SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

STUART M. STEINBERG and HEATH S. BERGER,

Plaintiffs,

INDEX No. 6667/07

MOTION DATE: Sept. 26, 2007
Motion Sequence # 001, 002

-against-

JOSEPH L. DISALVO, MARY ANN DISALVO, OLVASID REALTY, LLC, MARBEE REALTY, LLC, LEECOLE CORP., STEWART TITLE INSURANCE COMPANY, STEWART TITLE GUARANTY COMPANY, VINCENT MARCHESE, FRANK RACANO and JOHN DOE DEFENDANTS "1" THROUGH "10",

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Affirmation in Opposition & Reply..... X

This motion, by plaintiffs, for an order:

(1) Pursuant to CPLR §3215, for judgment as demanded in the complaint in favor of the plaintiffs and against defendants

Joseph L. DiSalvo, Mary Ann DiSalvo, Olvasid Realty, LLC, Marbee Realty, LLC and Leecole Corp., on the ground that said defendants have defaulted in appearing;

(2) Pursuant to CPLR §3215, for judgment in favor of the plaintiffs and against defendant Joseph L. DiSalvo on the first, second and seventh causes of action demanded in the complaint and setting the matter for an inquest for an assessment of damages against defendant Joseph L. DiSalvo, on the ground that said defendant has defaulted in appearing;

(3) Pursuant to CPLR §3215, for judgment in favor of the plaintiffs and against defendant Mary Ann DiSalvo on the second and seventh causes of action demanded in the complaint and setting the matter for an inquest for an assessment of damages against defendant Mary Ann DiSalvo, on the ground that said defendant has defaulted in appearing;

(4) Pursuant to CPLR §3215, for judgment in favor of the plaintiffs and against defendants Olvasid Realty, LLC and Marbee Realty, LLC on the seventh cause of action demanded in the complaint and setting the matter for an inquest for an assessment of damages against defendants Olvasid Realty, LLC and Marbee Realty, LLC, on the ground that said defendants have defaulted in appearing;

(5) Pursuant to CPLR §3215, for judgment in favor of the plaintiffs and against defendant Leecole Corp. on the ninth cause of action demanded in the complaint and entering a money judgment against Leecole Corp. and in favor of the plaintiffs in the amount of $100,000.00, together with interest from January 10, 2006, on the ground that said defendant has defaulted in appearing;

(6) Pursuant to CPLR §3215, for judgment in favor of the plaintiffs and against defendant Joseph L. DiSalvo on the ninth cause of action demanded in the complaint and entering

a money judgment against Joseph L. DiSalvo and in favor of the plaintiffs in the amount of $100,000.00, together with interest from January 10, 2006, on the ground that said defendant has defaulted in appearing;

(7) Pursuant to CPLR §3215, for judgment in favor of the plaintiffs and against defendants Olvasid Realty, LLC, Marbee Realty, LLC and Mary Ann DiSalvo on the tenth cause of action demanded in the complaint and entering a money judgment against Olvasid Realty, LLC, Marbee Realty, LLC and Mary Ann DiSalvo and in favor of the plaintiffs in the amount of $300,000.00, together with interest from March 29, 2007, on the ground that said defendants have defaulted in appearing;

(8) Pursuant to CPLR §3125, for judgment in favor of the plaintiffs and against defendant Joseph L. DiSalvo on the tenth cause of action demanded in the complaint and entering a money judgment against Joseph L. DiSalvo and in favor of the plaintiffs in the amount of $300,000.00, together with interest from March 29, 2007, on the ground that said defendant has defaulted in appearing; and

(9) Granting such other and further relief as this Court may deem just and proper;

and a cross-motion, by defendants, for an order, (1) pursuant to CPLR § 3012, granting the DiSalvo defendants leave of court to serve an Answer to the Complaint in this matter,(2) denying plaintiffs' motion for default judgment in its entirety, and (3) for such other and further relief as the Court deems just and proper, are **both** determined as hereinafter set forth.

FACTS

On or about January 10, 2005, Leecole Corp. ("Leecole") executed a mortgage note for the benefit of the plaintiffs, pursuant to which Leecole promised to pay the plaintiffs $100,000, plus interest, on or before January 10, 2006. As security for the

Leecole Note, Joseph DiSalvo ("DiSalvo") executed a personal guaranty for the benefit of the plaintiffs. On or about March 30, 2006, Marbee Realty, LLC ("Marbee"), Olvasid Realty ("Olvasid"), and Mary Ann DiSalvo executed a mortgage note for the benefit of the plaintiffs, pursuant to which Marbee promised to pay the plaintiffs $300,000, plus interest, on or before March 29, 2007. As security for the Marbee/Olvasid Note, DiSalvo executed a personal guaranty for the benefit of the plaintiffs.

The plaintiffs filed their complaint on April 18, 2007. Joseph DiSalvo, Mary Ann DiSalvo, Olvasid, Marbee, and Leecole (hereinafter referred to as "Defendants") have failed to file an answer within the statutory period, and their time to plead was not extended, thus placing them in default as of May 18, 2007.

PLAINTIFFS' CONTENTIONS

The plaintiffs argue that the defendants perpetrated a scheme by which they defrauded the plaintiffs out of hundreds of thousands of dollars and converted those assets to their own use.

As a result of the defendants' failure to timely answer the complaint, and there having been no extension of the defendants' time to plead, the plaintiffs now seek an order granting a default judgment. Specifically, the plaintiffs seek a default judgment as to liability against the defendants on the first, second, seventh, ninth, and tenth causes of action set forth in their complaint and further seek an inquest for an assessment of damages on the first, second, and seventh cases of action. Additionally, the plaintiffs request money judgments in their favor, based on the ninth cause of action (against Leecole and DiSalvo) and based on the tenth cause of action (against Marbee, Olvasid, Mary Ann DiSalvo, and DiSalvo).

DEFENDANTS' CONTENTION

The defendants oppose the plaintiffs' motion for a judgment of default, and state that they have both a reasonable excuse and meritorious defense. With respect to their reasonable excuse the defendants proffer two arguments: they contend that DiSalvo was unable to secure the funds necessary to retain counsel at the commencement of this action; and that DiSalvo engaged in negotiations with the plaintiffs to settle the issues in question, his primary concern being resolution of the matter without judicial intervention.

As to a meritorious defense, the defendants claim that because Steinberg, Fineo, Berger & Fischoff, P.C. and/or the plaintiffs, in their representative capacity, drafted all of the relevant documents and coordinated the transactions at issue, the plaintiffs were well aware of the details of these transactions. Therefore, the plaintiffs cannot claim to have been misled or defrauded by the defendants. Furthermore, the defendants relied on the plaintiffs to complete the transactions at issue, and any resulting errors were made by the plaintiffs or the title company. The defendants also argue, as a meritorious defense, that the mortgages, notes, and guaranties that comprise the instant action are void and unenforceable as a result of the plaintiffs' violation of the New York Code of Professional Responsibility, because, as DiSalvo's lawyers, the plaintiffs were precluded by the Code from entering into a business transaction unless several conditions were met, and since those conditions were not met; the plaintiffs' claims on the mortgage notes, as well as claims of fraud and conversion by the defendants', must be extinguished.

The defendants further seek, by cross-motion, leave of Court to serve an answer to the complaint on the plaintiffs pursuant to CPLR § 3012.

PLAINTIFFS' REPLY

The plaintiffs contend that the defendants have failed to offer sufficient opposition in order to defeat the plaintiffs' motion, as the defendants have submitted only an affidavit from Joseph DiSalvo, and Mr. DiSalvo fails to explain his relationship to the remaining defendants (Mary Ann DiSalvo, Olvasid, Marbee, and Leecole), and the plaintiffs' motion should be granted at least as against those remaining defendants for failure to properly oppose.

The plaintiffs argue that the defendants have failed to demonstrate both a reasonable excuse for their default and a meritorious defense; that the defendants' purported financial difficulties resulting in a failure to retain counsel as conclusory and contradictory, in addition to not being supported by the law. The plaintiffs further argue that the excuse of settlement negotiations does not constitute a reasonable excuse. Notwithstanding this claim of legal insufficiency, the plaintiffs deny that any negotiations with the defendants were ongoing at the commencement of this action. Instead, the plaintiffs assert that they met with DiSalvo in early March 2007, during which time the parties attempted to resolve their dispute. At the conclusion of that meeting, the plaintiffs informed DiSalvo and his counsel of the intent to commence an action if no settlement was reached. According to the plaintiffs, this March 2007 meeting was the last of any

settlement discussions or negotiations between the parties.

The plaintiffs contend that the defendants have not denied that the defendants received monies from the plaintiffs, that the notes and guaranties related to such monies are lawful and proper, that the defendants have defaulted under the obligations to the plaintiffs, and that pursuant to the notes and guaranties the defendants are jointly and severally liable to the plaintiffs. Therefore, any purported meritorious defense proffered by the defendants is therefore untenable in light of such facts. Accordingly, the defendants' only defense is that the plaintiffs have violated the New York Code of Professional Conduct, thus rendering the notes and guaranties at issue void and unenforceable. In response, the plaintiffs assert that written waivers were executed by the defendants which, they claim, satisfy their duties under the Code. Furthermore, the plaintiffs argue that the defendants were not their clients, but, in fact, clients of Steinberg, Fineo, Berger & Fischoff, P.C. Thus, there could not have been a breach of any obligation to the defendants by the plaintiffs.

The plaintiffs also contend that the defendants are seeking rescission of the notes and guaranties. But such rescission, the plaintiffs claim, would result in the unjust enrichment of the defendants, as they would be permitted to retain the monies given by the plaintiffs despite their wrongful conduct.

DECISION

In order to avoid a default judgment, the opposing party must demonstrate 1) a reasonable excuse for its default, and 2) a meritorious defense. (see, **Lipp v. Port Auth. of N. Y. & N. J.**, 34 A.D.3d 649, 649, 824 N.Y.S.2d 671, 671, 2nd Dept., 2006; **Jamieson v. Roman**, 36 A.D.3d 861, 862, 830 N.Y.S.2d 217, 217, 2nd Dept., 2007). This is a two-pronged test in which the party opposing default judgment must satisfy both elements. (see, **Lakeland Indus., Inc. v. Bing**, 23 A.D.3d 533, 533, 804 N.Y.S.2d 253, 253, 2nd Dept., 2005). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the Supreme Court. (**Pristavec v. Galligan**, 32 A.D.3d 834, 834-35, 820 N.Y.S.2d 529, 529, 2nd Dept., 2006).

At the outset, the Court notes that the defendants have not denied the existence or legality of the notes and guaranties at issue. Additionally, and of particular relevance, they have failed to deny that they are in default on those notes and guaranties.

As to the first element, the defendants claim that their default should be reasonably excused by reason of DiSalvo's purported inability to retain counsel due to an inability to secure funds, as a direct result of the plaintiffs' holding mortgages on four properties owned by DiSalvo, thereby denying him a source of liquid assets. The defendants, however, cite no case law in support of this proposition. Case law directly contradicts that theory, that is, a defaulting party's inability to afford counsel is not a reasonable excuse for its default. (**Rottenberg v. Lerner**, 232 A.D.2d 395, 395, 648 N.Y.S.2d 313, 313, 2nd Dept., 1996). Accordingly, the defendants' claimed inability to retain counsel does not constitute a reasonable excuse for their default.

The defendants also assert that they engaged in negotiations with the plaintiffs. Applicable case law reveals a different view – that it was proper for the trial court to reject the proffered excuse for default--that he was engaged in settlement negotiations--in light of the defendant's lengthy delay in appearing, (**Jamieson**, **supra**, at 862). Where the plaintiff had already requested and been granted an adjournment to secure his physician's affidavit in order to respond to the defendant's motion for summary judgment, rejection of that excuse was also proper (**Antoine v. Bee**, 26 A.D.3d 306, 306, 812 N.Y.S.2d 557, 558, 2nd Dept., 2006). Similarly, the defendant's ongoing default, blamed on settlement negotiations, was not reasonably excused. (**Majestic Clothing Inc. v. East Coast Storage, LLC**, 18 A.D.3d 516, 518, 795 N.Y.S.2d 289, 291, 2nd Dept., 2005). On the other hand, a reasonable excuse was found where the defendant presented proof that the parties had entered into settlement negotiations and that the plaintiff's attorney never mentioned that he would enter a default judgment. (**Lehrman v. Lake Katonah Club, Inc.**, 295 A.D.2d 322, 322, 744 N.Y.S.2d 338, 338, 2nd Dept., 2002).

Here, the Court finds that the defendants have not proffered a reasonable excuse. Mr. DiSalvo states in his affidavit: "Since the commencement of this action, I have attempted to amicably resolve this matter with plaintiffs and was led to believe that such a resolution was possible. . ." (DiSalvo Affidavit ¶9). Moreover, the defendants provide no details concerning their alleged efforts to amicably resolve the dispute, while the plaintiffs assert that they met with the defendants in early March 2007, and list who was present and what transpired, and that this was the last meeting. In contrast to pertinent case law, the plaintiffs here warned the defendants that they would commence an action shortly thereafter in order to enforce their rights. Accordingly, the demonstrable proof is that the defendants have failed to show a reasonable excuse for their default.

In order to avoid a default judgment the opposing party must also demonstrate a

meritorious defense. As noted above, the defendants have failed to deny the existence and legality of the notes and guaranties at issue, and have likewise failed to deny that they are in default of these notes and guaranties.

The defendants contend that the plaintiffs' position in relation to the defendants'--as their attorneys, responsible for drafting all relevant documents and coordinating all related transactions--afforded them full knowledge of the details of the transactions at issue. As a result, they assert, the plaintiffs cannot claim that the defendants perpetrated any frauds or made any material misrepresentations, because the plaintiffs were in control and aware of any events related to the transactions. Additionally, the defendants claim that any fault in filing must be imputed to the plaintiffs, whom they relied on for completing the transactions, and/or the title company.

Thus, the defendants present a partially meritorious defense vis-à-vis the plaintiffs' allegations of fraud and misrepresentation, while implicitly conceding that they are in default of the notes and guaranties at issue.

Although the defendants have proffered at least a partially meritorious defense for their default in answering, they have failed to offer a reasonable excuse. Since both elements must be satisfied by the party opposing default judgment, the defendants have failed to successfully oppose the plaintiffs' motion. (see, **Lakeland Indus., Inc. v Bing**, **supra**).

The defendants have also failed to carry their burden in their cross-motion for an order granting leave to serve an answer. Pursuant to CPLR § 3012, a party seeking leave to serve an answer must demonstrate a reasonable excuse for its default. See CPLR § 3012(d). As discussed above, the defendants have not offered a reasonable excuse.

Therefore, for the foregoing reasons, the plaintiffs' motion for judgment in favor of the plaintiffs and against defendants, for an inquest for an assessment of damages, and for a money judgment, on the ground that the defendants have defaulted in appearing, is **granted**, and the defendants' cross-motion for leave of court to serve an answer is **denied**.

This matter is referred to the Calendar Control Part (CCP), for a hearing on the issue of assessment of damages to be held on December 13, 2007 at 9:30 a.m.. The plaintiff shall file and serve a Note of Issue, together with a copy of this Order, on all

parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within twenty (20) days of the date of this Order. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

Counsel is directed to attach a copy of this Order with his Note of Issue when served upon the Calendar Clerk.

So Ordered.

Dated NOV 21 2007

Stephen A. Bucaria
J.S.C.

ENTERED

NOV 26 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE