SCAN

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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SHARON RAIFAIZEN,

Plaintiff,

-against-

DATA INDUSTRIES LTD., PAUL RAIFAIZEN, both as Executive Vice President of Data Industries, Ltd. and Individually, PAUL RUBIN, both as Executive Vice President of Data Industries, Ltd., and Individually, and CHARLES DUVAL, both as President of Data Industries, Ltd. and Individually.,

Defendants.

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TRIAL/IAS PART: 20

NASSAU COUNTY

Index No: 006168-09
Motion Seq. No: 2
Submission Date: 2/9/11

The following papers have been read on this motion:

Order to Show Cause, Affirmation in Support, Affidavit in Support and Exhibits.....x
Affidavits in Opposition.....x

This matter is before the Court for decision on the motion filed by Defendants Data Industries, Ltd. ("Data") and Charles Duval ("Duval") on January 26, 2011 and submitted on February 9, 2011. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Defendants move for an Order, 1) pursuant to CPLR §§ 317 and 5015(a), vacating the default judgment ("Judgment") entered on February 11, 2010; and 2) enjoining Plaintiff and all others from any and all actions to enforce the Judgment. Plaintiff Sharon Raifaizen ("Plaintiff")

opposes the motion.

B. The Parties' History

By Supplemental Order dated December 22, 2009 (Ex. D to Duval Aff. in Supp.), the Court 1) granted Plaintiff's Motion for Summary Judgment in Lieu of Complaint; 2) awarded Plaintiff summary judgment against Defendants Data Industries, Ltd. ("Data Industries"), Charles Duval ("Duval"), Paul Raifaizen and Paul Rubin ("Rubin") in the sum of $123,000; and 4) directed that an inquest be held on the issues of interest, counsel fees and other costs. The Judgment (Ex. E to Duval Aff. in Supp.), which was entered on February 11, 2010, directed that Plaintiff recover of 1) Data, 2) Defendant Paul Raifaizen, both as Executive Vice President of Data and Individually, 3) Paul Rubin, both as Executive Vice President of Data and Individually, and 2) Charles Duval, both as President of Data and Individually, the sum of $132,225.00, together with counsel fees in the sum of $2,701.25, for a total of $134,926.25.

In their supporting papers with respect to the motion now before the Court, the moving Defendants outline the applicable facts and law in support of their contention that they were not properly served.

With respect to their claim of a meritorious defense, Duval affirms as follows:

Duval has been the President of Data since its creation in or around 1984. On or within 2008, Duval was approached in his "official capacity as president" (Duval Aff. in Supp. at ¶ 13) about receiving a loan in the amount of $123,000 from Defendant Raifaizen's wife, who is the Plaintiff in this action. Duval believed that such an agreement would be in the interest of all parties.

Following the execution of the Note, the relationship between Paul Raifaizen and Plaintiff began to deteriorate, and they filed for divorce ("Divorce Action") on or within 2009. Purportedly due to her hostility towards Paul Raifaizen, Plaintiff refused to discuss any issues regarding the Note. Plaintiff filed this action while the Divorce Action was pending.

Duval disputes Plaintiff's claim that Duval, Rubin and Paul Raifaizen ("Individual Defendants") signed the Note as individuals and officers of Data, and submits that the Note is "ambiguous as to the capacity" in which they signed it as "each defendant only signed the document once in an unknown capacity" (Duval Aff. of Supp. at ¶ 17).

Defendants have provided a copy of the Note (Ex. G to OSC) which includes the following language:

> FOR VALUE RECEIVED, the undersigned, DATA INUDSTRIES, LTD., (the "Company"), hereby promises to pay to Sharon Raifaizen ("Holder"), the principal amount of ONE HUNDRED TWENTY Three [small case in original] THOUSAND DOLLARS ($123,000.00) (the "Principal Amount") payable on March 24, 2009 (the "Maturity Date")...
>
> Any legal costs assumed by the Holder in the event of a default by Data Industrties of this agreement shall be incurred by Data Industries, Charles Duval, Paul Rubin, and Paul Raifaizen.
>
> For value received, Charles Duval, Paul Rubin and Paul Raifaizen are jointly and severally liable for the unpaid balance of the Principal Amount and any outstanding interest due or accrued.

The Note is signed by Paul Raifaizen and Rubin in their capacity as Executive Vice President, and by Duval in his capacity as President.

In opposition, Plaintiff submits, first, that all Defendants were properly served with Plaintiff's prior motion.

Plaintiff describes as "nonsense" (Zucker Aff. in Opp. at ¶ 25) Defendants' contention that it is unclear whether Duval signed the Note in his individual capacity or in his capacity as President of Data. In support, Plaintiff notes that 1) Defendants drafted the note and, therefore, any ambiguities should be construed against them; 2) the "plain language of the Note" (*id.* at ¶ 27) demonstrates that Data and the Individual Defendants are liable to Plaintiff for its repayment; 3) Defendants Rubin and Paul Raifaizen have never contested their liability to Plaintiff under the Note, and have not moved to vacate the Judgment; and 4) the Court has already decided this issue by its holding in the Court's December 22, 2009 Order that "Defendants executed [the Note], pursuant to which they agreed to be jointly and severally liable for payment of the Loan" (Ex. D to OSC at pp. 2-3).

C. The Parties' Positions

Defendants submit that 1) they have demonstrated an excusable default by establishing that Plaintiff failed to properly serve the Defendants; 2) they have established a meritorious defense by establishing that there are issues of fact as to whether Defendants Paul Raifaizen, Rubin and Duval signed the Note in an individual and/or representative capacity; and 3) there are

procedural issues with respect to the Court's prior Order granting Plaintiff's motion that warrant a vacatur of the Judgment.

Plaintiff oppose Defendants' motion, submitting that 1) Defendants were properly served with Plaintiff's prior motion; 2) there is no merit to Defendants' claim that the Note is ambiguous as to the obligations of the Defendants; and 3) the Court's prior Orders were properly issued.

RULING OF THE COURT

CPLR § 5015(a)(1) permits a court to relieve a party from a judgment or order upon the ground of excusable default, if such 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. A party seeking to vacate an order entered upon his default is required to demonstrate, through the submission of supporting facts in evidentiary form, both a reasonable excuse for the default and the existence of a meritorious cause of action or defense. *White v. Incorp. Village of Hempstead*, 41 A.D.3d 709, 710 (2d Dept. 2007).

To establish an entitlement to judgment as a matter of law on a guaranty, plaintiff must prove the existence of the underlying obligation, the guaranty, and the failure of the prime obligor to make payment in accordance with the terms of the obligation. *E.D.S. Security Sys., Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept., 1999). To be enforceable, a guaranty must be in writing executed by the person to be charged. General Obligations Law § 5-701(a)(2); *see also Schulman v. Westchester Mechanical Contractors, Inc.*, 56 A.D.2d 625 (2d Dept. 1977). The intent to guarantee the obligation must be clear and explicit. *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 A.D.2d 268 (1st Dept., 2001), *app. dism.*, 98 N.Y.2d 763 (2002). Clear and explicit intent to guaranty is established by having the guarantor sign in that capacity and by the language contained in the guarantee. *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63 (1961); *Harrison Court Assocs. v. 220 Westchester Ave. Assocs.*, 203 A.D.2d 244 (2d Dept. 1994).

Even assuming, *arguendo*, that the moving Defendants have demonstrated a reasonable excuse for their default, the Court denies their motion based on the Court's conclusion that they have not demonstrated the existence of a meritorious defense. The language of the Note

establishes that Defendants Paul Raifaizen, Paul Rubin and Charles Duval were liable to Plaintiff in both their individual and representative capacities. This conclusion is based on the 1) the execution of the Note by the Individual Defendants in their representative capacities, and 2) the language of the Note which includes the statement that "[f]or value received, Charles Duval, Paul Rubin and Paul Raifaizen are jointly and severally liable for the unpaid balance of the Principal Amount and any outstanding interest due or accrued." Accordingly, the Court denies the motion.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
March 28, 2011

HON. TIMOTHY S. DRISCOLL
J.S.C.