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

PRESENT: MADDEN Justice PART 11

FIRST FUNDS, LLC.

INDEX NO. 105249/09

MOTION DATE

- v -

ACCUSIGMA CORP, ET AL.

MOTION SEQ. NO. 02

MOTION CAL. NO.

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

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

FILED
8 2010
COUNTY CLERK'S OFFICE

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

Dated: February 3, 2010

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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FIRST FUNDS, LLC, as assignee of American Capital Advance, LLC,

INDEX NO. 105249/09

Plaintiff,

-against-

ACCUSIGMA CORP. D/B/A CJ CARPET & REMODELING and JONG PARK,

Defendants.

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JOAN A. MADDEN, J.:

In this action for breach of contract and breach of guaranty, defendants move to vacate their default in failing to oppose plaintiff's motion for summary judgment, to restore plaintiff's motion the court's calendar, and to deny the motion. Plaintiff opposes the motion.

On April 14, 2009, plaintiff commenced this action for breach of a Purchase and Sale of Future Receivables Agreement (the "Agreement"). It is not disputed that defendant Jong Park signed the Agreement on May 9, 2007 in his capacity as owner and principal of "Seller," which is listed on the Agreement as "Accusigma Corp. d/b/a CJ Carpet & Remodeling." It is also not disputed that as part of the Agreement, defendant Park signed an unconditional personal guaranty. On May 29, 2009, Park filed a pro se answer on his own behalf and on behalf of the corporate defendant, asserting that "[a]ll of my shares of Business were relinquished to my Partner, Mr. Jinan Wu whom now owns 100% of CJ Carpet & Remodeling Company," and "[s]ince then Mr. Jinan Wu has paid to First Funds from his personal checking account and his

business checking account."[1]

On or about June 26, 2009, plaintiff moved for summary judgment, and defendants defaulted on the motion. By an order dated August 19, 2009, this court granted plaintiff's motion on defendants' default, and directed the Clerk to enter judgment in the amount of $239,240.23, together with interest from March 20, 2009, and costs and disbursements. On September 9, 2009, a judgment was entered in plaintiff's favor and against defendants, in the total amount of $249,995.63. On November 6, 2009, defendants, who are now represented by counsel, secured the instant order to show cause seeking to vacate their default, and restore and deny plaintiff's motion.[2]

To vacate their default in opposing plaintiff's motion for summary judgment, defendants are required to demonstrate both a reasonable excuse for the default and a meritorious defense to the motion and the action. See Bryant v. New York City Housing Authority, ___ AD3d ___, 2010 WL 155961 (1st Dept 2010); Caprio v. 1025 Manhattan Avenue Corp, 63 AD3d 656 (2nd

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[1]Although Park could not properly answer for the corporation, defendants are now represented by counsel.

[2]It is unclear whether the motion is being made by both the corporate and the individual defendants, or the individual defendant alone. Although the motion papers refer to "defendants" collectively and "denying plaintiff's motion for summary judgment in its entirety," the affidavit submitted by defendant Park and the arguments in support of the motion, focus on Park individually and Park's liability under the personal guarantee. For example, when Park states "I" did not receive the motion papers, he does not seem to be disputing the corporation's receipt of the papers (papers mailed to corporation at a different address than Park's). Also, Park asserts in his affidavit that he has a meritorious defense of novation in connection with his "individual liability as a personal guarantor," and the motion papers do not identify a specific meritorious defense for the corporate defendant.

Dept), lv app dismissed ___ NY3d ___, 2009 WL 4845857 (2009); QRT Assocs v. Mousouris, 40 AD3d 326 (1st Dept 2007).

Defendants' motion is denied, as they not made a sufficient showing to establish either a reasonable excuse for the default or a meritorious defense.

As to the excuse for the default on plaintiff's motion, defendant Park submits an affidavit stating "I did not receive a copy of plaintiff's motion papers." The affidavit of service states that the motion was served by first class mail on June 25, 2009, by mailing it to Accusigman Corp. D/B/A CJ Carpet & Remodeling at 3053 W. Olympic Blvd, Los Angeles, CA 9003, and mailing it to Jong Park at two different addresses, 442 Robinson Dr., Tustin, CA 92782 and 5404 Pine Ave, Chino Hills, CA 91709. Defendant Park does not assert that the above addresses are incorrect. Notably, one address is identical to the address Park provided in his pro se answer, 5405 Pine Ave, Chino Hills CA, 91709. Although Park states that he did not receive the motion papers, the mere denial of receipt is insufficient to rebut the proof, based on the affidavit of service, that the motion papers were properly mailed and the presumption of receipt arising from that proof. See Bryant v. New York City Housing Authority, supra; Caprio v. 1025 Manhattan Avenue Corp, supra. Defendants, therefore, fail to set forth a reasonable excuse for their default in opposing plaintiff's motion.

Defendants also fail to demonstrate a meritorious defense. Park argues that he has a defense of novation, alleging that plaintiff made a "new agreement" with his former business partner Jinan Wu "for the payment of the sums alleged to be due" and based on "this new agreement, my individual liability as personal guarantor was released and discharged." Park's bare and conclusory allegations are insufficient to establish the requisite elements of a

novation, which consist of "a previous valid obligation, agreement of all parties to the new obligation, extinguishment of the old contract, and a valid new contract." Wasserstrom v. Interstate Litho Corp, 114 AD2d 952, 954 (2nd Dept 1985); see also DCA Advertising, Inc v. Fox Group, Inc, 2 AD3d 173, 174 (1st Dept 2003).

Even assuming without deciding as Park alleges that after he sold the business to Wu, he "requested that the daily credit card withdrawals made by plaintiff, as required under the Agreement, be switched from Accusigma's account [to] the business account of the new business and [its owner] Wu," and that plaintiff thereafter "withdrew funds that were due and owing to First Funds under the Agreement from accounts that were controlled by Wu," Park does not allege that plaintiff agreed to extinguish Park's personal guarantee, or that plaintiff obtained a new personal guarantee from Wu. See id; Ventricelli v. DeGennaro, 221 AD2d 231, 232 (1st Dept 1995), lv app denied 87 NY2d 808 (1996).

Defendants' further reliance on the stipulation of settlement to establish a novation, is unavailing. Defendants submit an unsigned copy of a stipulation of settlement between plaintiff and non-party JinanWu,[3] dated April 27, 2009, in which Wu agreed to pay plaintiff $192,000 in 20 monthly installments (with the first payment due by April 30, 2009, and each subsequent payment due on the 13th of each month thereafter), "in full settlement of its claims asserted herein," and upon payment of the total settlement amount, "plaintiff shall deliver a Stipulation of Discontinuance with Prejudice of the action." The stipulation further provides that "in the event

[3]Defendant Park is not a party to and is not mentioned in the stipulation. An earlier version of the stipulation dated April 23, 2009, referenced Park as a defendant, and included signature lines for both Park and Wu. At Park's request, his name, e-mail address and signatures lines were eliminated in the April 27 stipulation.

of default in payment," Wu would be notified by e-mail, and "should such default remain uncured for five (5) days after such notice, then *plaintiff may proceed as it sees fit, including but not limited to* entering judgment in the amount of $239,240.23 . . . in a separate or related action seeking payment directly from Mr. Jinan Wu, crediting any payments made hereunder" (emphasis added).

Contrary to defendants' assertion, the stipulation does not substitute Wu as a new obligor for Park's original obligation under the guaranty. See DCA Advertising, Inc v. Fox Group, Inc, supra; Ventricelli v. DeGennaro, supra at 232. Rather, by its clear and express terms, the stipulation simply provides plaintiff with the additional remedy of proceeding against Wu in the event he defaults, with plaintiff retaining its rights under Park's guarantee to "proceed as it sees fit." Thus, since the stipulation between plaintiff and Wu is devoid of any language indicating that it either "revoked, cancelled, extinguished, superseded or otherwise satisfied" Park's obligations to plaintiff on the guaranty, the stipulation does not satisfy the elements necessary to create a novation. Id; see also County Glenn, LLC v. Himmelfarb, 4 Misc3d 1015(A) (Sup Ct, NY Co 2004).

The court notes that it appears Wu already defaulted on the stipulation before plaintiff moved for summary judgment, as plaintiff's original motion papers included an attorney's affirmation explaining that in "April 2009, the parties reached a tentative settlement arrangement with defendants' business partner. However, the parties failed to remit the scheduled payment installments under the arrangement."[4]

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[4]Park's statement to contrary that the stipulation "was signed by Wu and plaintiff's attorney and Wu commenced to make payment to plaintiff," is based on information and belief.

Based on the foregoing, where defendants have demonstrated neither a reasonable excuse for their default in opposing plaintiff's motion, nor a meritorious defense, their motion to vacate the default must be denied. See Bryant v. New York City Housing Authority, supra.

Accordingly, it is hereby

ORDERED that defendants' motion is denied in its entirety, and the stay of the enforcement of the judgment is lifted.

DATED: ~~January~~ February 3, ~~2010~~ 2016

ENTER:

J .S.C.