they previously moved to vacate the default judgment and also are immigrants from Montenegro who were allegedly "not learned in the nuances of American jurisprudence," which the court finds to be a reasonable justification for their failure to present this new fact on the prior motions.

Accordingly, the moving defendants' motion for leave to renew the court's Decision is granted. As the court has granted the moving defendants' motion for leave to renew the court's Decision, the court need not consider the moving defendants' motion for leave to reargue the court's Decision. Upon renewal, the moving defendants' motions to vacate the default judgment entered against them is granted and it is hereby

ORDERED that the decision and order of the court dated January 27, 2016 granting plaintiff's motion for a default judgment against defendants based on their failure to timely answer or otherwise appear in the present action and the judgment entered against defendants on June 17, 2016 are vacated as to defendants Qerem Cukoviq and Suzana Cukoviq only; and it is further

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ORDERED that defendants Qerem Cukoviq and Suzana Cukoviq are to serve an answer or otherwise move with respect to plaintiff's complaint within twenty (20) days from the date of this order. This constitutes the decision and order of the court.

DATE: 2/14/17

CK
KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.