[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KORNREICH Justice

PART 54

MODE CONTEMPO INC

-v-

CK 123 ST

INDEX NO. 116591/05

MOTION DATE

MOTION SEQ. NO. 7

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for enforce

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: May 1, 2007

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

MODE CONTEMPO, INC.,

Plaintiff,

-against-

CKI 23RD STREET LLC, KHORSO "KAY" HAKAKIAN, LADIES MILE, LLC and BERNADETTE CASTRO,

Defendants.

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Index No.: 116591/05

DECISION and ORDER

KORNREICH, SHIRLEY WERNER, J.:

This action arises from a dispute over a lease assignment. Plaintiff Mode Contempo, Inc. ("MCI") now moves, by order to show cause, (1) to enforce the court's January 29, 2007 order, which awarded MCI summary judgment on its first cause of action for specific performance, and (2) for a default judgment for legal fees in the amount of $43,683.75. Previously, plaintiff discontinued the action against defendants Ladies Mile, LLC ("Ladies Mile") and Bernadette Castro. Remaining defendants CKI 23rd Street LLC ("CKI") and Khorso "Kay" Hakakian (collectively, the "CKI defendants") oppose MCI's motion and cross-move (1) to vacate a default, entered against them on Feburary 21, 2007 and (2) for summary judgment dismissing the remaining claims.

I. ***Statement of Facts***

A more complete statement of facts can be found in the court's January 29 order. In brief, this action concerns a lease for premises located at 43 West 23rd Street, New York, N.Y. (the "premises"), executed between CKI and Ladies Mile (or the "Landlord"). On May 29, 2003, plaintiff, a furniture retailer, and CKI entered into two contracts: an "Assignment and Assumption of Lease Agreement" (the "May 29 Assignment") and a "Supplemental Assignment

and Assumption of Lease Agreement (the "May 29 Supplement"), by which CKI assigned its lease for the premises to MCI through March 31, 2009. In consideration of the contract, plaintiff paid the total sum of $400,000 to CKI.

The May 29, 2003 Supplement provided for the procurement/assignment of a ten-year lease extension by CKI, for the amount of $50,000. By the Supplement's terms, CKI had to either "procur[e] the Assignment of the lease extension for the period of April 1/2009 to March 30[,] 2019" or, if CKI was unable to procure such an assignment, it had to "transfer its membership interest in CKI 23rd st. [sic] LLC to Assignee [MCI] or its Nominee" for the same $50,000 amount.

The court found that plaintiff was entitled to an award of specific performance and that the CKI defendants must comply with the terms of the May 29 Supplement. Specifically, the CKI defendants were ordered to "transfer their membership interest in CKI 23rd Street LLC to MCI or its nominee" and MCI was ordered to pay CKI the agreed upon amount of $50,000 pursuant to the May 29, 2003 Supplement's terms, within twenty days after service upon them of a copy of the January 29th order with notice of entry.

Thereafter, on February 9, 2007, plaintiff served the order, with notice of entry, on the CKI defendants. However, on February 21, 2007, defendants' counsel refused to tender plaintiff's $50,000 check, claiming that the January 29th decision had not yet been entered by the Clerk of the court. In fact, the order was not entered by the Clerk until February 22, 2007. On February 22, 2007, plaintiff served the now-entered Notice of Entry on defendants. Plaintiff then filed the instant order to show cause on February 28, 2007.

Meantime, on February 21, 2007, the parties were scheduled to appear before the court mediator, Michael Tempesta. Defendants failed to appear and were held in default. Tanya C.

Simmons, a paralegal at the office of defendants' counsel, avers that on February 20, 2007, plaintiff's counsel "advised that there was a mediation scheduled in this case at 9:30AM the very next morning." According to Ms. Simmons, this was the first notice her office had received of such mediation and so she contacted Mr. Tempesta by phone, inquiring as to whether defendants needed to appear on February 21st, since summary judgment had already been awarded plaintiff. Mr. Tempesta advised her that they need not appear.

Despite that assurance, Ms. Simmons states that on the morning of February 21st, she received a call from Mr. Tempesta, who informed her that plaintiff's counsel "was sitting in his office ready for mediation" and asked why defendants' representative was not present. Although Ms. Simmons avers that she reminded Mr. Tempesta of their alleged conversation of the prior day, "[h]e advised that he specifically recalled same, but nevertheless, that if [defendants] didn't send an attorney over there immediately, 'you guys are gonna be in default.'" Ms. Simmons avers that no attorney in her office was available to appear and that Mr. Tempesta denied her request for an adjournment. Defendants were defaulted.

Finally, plaintiff claims that since defendants have been defaulted, it is entitled to a default judgment for attorney's fees, in the amount of $43,683.75. In its moving papers, plaintiff does not cite any agreement providing for payment of attorney's fees. Defendants claim that there is no written agreement between the parties providing for such an award. In response, plaintiff argues that the lease, assigned to it by defendant CKI, provides for the payment of legal fees, though plaintiff fails to cite any specific portion of the lease containing such provision.

II. *Conclusions of Law*

A. *Plaintiff's Motion*

Initially, that portion of plaintiff's motion seeking to enforce the court's January 29th

order is not yet ripe, since it was made prior to the expiration of the twenty-day period in which defendants had to comply with the court's January 29, 2007 order. Thus, that portion of plaintiff's motion is denied, without prejudice and with leave to renew when it becomes ripe. Further, the award of damages sought by plaintiff—predicated on defendants' default—is denied in light of the court's decision to grant defendants' cross-motion to vacate that default, as discussed below.

B. ***Defendants' Cross-Motion***

In order to vacate a default judgment, the movant must demonstrate a good excuse for default and a "full and complete disclosure of a meritorious defense[.]" *Benadon v. Antonio*, 10 A.D.2d 40, 42 (1st Dept. 1960); *Pena v. Mittleman*, 179 A.D.2d 607, 609 (1st Dept. 1992). *See also* Siegel, NY Practice § 108, at 187 (3d ed). Moreover, it is within the sound discretion of the court to determine whether movant's excuse for the delay is reasonable and if the defense has sufficient merit. *Navarro v. A. Trenkman Estate, Inc.*, 279 A.D.2d 257, 258 (1st Dept. 2001). *See also Anamdi v. Anugo*, 229 A.D.2d 408 (2d Dept. 1996) ("determination of what constitutes a reasonable excuse and a meritorious defense is generally within the sound discretion of the trial court").

Here, defendants claim that their default was due to the fact that they believed the February 21st mediation had been canceled, in light of the court's January 29 decision awarding summary judgment to plaintiff. The affidavit of Tanya Simmons, a paralegal for defendants' counsel, supports this claim. Further, defendants have set forth a meritorious defense to the instant action, *viz.*, that there is no written agreement providing for an award of attorney's fees. *See Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491 (1989) (generally, "attorney's fees are incidents of litigation and a prevailing party may not collect them from the

loser unless an award is authorized by agreement between the parties, statute or court rule"). *See also Aerovias De Mexico, S.A. v. Malerba*, 265 A.D.2d 214, 215 (1st Dept. 1999) (on motion to vacate default, defendant need not prove its defense but only must "set forth facts sufficient to make out a prima facie showing of a meritorious defense"). In light of the defendants' good excuse and meritorious defense, and given the court's preference to determine cases on their merits, the defendants' default must be vacated. Finally, there is no evidence demonstrating that plaintiff will be prejudiced if this portion of the cross-motion is granted.

While defendants have raised a meritorious defense sufficient to vacate their default, there is still a question of fact as to whether any agreement between the parties does provide for attorney's fees, as plaintiff contends in its opposition to the cross-motion. Thus, defendants' cross-motion for summary judgment must be denied at this time. Accordingly, it is

ORDERED that plaintiff's motion to enforce the court's January 29, 2007 order is denied, without prejudice, with leave to renew when it is ripe; and it is further

ORDERED that plaintiff's motion for a default judgment is denied; and it is further

ORDERED that defendants' cross-motion is granted in part, to the extent that their default is vacated; and it is further

ORDERED that the portion of defendants' motion seeking summary judgment is denied.

ENTER:

J.S.C.

Date: May 1, 2007
New York, New York