

<b>444 Madison, LLC v Security Intelligence Tech., Inc.</b>
2006 NY Slip Op 30748(U)
March 7, 2006
Supreme Court, New York County
Docket Number: 103149/05
Judge: Faviola A. Soto
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7

444 MADISON, LLC,

Plaintiff,

-against-

SECURITY INTELLIGENCE TECHNOLOGIES, INC.

Defendant.

**FILED**

MAR 15 2006

NEW YORK  
COUNTY CLERK'S OFFICE

Index No. 103149/05

DECISION & ORDER

HONORABLE FAVIOLA A. SOTO, J.:

Defendant Security Intelligence Technologies, Inc. (SIT) moves, by order to show cause dated January 23, 2006, pursuant to CPLR 5015(a)(1), to vacate the order and judgment dated December 13 and entered on December 23, 2005, and to vacate the order of November 3, 2005, striking defendant's answer and defenses. Plaintiff opposes. On the return date of February 9, 2006, the court granted movant leave to file a reply, which was submitted on February 17, 2006.

Background

In a prior action entitled 444 Madison, LLC v. CCS International, Ltd. and Spy Shop, Ltd. d/b/a Counter Spy Shop, 102870/04, plaintiff commercial landlord obtained a judgment, entered on January 5, 2005, in its favor against defendants commercial tenants in the sum of \$212,461.55 (the prior judgment). Plaintiff was unable to collect on the prior judgment.

Plaintiff filed the instant action to collect on the prior judgment. By summons and verified complaint dated March 3, 2005, plaintiff alleges that SIT is the successor to CCS International, Ltd (CCS), as on or about April 17, 2002, CCS transferred, assigned, conveyed and/or sold all of its assets to SIT, and references the 10-QSB filed with the Securities Exchange Commission dated May 20, 2004, which described the transaction as a merger and as a reverse

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acquisition, and sets forth that CCS became a wholly owned subsidiary of SIT.

Plaintiff alleges three causes of action against SIT. The first cause of action alleges successor liability. The second cause of action alleges that as a result of the merger, and notwithstanding SIT's characterization of the merger as a reverse transaction, SIT is a mere continuation of CCS and SIT is liable for the judgment. The third cause of action alleges that the transaction between SIT and CCS was a defacto merger, and that SIT is liable for the prior judgment, as the financial statements were consolidated, litigation involving defendant as a defendant was noted in the SEC filing, one of the actions was settled by CCS issuing shares in SIT on behalf of CCS, CCS ceased ordinary business and became shorn of its assets and became a shell, and there was and is a continuity of management, personnel, physical location, assets and general business between SIT and CCS. The fourth cause of action alleges that the merger occurred solely to defraud CCS's creditors, and in particular plaintiff, as it effectively rendered CCS insolvent, and was conducted solely to recover monies from any proceeds of the merger without paying creditors of CCS.

Defendant did not answer the complaint.

By order to show caused dated April 22, 2005, the court signed an order to show cause directing defendants to show cause why default judgment should not be entered.

On May 5, 2005, the application for the default was conditionally granted, unless defendant answers the complaint and satisfactorily serves an answer to the subpoena and produces documents by May 16, 2005.

Defendant's answer is dated May 15, 2005. It is not verified. The responses to the information subpoena of May 19<sup>th</sup> were not notarized.

Defendant denies the allegations of the verified complaint, and asserts four defenses:

1) that SIT did not exist at the time of the landlord-tenant relationship between CCS and plaintiff, and that SIT was organized and financed for reasons unrelated to any claim that plaintiff might have had against CCS; 2) that SIT played no role of any kind in the relationship between plaintiff and CCS, or any role in the alleged wrong, non-payment of rent, about which plaintiff complains; 3) that the 2002 merger had no financial impact upon CCS except that CCS benefitted from the new cash which flowed into the combined companies as a direct result of the merger; and 4) that SIT and its corporate subsidiaries, including CCS, have always conducted themselves as separate and independent corporations, and therefore, they are each entitled to the benefit of the limited liability doctrine and are not liable for the debts of the related but separate corporate entities.

As set forth in the preliminary conference order, the note of issue was to be filed by September 29, 2005, and a compliance conference was noticed and scheduled for September 8, 2005.

Defendant failed to appear.

By compliance conference order dated September 8, 2005, defendant's non-appearance was noted, discovery extended and the note of issue date extended until December 31, 2005, and a further compliance conference was originally scheduled for November 1, 2005, and then rescheduled by the court for November 3, 2005.

Plaintiff provided defendant with a copy of the order with cover letter dated September 8, 2005, and notified defendant of the rescheduled date by cover letter dated September 14, 2005.

On November 3, defendant again failed to appear at the compliance conference.

By order dated November 3, 2005, the court noted defendant's repeated failure to appear

at the court conferences, despite notice, and granted plaintiff's application to strike defendant's answer and, while directing plaintiff to place the matter on the inquest calendar within 60 days, granted leave to plaintiff to make an application for entry of a money judgment based upon a sum certain.

With cover letter dated November 3, 2005, plaintiff provided defendant with the order.

Defendant did not move to vacate the order.

On December 1, 2005, plaintiff made the application on notice for entry of judgment against defendant.

Defendant failed to oppose the application.

The application was granted, and the court signed the order and judgment on December 13, 2005. The judgment was entered in the County Clerk's office on December 23, 2005, and plaintiff served notice of entry dated December 28, 2005.

#### The Instant Motion

By order to show cause dated January 23, 2006, defendant now moves to vacate the December 2005 order and judgment and the November 2005 order striking its answer.

The motion is accompanied by an attorney affirmation. Although the answer was not verified by a party (or even counsel), the motion is not accompanied by an affidavit of merits from someone with personal knowledge.

Counsel argues that the December order and judgment and the November 2005 order should be vacated because defendant has both an excusable default and a meritorious defense, and this action should be tried on its merits. Without referencing its original failure to answer the complaint and plaintiff's default motion, defendant asserts that it timely filed an answer

raising substantial defenses. Without referencing the September 8<sup>th</sup> or November 3<sup>rd</sup> compliance conferences, counsel asserts that he failed to appear at two status conferences scheduled in October, and attributes that failure to pressure in other matters that he, as a single practitioner, experienced. He argues, therefore, as defendant's excusable default, that this is law office failure for which the client should not be penalized and for which he has shown a reasonable explanation. He further asserts that defendant did meet its discovery obligations, although he acknowledges that the responses to the information subpoena were not notarized and that defendant has not appeared for a deposition, asserting that such failure is because plaintiff never got back to him with a date. He refers to some stipulation entered into at a conference on June 2<sup>nd</sup>; agreeing to a conventional somewhat accelerated discovery schedule, although the stipulation is not attached.

As to a meritorious defense, he repeats the defenses asserted in the unverified answer. He also asserts the judgment and the related enforcement procedures threaten the very existence of SIT and the livelihood of its some 20 employees, and that SIT is a valuable source of bombjamming and other high tech defense equipment under development for the United States and other governmental agencies and already in use by American contractors in Afghanistan and other sensitive areas. He argues that plaintiff's allegations are not true, and there is no basis for plaintiff to seek to collect from SIT the back rent owing from CCS. He argues that as the Supreme Court, Westchester County, Index No. 8482/04 held in its decision dated December 22, 2004 that the petitioner creditor therein could not pierce the corporate veil and collect on its arbitration award against CCS by proceeding against a subsidiary, here too there is no basis to pierce the corporate veil. Defendant relies on various cases.

Plaintiff opposes, arguing that defendant has failed to meet its burden. Relying on the procedural history of this action, plaintiff argues that defendant has failed to proffer an excusable default, or to explain defendant's pattern of neglect and default. Here, defendant has a protracted pattern of default and neglect, and at every step of the litigation, defendant and its counsel have defaulted and failed to comply with conditional orders, such as producing documents.

Plaintiff further argues that defendant has failed to show a meritorious defense to the complaint, as defendant's argument that plaintiff has failed to show a sufficient basis to pierce the corporate veil is irrelevant to the allegations of this complaint, and defendant's reliance on a decision in another action based on the showing therein and involving a different theory of recovery is incorrect. Nor has defendant demonstrated sufficiently a meritorious defense under the facts herein. Plaintiff relies on various cases and argues that the cases relied upon by defendant are not applicable herein.

Defendant, by counsel affirmation, replies by attaching six documents, including various tax returns, and argues that case law demonstrates that based on these documents, successor liability could not be found.

#### Discussion

Defendant has failed to meet its burden. Defendant has failed to demonstrate excusable default or a meritorious defense.

Under the procedural history of this action, defendant has failed to demonstrate an excusable default or a reasonable explanation for its pattern of repeated neglect and default. Even were this a single or a double default, and it is far more, defendant fails to sufficiently support the claim of law office failure. Having repeatedly ignored the legal process, defendant

has shown no reason why its defaults, its failure to comply with the court's orders, and its repeated non-appearances, should be excused. Even at this late date, defendant has been less than forthcoming with the court.

Moreover, the court notes that as the answer was not verified, it does not appear that defendant ever properly answered the verified complaint, and its default from April 2005 and the court's order of May 2006 still stands.

Nor has defendant sufficiently demonstrated a meritorious defense within its moving papers. The motion is supported only by an affirmation by counsel and conclusory assertions; there is no affidavit from a person with personal knowledge or a sufficient factual showing. Defendant's reliance on a decision in another action involving a different showing is misplaced. Nor can defendant, in its reply papers, also only from an attorney, now seek to assert new insufficiently supported arguments.

Under these circumstances, defendant has shown too little, too late, and, to the extent, if at all, defendant has made some showing (and the court does not so find), the court declines to exercise its discretion and vacate the orders and the judgment.

Accordingly, it is

ORDERED that defendant's motion for relief under CPLR 5015(a)(1) is denied.

Dated: New York, New York  
March 7, 2006

Copies mailed

**FILED**  
**MAR 15 2006**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**

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FAVIOLA A. SOTO, J.S.C.