SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

T.D. BANK, N.A.,

Plaintiffs,

INDEX NO.: 021293/2009
MOTION DATE: 05/24/2010
MOTION SEQUENCE: 003 & 004

-against-

J&T HOBBY, LLC, MITCHELL SERBES, J&T HOBBY WEST, INC., J&T HOBBY DISTRIBUTORS CORP., JOSEPH PIROZZI and THERESA DEPIETRO,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation, Statement of Undisputed Facts, Affidavits & Exhibits Annexed	1
Defendants' Memorandum of Law in Support of Motion	2
Notice of Cross-Motion, Affirmation & Exhibits Annexed	3
Memorandum of Law in Opposition to Cross-Motion	4
Affirmation of Helmut Borchert, Esq. in Opposition to Cross-Motion & Exhibits Annexed	5
Reply Affirmation of Helmut Borchert, Esq. in Support of Motion & Affidavits	6
Defendants' Reply Memorandum of Law	7
Plaintiff's Reply Memorandum of Law in Further Support of Cross-Motion	8
Letter from Leo V. Duval, Esq. dated 12/1/09 addressed to the Court	9

PRELIMINARY STATEMENT

Defendants Pirozzi, DePietro and J&T Hobby Distributors Corp.("Distributors") move for dismissal of the amended complaint and causes of action as against them pursuant to CPLR

3211(a)(7) and CPLR 3212. These defendants further move for an Order dismissing plaintiff's request for attorneys' fees as against these defendants.

Plaintiff opposes the motion and cross-moves for an order compelling these defendants to share in the cost of reproducing documents in their possession and produced by prior order of the Court. Plaintiff contends that defendants misrepresented the volume of documents of J&T Hobby, LLC in their possession, and that they have been caused to expend $20,000 in copying expenses.

Plaintiff also moves for a default judgment against defendants J&T Hobby, LLC ("J&T Hobby"), Mitchell Serbes, and J&T Hobby West, Inc. (J&T West") pursuant to CPLR 3215.

BACKGROUND

The Verified Amended Complaint, verified by an officer of plaintiff, sets forth the history of this proceeding. The action involves claims of non-payment of advances made by plaintiff to J&T Hobby, LLC in the amount of $1,900,000. To date, defendants J&T Hobby and J&T West have not appeared in this action.

J&T Hobby was founded in 1992 by defendant Pirozzi. Sometime prior to May 3, 2005 defendant Serbes acquired a 45% interest in the limited liability company. According to the operating agreement, as of May 3, 2005 Pirozzi was an owner of 45%, his wife Theresa DePietro had a 10% interest and Serbes had a 45% interest. The agreement also provided for the purchase of 55% by Serbes by paying $675,000 to Pirozzi, $250,000 on purchase, and $425,000 by quarterly payments of $21,250. DePietro's shares were to be purchased for the total of $150,000, $60,000 on purchase, and $90,000 by quarterly installments of $4,500. Serbes exercised his rights under the agreement and by an amendment to the operating agreement dated June 9, 2008, Pirozzi and DePietro acknowledged that Serbes was the owner of 100% interest of the limited liability company.

On or about June 6, 2008, J&T Hobby LLC ("Borrower") executed and delivered to plaintiff a Revolving Term Note, and on June 9, 2008 J&T Hobby, LLC executed a Term Loan Note to TD Bank. As security for these notes dated June 6 and June 9, 2008, the Borrower granted plaintiff T.D. Bank a security interest in all of its personal property, including collateral, to secure repayment of advances. In addition, on June 9, 2009, Borrower entered an interest rate

swap agreement ("ISDA") with plaintiff, which enabled Borrower to convert the floating rate payments due on the Revolving Term Note to fixed rate payments. The ISDA had a $100,000 termination fee upon default. The following day, June 10, 2008, TD Bank filed UCC financing statements with the New York Secretary of State. As further security, Serbes and J&T Hobby West each executed and delivered an unlimited guaranty agreement dated June 6, 2008 for all of the Borrower's obligations to TD Bank. In addition, on June 9, 2008 West executed and delivered a surety and guaranty agreement to the bank. West also granted TD Bank a security interest in all of its personal property including, without limitation, accounts, chattel paper and inventory.

Ultimately, J&T Hobby stopped making payments to plaintiff, and now plaintiff seeks to recover under the various agreements. J&T Hobby LLC failed to make payments of principal and interest on the Notes due on August 1, 2009 and thereafter.(Verified Amended Complaint, para 26). There is a principal balance owing on the Term Note of $1,205,103.64.(Id. at para 27). J&T Hobby LLC also defaulted on the Revolving Note which matured on August 10, 2009 with an outstanding unpaid balance of $599,973.63. Additionally, plaintiff claims it is owed the $100,000.00 termination pursuant to the ISDA. Plaintiff demanded payment in a September 16, 2009 demand letter to J&T Hobby LLC and the Guarantors, Serbes and West.

On October 19, 2009, a hearing was held, during which it was learned that control of J&T Hobby, LLC was in the hands of defendants Pirozzi, DePietro and/or Distributors. During this hearing Pirozzi testified that he didn't have any records in his possession of J&T Hobby, LLC prior to July 15, 2009, but suggested he had items from July 16, 2009 going forward.(See October 29, 2010 Hearing Minutes, pg. 42 lines 3-24). During the hearing, plaintiff obtained permission to take possession of J&T Hobby, LLC's assets within the warehouse including its books and records, pursuant to the agreements with J&T Hobby, LLC. After taking possession of J&T Hobby, LLC's property within the warehouse, plaintiff had the records bates stamped and was to provide a copy of these records to the attorney for Pirozzi, DePietro, and Distributors. After acquiring J&T Hobby, LLC's records, plaintiff determined that there were two years worth of records of J&T Hobby, LLC.

DISCUSSION

Reproduction Costs

CPLR 3120(1) provides in part:

> "1. After commencement of an action, any party may serve on any other party a notice... :
>
> (I) to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served"

CPLR 3103(a) provides:

> "(a) Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

The general rule is that "each party should bear the expenses it incurs in responding to discovery requests."(*Clarendon Nat. Ins. Co. v. Atlantic Risk Management, Inc.*, 59 A.D.3d 284[1st Dept 2009], citing *Waltzer v Tradescape & Co., L.L.C.*, 31 AD3d 302, 304 [1st Dept 2006]); See also, *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 27 Misc.3d 1061 (Sup Ct, NY County, 2010). An exception to the general rule allows discovery cost allocation determinations when the discovery costs at issue concern electronically stored information that is not readily available. *Id.* The *MBIA* Court observed that *Clarendon* and *Waltzer* are consistent on this point. It follows that discovery cost allocation determinations are not allowable for discovery issues concerning electronically stored information that is readily available. However, this court has concluded that cost shifting may be appropriate on proper application.

Here, plaintiff seeks to shift the costs of copying and bates stamping the books and records of J&T Hobby to defendants Pirozzi, DePietro and Distributors. However, there is nothing to suggest that the books and records obtained by plaintiff were stored electronically in a manner that would be classified as not readily available.

During the October 29, 2009 hearing, it was learned that defendants Pirozzi, DePietro and Distributors had possession of J&T Hobby's books and records. During the hearing, plaintiff sought possession of these documents, or copies of these documents. At first, defendants agreed to provide copies of the documents to plaintiff. Later in the hearing it was agreed that plaintiff

could have these documents, but would provide copies of the documents to defendants Pirozzi, DePietro and Distributors. Importantly, when attempting to ascertain the quantity of documents, which would determine the extent of copying to be performed, Pirozzi represented to the court that there were only documents of J&T Hobby from July 2009 to the date of the hearing. Plaintiff took possession of two years worth of J&T Hobby's books and records. This was substantially greater than expected based on Pirozzi's representations. Despite the substantially greater number of documents provided than contemplated during the hearing, neither party moved for a new hearing to determine whether the copying of documents at the October 29 hearing was still appropriate.

While plaintiff argues it is the requesting party, after plaintiff took possession of the documents it could also be viewed as the producing party. Likewise, defendants Pirozzi, DePietro and Distributors could be viewed as the requesting party after plaintiff acquired possession of the books and records (which they originally controlled).

In light of all the facts, cost allocation is not warranted in the tradition sense, as between requesting party and producing party. However, given the ambiguous nature as to which party was requesting production of the books and records of J&T Hobby, this court finds that both plaintiff and defendants Pirozzi, DePietro and Distributors should share the burden of copying the books and records of J&T Hobby. Plaintiff is liable for one half of the total costs of reproducing the books and records. Likewise, defendants Pirozzi, DePietro and Distributors are jointly and severally liable for the other half of the total costs of reproducing J&T Hobby's books and records.

Summary Judgment

Defendants Pirozzi, DePietro, and Distributors have moved for summary judgment under CPLR 3212. Plaintiff's attorney states in opposition that defendants' motion to dismiss is "improper and premature."(Glickman Statement, para 1, lines 2-3). The only support for this assertion is in Glickman's statement, where he seems to argue that an earlier motion to dismiss of defendants should be denied because plaintiffs filed an amended complaint. To the extent this is Mr. Glickman's argument, it is not responsive to plaintiffs motion to dismiss under CPLR 3211(a)(7) or 3212, which plainly are addressed to the amended complaint. Accordingly, the

Court will treat this aspect of defendants' motion as a motion for summary judgment.

Summary judgment will only be granted if it is clear that no material and triable issue of fact is presented. (Stillman v. Twentieth Century-Fox Corp., 3 N.Y.2d 395, 404 [1957]). Summary judgment is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. (Moskowitz v. Garlock, 23 A.D.2d 94 [3d Dept.1965]); (Crowley's Milk Co. v. Klein, 24 A.D.2d 920 [3d Dept.1965]). On a motion for summary judgment, the evidence is considered in a light most favorable to the opposing party. (Weill v. Garfield, 21 A.D.2d 156 [3d Dept.1964]). The party opposing the motion is obligated to come forward and bare his proof, and the failure to do so may lead the court to believe that there is no triable issue of fact. (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). Such proof must be by the affidavit of an individual with personal knowledge, or with an attorney's affirmation to which material is appended in admissible form. *Id.*

To obtain summary judgment, a movant must establish the cause of action or defense by tendering evidentiary proof in admissible form. (Friends of Animals v. Associated Fur Mfrs., 46 N.Y.2d 1065 [1979]). Generally, for the non-movant to succeed, the non-movant must produce evidence in admissible form. *Id.* However, this rule for the non-movant is more flexible, and the non-movant "may be permitted to demonstrate acceptable excuse for his failure to meet the strict requirement of tender in admissible form." *Id.* Whether the excuse is accepted depends on the circumstances in the particular case. *Id.*

Here, the defendants(movants) have supported their motion for summary judgment to dismiss plaintiff's causes of action as against them, with affidavits of Pirozzi and DePietro, as well as affidavits of non-parties Vinogradov and Lee.(Notice of Motion, Annexed Affidavits). They have also annexed documentary evidence to the motion. Plaintiff's opposition is non-responsive to defendants' summary judgment motion. Plaintiff failed to meet its burden, to the extent it opposes defendants motion for summary judgment, to provide a basis for its opposition. To the extent plaintiff has opposed this aspect of the motion, it is wholly conclusory. Because plaintiff has failed to come forward and bare its proof, or substantiate an argument why summary judgment should not be granted, this Court concludes there is no triable issue of fact. (See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). Plaintiff's causes of action as

against defendants Pirozzi, DePietro and Distributors, Corp. are dismissed.

Accordingly, to the extent plaintiff's amended complaint requests attorneys' fees from defendants Pirozzi, DePietro and Distributors, Corp., this request is denied.

Default Judgment

Under CPLR 3215(a), "When a defendant has failed to appear [or] plead ... , the plaintiff may seek a default judgment against him." Under CPLR 3215(f), the party seeking a default judgment must submit "proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the ... default in answering or appearing." (*Allstate Ins. Co. v. Austin*, 48 A.D.3d 720, [2d Dept 2008]). In a default proceeding where the defendant fails to appear, "the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists".(*Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62,[2003]).

CPLR 311(a)(1) provides that

> "Personal service upon a corporation ... shall be made by delivering the summons as follows:
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> > 1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, ... or to any other agent authorized by appointment or by law to receive service."

On December 1, 2009 attorney Leo Duval faxed a letter to this court to "confirm that [he] represents Guy M. Serbes in this matter."(December 1, 2009, Duval letter). He further states that "Mr. Serbes consents to the continuation of the TRO and will soon enter a stipulation to this effect."*Id.* Plaintiff has provided proof of service, in the form of an affidavit by John Delaney, that on January 5, 2010 Leo V. Duval, Esq. was served a copy of the verified amended complaint and the attorney's statement in opposition to motion to dismiss.(see Exhibit C, Plaintiff's Cross-Motion). Based on these facts, the court finds that Serbes has appeared in this action. Despite Serbes appearance, he has failed to file an answer or submit any pleadings. Plaintiff's fifth and sixth causes of action assert claims based on a Guaranty agreement signed by Serbes to unconditionally guarantee J&T Hobby's debts and obligations to TD Bank. The fifth cause of action seeks payment for the amount of J&T Hobby's indebtedness to TD Bank. The sixth cause

of action seeks payment for costs, expenses and attorney's fees pursuant to the guaranty agreement, arising out J&T Hobby's failure to pay its debts to TD Bank. The fifth and sixth causes of action state viable causes of action against Serbes. Plaintiff's request for a default judgment as against Serbes is granted. A hearing will be held to determine TD Bank's damages with respect to Serbes.

With respect to defendants J&T Hobby, LLC and J&T Hobby West, Inc. there is inadequate proof of service on these defendants. There is no proof that a summons or complaint was ever served on these defendants. There is inadequate evidence in plaintiff's supporting papers to provide a basis for why acceptance of service by Mr. Duval would have been proper with respect to defendants J&T Hobby LLC and J&T Hobby West, Inc. For these reasons plaintiff's cross motion seeking a default judgment with respect to J&T Hobby and J&T Hobby West is denied.

The parties are directed to appear for a hearing before Court Attorney/Referee Frank Schellace (Special Term Part 2 Courtroom, Room 060, Lower Level) on September 28, 2010, at 9:30 A.M., to determine:

(1) the cost of reproducing J&T Hobby's books and records; and

(2) TD Bank's damages with respect to Serbes.

Counsel for plaintiff shall serve defendants and file with the Clerk of the Court a Note of Issue and pay all appropriate fees for the filing thereon on or before September 17, 2010.

This constitutes the Decision and Order of the Court.

Dated: September 1, 2010

J.S.C.

ENTERED

SEP 09 2010

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