SHORT FORM ORDER

Index Number: 37673-2009

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

***Present*: HON. EMILY PINES**
J. S. C.

Original Motion Date: 04-21-2010
Motion Submit Date: 05-11-2010
Motion Sequence .: 001 RRH
Sept. 27, 2010

_____X

CAPITOL ONE, N.A.,

Plaintiff,

-against-

MADISON AVENUE DIAMONDS, LLC, MOSHE LAX and MADISON AVENUE DIAMONDS HOLDING, LLC,

Defendants.
_____X

Attorney for Plaintiff
Lazer, Aptheker, Rosella & Yedid, PC
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225 Old Country Road
Melville, New York 11747

Attorney for Defendant
David M. Bass, Esq.
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ORDERED, that the motion (motion sequence number 001) by plaintiff for a default judgment against defendants is granted; and it is further

ORDERED, that a hearing on counsel fees is scheduled for September 27, 2010 at 9:30 a..m. before the undersigned; and it is further

ORDERED, that submission of Judgment shall abide the determination of counsel fees.

This is an action for breach of a Promissory Note and failure to pay on a personal guaranty and seeks damages in the amount of $520,923.01, plus interest and attorneys' fees. Plaintiff[1] commenced the instant action by filing of a Summons and Complaint on September 21, 2009 and service upon

[1]Plaintiff is the successor in interest to North Fork Bank who entered into the Promissory Note with defendant.

defendants was effectuated as follows: upon Madison Avenue Diamonds Holding, LLC and Madison Avenue Diamonds, LLC, by service upon the Secretary of State pursuant to Limited Liability Company Law §303, on November 18, 2009; and service upon Moshe Lax pursuant to CPLR §308(2) by leaving with a person of suitable age and discretion, to wit, "D. Rudich" at 580 5th Avenue, #501, New York, New York, on November 19, 2009, followed by mailing a copy of the Summons and Complaint on November 23, 2009. Defendants have not answered or otherwise moved with respect to the Complaint and Plaintiff now seeks a default judgment. Plaintiff has provided proof of the additional mailing to the individual defendant pursuant to CPLR §3215(g)(3)(i).

In support of the motion, plaintiff has annexed a copy of the Verified Complaint, the affidavits of service, the Promissory Note and personal guarantees, and an affidavit by Gerard Waters, Vice President of plaintiff. According to Waters, or about July 12, 2007, defendant Madison Avenue Diamonds, LLC ("MAD") executed a Promissory Note, wherein MAD was permitted to borrow up to the sum of $1,000,000.00 payable in equal monthly payments at an interest rate of prime rate plus 1.5% per annum. Under the terms of the Promissory Note, MAD also agreed in the event of a default that plaintiff was entitled to accelerate the loan and also agreed to the payment of default interest at a rate of 5% over the current rate, plus late fees and attorneys' fees. On the same day, defendant Moshe Lax executed a guaranty of payment of the Promissory Note and on July 17, 2007, defendant Madison Avenue Diamonds Holding, LLC ("MAD Holding") also executed a guaranty of payment of the Promissory Note. Moshe Lax executed the guaranty on behalf of MAD Holding.

Plaintiff asserts MAD failed to pay as required under the Agreement in that it has failed to pay the monthly payment since on or about August 1, 2009, plaintiff has elected to accelerate all payments due and owing and there is now the sum of $521,923.01 due and owing, plus interest in the amount of $33,339.07 (and continuing to accrue until entry of judgment), plus late charges in the amount of $1,012.57, plus costs and attorneys' fees. Plaintiff states that defendants Moshe Lax and MAD Holding have failed to pay pursuant to the terms of the guaranty. Plaintiff now seeks the entry of a default judgment against defendants based upon their failure to answer or otherwise move with respect to the Summons and Complaint.

Defendants oppose the motion for a default judgment and request that the Court excuse their default, and extend them time to answer the Complaint. Defendants submit an affirmation of counsel and a proposed Verified Answer with affirmative defenses. Defendants argue that they have both a reasonable excuse for their default and a meritorious defense warranting denial of the motion for a

default judgment and granting additional time to serve a Verified Answer. Initially, with regard to Moshe Lax, defendants assert that while the affidavit of service indicates he was served pursuant to CPLR §308(2), the person listed in the affidavit of service "D. Radich", was not authorized to accept service on his behalf. Defendants do not challenge the service upon the limited liability companies via the Secretary of State, but indicate they are not aware whether they actually received the papers.

Defendant's counsel sets forth a lengthy recitation of unrelated disputes between plaintiff and a non-party, the Chaim Lax Family Trust, which he claims were ongoing during the time period when this action was commenced, as a basis for his excuse in responding to the Verified Complaint. Additionally, counsel states that he was also engaged in discussions with plaintiff's counsel and sought copies of the affidavits of service but never received them. Thus, he believed the Summons and Complaint had not been properly served, and thus did not respond thereto, and as such claims law office failure pursuant to CPLR §2005 as a basis for the Court excusing the default. Defendants further claim that plaintiff will not be prejudiced by vacatur of the default since no judgment has yet to be entered.

Defendants also claim they have a meritorious defense to this action and submit a proposed Verified Answer containing affirmative defenses in support thereof. Defendants set forth the affirmative defenses of failure to state a cause of action, statute of limitations, statute of frauds, estoppel, release, waiver, ratification and acquiescence, unclean hands, laches, failure to mitigate damages, plaintiff's breach of contract, documentary evidence, lack of personal and subject matter jurisdiction, accord and satisfaction, comparative negligence, failure to satisfy conditions precedent, and failure to name an indispensable party. Defendants' proposed Answer also contains a reservation of rights and defendants argue that this action should be decided on the merits, rather than upon default. With regard to Moshe Lax, since defendants claim he was not served by personal delivery, that he should be entitled to defend this action on the merits pursuant to CPLR §317 and even though the companies were properly served, inconsistent judgments could result if the default was not vacated against all of the defendants. Therefore, defendants urge the Court to deny the motion for a default judgment and allow them to interpose an Answer.

In reply, plaintiff argues that defendants have failed to demonstrate a reasonable excuse for their default and note that defendants' counsel admits having received a copy of the Complaint as far back as October of 2009. Plaintiff asserts that if defendants believed they were not properly served, their remedy was to move to dismiss based upon lack of personal jurisdiction and instead chose to simply ignore the Complaint and the requirements of the CPLR. Plaintiff notes that it was not under any

obligation to provide the affidavits of service to defendants' counsel and further that plaintiff's counsel repeatedly advised defendants' counsel that it was proceeding with the litigation. Thus, plaintiff argues that defendants have failed to demonstrate any reasonable excuse for their failure to answer the Complaint. Plaintiff states that it waited more than five months before it sought a default judgment and that there is no law office failure that warrants vacating the default.

Additionally, plaintiff argues that defendants have wholly failed to establish a meritorious defense in that the conclusory affirmative defenses of the proposed Verified Answer is insufficient and there are no questions of fact in this case. Defendants failed to demonstrate they had a defense to their nonpayment of their obligations on the Promissory Note and guarantees and thus, their motion for a default judgment should be granted.

CPLR §3215(a) allows a plaintiff to seek a default judgment against a defendant who has failed to appear, plead or proceed to trial of any action. A party who has defaulted in appearing or pleading may seek relief pursuant to CPLR §5015 or CPLR §317. CPLR §5015(a) states in relevant part:

> The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
>
> 1. excusable default, if such made motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry;

To vacate the default however, the Courts have held that defendant must demonstrate both a reasonable excuse for the default and a meritorious defense to the action. ***Westchester Medical Center v. Hartford Casualty Insurance Co.,*** 58 A.D.3d 832, 872 N.Y.S.2d 196 (2d Dept. 2009); ***Weiss v. Croce,*** 58 A.D.3d 832, 872 N.Y.S.2d 196 (2d Dept. 1990). Pursuant to CPLR §317, a defendant who has been served by other than personal delivery may seek relief from a default judgment upon a showing that it did not receive actual notice of the summons in time to defend and has a meritorious defense. ***Franklin v. 172 Aububon Corp.,*** 32 A.D.3d 454, 819 N.Y.S.2d 785 (2d Dept. 2006). Under CPLR §317, the movant does not have to demonstrate a reasonable excuse for the default as under CPLR Rule 5015. ***D & D Asphalt Construction Corp. v. Corealty, LLC.,*** 296 A.D.2d 432, 744 N.Y.S.2d 713 (2d Dept.

2002). However, in a case in which "part of the service consists of a mailing to the defendant (e.g., CPLR 302(2) & (4)), the defendant's uncorroborated denial of receipt will be insufficient to rebut the presumption that a properly mailed letter was received by the addressee." ***C.P.L.R. §317, McKinney's Practice Commentaries (Alexander 2001), citing, Facey v. Heyward,*** 244 A.D.2d 452, 664 N.Y.S.2d 119 (2d Dept. 1997). The Second Department has repeatedly held that a process server's affidavit of services creates a presumption of proper mailing and defendant's conclusory allegations that he did not personally receive notice in time to defend the action is insufficient overcome this presumption. ***See, Prospect Park Managment v. Beatty,*** 73 A.D.3d 885, 900 N.Y.S.2d 433 (2d Dept. 2010); ***Cavalry Portfolio Services, LLC,*** 55 A.D.3d 524, 865 N.Y.S.2d 286 (2d Dept. 2008); ***Udell v. Alcamo Supply & Contracting Corp.,*** 275 A.D.2d 453, 713 N.Y.S.2d 77 (2d Dept. 2000).

Based on the foregoing, plaintiff's motion for a default judgment is granted and defendants' application to vacate the default is denied. With respect to CPLR §5015, the Court finds that defendants have failed to demonstrate a reasonable excuse for the default or a meritorious defense. Defendants have failed to proffer any defense to their nonpayment under the terms of the promissory note and guarantees and the conclusory affirmative defenses set forth in the proposed Answer are insufficient to demonstrate a defense. Defendant Lax's application pursuant to CPLR §317 is likewise without merit as he has failed to establish that he did not receive notice of the summons and complaint in time to defend the action. ***Sturino v. Nino Tripicchio & Son Landscaping,*** 65 A.D.3d 1327, 885 N.Y.S.2d 625 (2d Dept. 2009).

This matter is set down for a hearing on counsel fees on September 27, 2010 at 9:30 a.m. before the undersigned. Submission of Judgment shall abide the determination of counsel fees.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

HON. EMILY PINES

Dated: July 15, 2010
Riverhead, New York

EMILY PINES
J. S. C.