

Stimpfel v Vidas

2011 NY Slip Op 32491(U)

September 13, 2011

Supreme Court, Nassau County

Docket Number: 21078-10

Judge: Timothy S. Driscoll

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SUPREME COURT-STATE OF NEW YORK

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
JOHN STIMPFEL,

Plaintiff,

-against-

TRIAL/IAS PART: 20
NASSAU COUNTY

Index No: 21078-10
Motion Seq. No. 1
Date of Submission: 8/9/11

VLADIMIR VIDAS, Individually and as
President of PAGUS, INC., and PAGUS, INC.,

Defendants.

-----X

This matter is before the Court for decision on the motion filed by Plaintiff John Stimpfel (“Stimpfel” or “Plaintiff”) on April 20, 2011 and submitted on August 9, 2011. For the reasons set forth below, the Court denies the motion and deems Defendants’ Verified Answer timely filed and served.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3215, directing the entry of a default judgment against Defendants Vladimir Vidas (“Vidas”) and Pagus, Inc. (“Pagus”).

Defendants oppose Plaintiff’s motion.

B. The Parties’ History

The Verified Complaint (“Complaint”) (Ex. A to Ryan Aff.) alleges as follows:

Defendant Pagus is a corporation whose principal business is the operation of a restaurant located at 875 Willis Avenue, Williston Park, Nassau County, New York 11596 (“Premises”).

The Premises is subject to a lease agreement (“Lease”) between landlord Robert Realty (“Landlord”) and tenant Pagus which requires Pagus to perform certain obligations and pay certain to preserve its status as a tenant in good standing. Stimpfel and Vidas are the sole

shareholders of Pagus, with 40% and 60% interests, respectively. On or before September 15, 2010, Stimpfel was the Secretary/Treasurer of Pagus and Vidas was the President and managing agent of the daily operations of Pagus.

The Complaint contains four (4) causes of action 1) corporate mismanagement by Vidas who has allegedly taken actions, or failed to take actions, without Stimpfel's consent, including failing to pay real estate and sales taxes, which have placed Pagus in "serious financial jeopardy" (Compl. at ¶ 7), 2) misconduct of Vidas, a corporate officer, by engaging in conduct, without Stimpfel's consent, including closing Pagas' bank account and opening a separate account at an undisclosed location, 3) for an accounting in light of Vidas' failure and refusal to provide Stimpfel with financial information about Pagas, and 4) for partition of Pagas, given the parties' inability to continue to operate Pagas as the sole shareholders of that corporation.

Counsel for Plaintiff affirms that the Complaint was personally served on Vidas on November 24, 2010, and was simultaneously served on Vidas in his capacity as President of Pagus, as reflected by the Affidavits of Service provided (Exs. B and C to Ryan Aff.). Defendants failed to answer or otherwise appear within the time required pursuant to the CPLR. On February 23, 2011, a Verified Answer ("Answer") (*id.* at Ex. D) was served on behalf of the Defendants.

Prior counsel for Plaintiffs ("Prior Counsel") rejected the Answer by letter dated March 1, 2011 (Ex. E to Ryan Aff.). In that letter, Prior Counsel stated that "Both Answers are rejected in their entirety as untimely. Both Defendants are currently in default." Defendants' counsel ("Defendants' Counsel") responded by letter dated March 3, 2011 (*id.* at Ex. F) in which he advised Prior Counsel that if she would not accept the Answer, Defendants would "gladly make an application under Rule 2004 of the CPLR to compel your offices to accept this Answer." The letter also makes reference to Prior Counsel's "obvious ethical conflict" and suggests that it is more appropriate for Defendants' substitute counsel to reject the Answer.

In opposition, Defendants' Counsel affirms that, immediately after being retained by Defendants, he spoke with Prior Counsel. His first conversation with Prior Counsel occurred on December 8, 2010 and continued thereafter, and included discussions regarding settlement of this action, as well as a potential counterclaim in connection with sums due from Plaintiff to Defendants on a promissory note. The Answer contains a counterclaim in which Defendants

allege that the parties entered into an agreement in 2007 involving Plaintiff's purchase of forty (40) shares of Capital Stock of Pagus for the sum of \$144,000.00, Plaintiff executed a series of promissory notes in favor of Defendants in connection with that purchase, and Plaintiff is in default of those Promissory Notes. The Answer also includes an affirmative defense that Plaintiff failed to establish the statutory requisites necessary for the filing of the instant action. Defendants' Counsel affirms that Prior Counsel repeatedly assured Defendants' Counsel that he need not be concerned with filing an Answer "so long as an open line of communications was maintained between the litigants" (Dekaljo Aff. in Opp. at ¶ 4).

On January 7, 2011, Defendants' Counsel determined that Prior Counsel had a conflict that rendered her unable to continue to represent Plaintiffs, and so advised Prior Counsel. When he did not receive a response from Prior Counsel on the conflict issue, Defendants' Counsel prepared the Answer, dated January 11, 2011, which was served and filed on or about February 15, 2011. Following the service of the Answer, Defendants' Counsel attempted to contact Prior Counsel but did not receive a return telephone call. On February 23, 2011 Defendants' Counsel faxed to Prior Counsel a letter (Ex. A to Dekaljo Aff. in Opp.) in which he advised her, *inter alia*, that 1) Defendants' Answer and Counterclaim were previously forwarded to her, and Defendants were awaiting a response; 2) she should not continue to represent Plaintiff, in light of the conflict raised by her representation of the parties in a prior proposed business stock sale, which did not materialize; and 3) Defendants intended to move for summary judgment on their counterclaim, and might move to disqualify Prior Counsel. On March 2, 2011, Defendants' Counsel received correspondence from Prior Counsel in which she stated that she was rejecting the Answer. Defendants' Counsel notes that Prior Counsel has been replaced by substitute counsel for Plaintiff.

Prior Counsel provides an affidavit in which she disputes the assertions of Defendants' Counsel. Prior Counsel agrees that she and Defendants' Counsel first spoke on December 8, 2010, but affirms that the conversation primarily concerned his opinion regarding the merits of the case, including his belief that Defendants' counterclaim had greater merit than the Complaint. Prior Counsel notes that Defendants' Counsel did not request an extension of time to answer or send her a proposed stipulation regarding an extension. She disputes that she communicated to Defendants' Counsel that Plaintiff would accept Defendants' answer at any

time, or that she consented to an extension.

C. The Parties' Positions

Plaintiff submits that the Answer is a “nullity” (Ryan Aff. at ¶ 7), both because it was untimely and because it was not properly verified.¹ Plaintiff argues that Defendants have defaulted in appearing in this action, and the Court should award Plaintiff a default judgment against Defendants.

Defendants oppose Plaintiff’s motion on the grounds that 1) policy considerations favor a determination of cases on the merits; 2) a default judgment is inappropriate in light of the fact that there is no evidence that Defendants’ conduct was deliberate or contumacious; 3) the Court, in the exercise of its discretion, should deny Plaintiff’s motion for a default judgment; and 4) in light of the attendant circumstances, including the belief of Defendants’ Counsel that Prior Counsel was agreeable to an extension of their time to answer, the Court should deny Plaintiff’s motion.

RULING OF THE COURT

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

A court may excuse a default in answering upon a showing of a meritorious defense and a justifiable excuse for the default. *Mena v. Kong.*, 269 A.D.2d 575, 576 (2d Dept. 2000), citing CPLR § 5015(a)(1) and *Fox v. Bicanic*, 163 A.D.2d 272 (2d Dept. 1990). Public policy favors the resolution of cases on the merits. *Bunch v. Dollar Budget, Inc.*, 12 A.D.3d 391 (2d Dept. 2004).

The Court denies Plaintiff’s motion in consideration of 1) the relatively brief delay in serving the Answer, 2) the communications between counsel for the parties following the filing of the Complaint, which provide a justifiable excuse for Defendants’ delay in answering, 3) the

¹ Defendants have provided an Answer verified by Vidas on February 16, 2011.

apparently lack of willfulness of Defendants in their delay in answering the Complaint, 4) the public policy favoring the resolution of cases on their merits, and 5) Defendants' showing of a meritorious defense, as well as a meritorious counterclaim. The Court hereby deems the Answer timely filed and served.

All matters not decided herein are hereby denied.

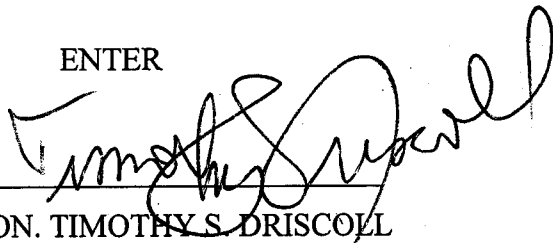
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on October 27, 2011 at 9:30 a.m.

DATED: Mineola, NY

September 13, 2011

ENTER



A handwritten signature in black ink, appearing to read 'Timothy S. Driscoll', is written over a horizontal line.

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

SEP 19 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**