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

PRESENT: HON. PAUL G. FEINMAN PART 12

Justice

RUBIN BAUM and DENISE BAUM

-v-

MITCHELL ORIMMER

INDEX NO. 115604/2007

MOTION DATE

MOTION SEQ. NO. 002

The papers considered on this motion ~~(s and cross motion)~~ are enumerated in the attached decision/order.

Cross-Motion: Yes ✓ No

Upon the foregoing papers, it is ORDERED that this motion ~~(s and cross motion)~~ is ~~are~~ decided in accordance with the annexed decision and order.

FILED

APR 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/17/2012

J.S.C.

1. Check one: ✓ FINAL DISPOSITION NON-FINAL DISPOSITION

2. Check as appropriate: Motion is GRANTED ✓ DENIED GRANTED IN PART OTHER

3. Check if appropriate: SETTLE ORDER/JUDGMENT SUBMIT ORDER/JUDGMENT
DO NOT POST FIDUCIARY APPOINTMENT
REFERENCE
PC/CC

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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RUBIN BAUM & DENISE BAUM,
Plaintiffs,

against

MITCHELL DRIMMER,
Defendant.

----------X

Index Number 115604/2007
Mot. Seq. No. 002

DECISION AND ORDER

For the Plaintiffs:
Eric B. Schultz, Esq.
1 Scott Pl.
Plainview, NY 11803

For the Defendant:
Law Offices of Robert I. Strougo
By: Robert I. Strougo, Esq.
286 Madison Ave., ste 2200
New York, NY 10017

Papers considered in review of this motion to vacate a default :

Papers	Document Number:
Order to Show Cause, Affidavits, Affirmations, Exhibits	1
Affidavit in Opp. of Denise Baum, Exhibits	2
Affidavit in Opp. of Shepherd Baum	3
Affirmation, Affidavit in Reply	4
Stipulations of Adjournment, 11/17/2011	5

PAUL G. FEINMAN, J.:

By decision and order dated January 13, 2011, this court granted plaintiffs Rubin and Denise Baum's motion to strike the defendant Mitchell Drimmer's pro se answer and to enter judgment against him based on a pattern of defaults by Drimmer related to discovery and in appearances at scheduled compliance conferences. Notice of entry of that decision was served on January 21, 2011, and on February 16, 2011 the Clerk of Court entered a money judgment against defendant in the sum of $367,151,15. Apparently restraining notices have been placed on certain of defendant's Florida accounts, and he now moves by order to show cause to vacate this court's January 13, 2011 decision and order and the money judgment. Plaintiffs, his sister and brother-in-law, oppose. For the reasons set forth below, the motion is denied.

Plaintiffs commenced this action in November 2007 by filing and serving a summons with notice seeking to recover "moneys lent," in the amount of $200,000 plus interest from December 1, 2001 (Aff. in Opp. Schultz Aff. ex. A). There is no question that defendant was personally served with the document at his residence in Sunny Isles Beach, Florida (Aff. in Opp. Schultz Aff. ex. A [Summons w/ Notice; Proof of Service]; OSC Drimmer Aff. ¶ 3). Defendant did not demand a complaint (CPLR 3012 [b]), but rather filed a pro se answer and "denie[d]" sufficient knowledge or information, and also "[d]enied" and demanded "strict proof"; his answer was dated May 5, 2008 (R. Baum Aff. in Opp. ex. B). On about August 1,2008 plaintiff's attorney mailed defendant various discovery demands, including a Notice to Admit (R. Baum Aff. in Opp. ex. C, D). On about October 22, 2008, plaintiffs' attorney mailed defendant a copy of the plaintiffs' Request for Judicial Intervention which included a request for a preliminary conference, along with a second copy of the discovery demands (R. Baum Aff. in Opp. ex. D). On December 23, 2008, plaintiffs' attorney notified Drimmer at his Florida address, by Certified Mail, Return Receipt Requested, that the court had scheduled their preliminary conference for January 14, 2009 (R. Baum Aff. in Opp. ex. E).

Defendant appeared at the January 14, 2009 court conference through an attorney, Robert I. Strougo, and the parties entered into a preliminary conference order setting out the schedule for pre-trial discovery (R. Baum Aff. in Opp. ex. F). The preliminary conference order indicated that Strougo was authorized to appear and was only appearing for that one conference, although under the order's "Additional Directives," it was stated that plaintiffs would provide "an additional" copy of the verified complaint by facsimile transmission to Strougo by January 23,

2009,[1] with defendant to serve his answer before February 28, 2009. The order also provided that the parties would next appear in court on April 15, 2009. Strougo did not file a notice of appearance at this time.

Neither defendant personally nor an attorney representing him appeared on April 15, 2009. An answer to the complaint was never filed. When defendant failed to appear, plaintiffs' attorney, at the Part Clerk's direction contacted defendant by telephone from the Courthouse. The conference was adjourned, and, because defendant had not appeared, the attorney mailed him by Certified Mail Return Receipt Requested, a copy of the court's order adjourning the conference to April 29, 2009. In his accompanying cover letter, plaintiffs' counsel pointed to the court's language that defendant "shall not be entitled to any further adjournments." (R. Baum Aff. in Opp. ex. H [Adjournment]; ex. I [letter of 04/15/2009]).

On April 29, 2009, plaintiffs' counsel appeared; nobody appeared on defendant's behalf. Plaintiffs' counsel wrote out a proposed order, which was signed by the court. It stated,

> "The compliance conference in the above-captioned action shall be adjourned to May 27, 2009 at 11 a.m. on consent of all parties. The parties are in discussion to settle the matter. Plaintiffs' attorney represents that he has spoken to the defendant pro se and he is in the State of Florida & cannot appear today. This adjournment shall be final against the defendant."

See, Order dated 4/29/09 [Feinman, J.]. Nevertheless, when defendant failed to appear, the April 29, 2009 conference date was rescheduled to May 27, 2009, and then to July 22, 2009,[2] and finally to August 12, 2009. Defendant failed to appear on any of these dates, or to send counsel.

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[1] A copy of the complaint, dated December 8, 2008, and verified by plaintiffs' attorney Schultz, is attached as ex. G to R. Baum's Affidavit in Opposition.

[2] Plaintiffs' attorney mailed defendant a letter by Certified Mail, Return Receipt Requested, on June 26, 2009, notifying him of the adjournment to July 22, 2009; the letter was returned to the attorney marked "unclaimed," and "unable to forward." (R. Baum Aff. in Opp. ex. J).

On August 12, 2009, the court issued an order finding defendant in default and providing that plaintiffs could move on notice for entry of a default judgment and reasonable attorney's fees; a copy of the order was mailed by plaintiffs' counsel to defendant at the Sunny Isles Beach, Florida address (R. Baum Aff. in Opp. ex. K).

On about September 7, 2010, plaintiffs moved to vacate defendant's pro se answer asserting a general denial, which had actually been filed before the verified complaint was served, and for entry of a money judgment. According to the affidavit of service, the notice of motion was mailed to defendant at the Sunny Isles Beach, Florida address which was contained in his pro se answer. The motion was calendared for November 12, 2010 in the Motion Submission Part, and defendant defaulted. On January 13, 2011, the court granted plaintiffs' motion on default, and directed that upon proof of service of a copy of the court's decision and order together with notice of its entry, the Clerk should enter a money judgment against defendant. Judgment was filed and entered on February 16, 2011, in the total amount of $367,151.15.

Thereafter, plaintiffs domesticated the judgment in the State of Florida, and by motion dated August 12, 2011, plaintiffs moved in the Circuit Court of Miami-Dade County for a writ of garnishment as to funds belonging to defendant and his wife held by Bank of America, N.A. (OSC Strougo Aff. ex. E). The Bank answered on September 16, 2011, and indicated there were three accounts owned by defendant and his wife that might be in issue (OSC Strougo Aff. ex. E).

By order to show cause signed on November 4, 2011, defendant moves to vacate the January 13, 2011 order granting plaintiffs a judgment and to reinstate his answer. In essence he argues that he believed that he and his sister had resolved their quarrel, which concerned monies loaned by plaintiffs to assist defendant in establishing his business, by discussions memorialized

in an e-mail dated April 22, 2009, sent by Denise Baum to her attorney and copied to defendant, stating that based on the parties' agreement, she was asking her attorney to "cease at this time from any and all proceedings with regard to the lawsuit and the $200,000.00 that is owed to me" (OSC, Drimmer Aff. ¶¶ 6-12; ex. B [04/22/2009 email]). The agreement as described in the e-mail from Denise Baum, was that defendant would send her four paintings by their grandfather and that he already sent her a check for $500.00 "on account, meaning that in time when he has additional monies he will continue to send money to me." (OSC Drimmer Aff. ex. B).

Defendant provides a copy of the UPS tracking service showing that the four paintings were delivered to plaintiffs at their 34th Street address on May 12, 2009 (OSC Drimmer Aff. ex. D). Drimmer also proffers a receipt for a Personal Money Order dated April 22, 2009, issued in the amount of $500.00 and made out to Denise Baum (OSC Drimmer Aff. ex. A). Notably defendant refers to this payment in his affidavit as a payment for legal fees, and disputes Denise Baum's e-mail statement that it was a payment "on account" (OSC Drimmer Aff. ¶ 9; Aff. in Reply, Drimmer Aff. ¶¶ 14, 16).

Defendant alleges that he remained unaware that the litigation continued. For instance, he alleges that Denise Baum visited Florida in about November 2010 because their father was ill, that she and defendant spoke in an "amicable way," and she gave no hint that her attorney was seeking to strike his answer and enter a default judgment (OSC Drimmer Aff. ¶ 20). He also contends that he received none of the court papers or communications by plaintiffs' counsel, "[f]rom the time of [his] sister's letter in April 2009 to September 2011" (OSC Drimmer Aff. ¶¶ 15-16, 23). He is silent, of course, as to his failure to appear at the earlier court conference of April 15, 2009, notice of which he apparently concedes receiving, although he denies receiving any telephone calls from plaintiffs' attorney (Aff. in Reply, Drimmer Aff. ¶ 28). He fails to

explain why the date-stamped June 26, 2009 letter from plaintiffs' attorney notifying defendant of the July 22, 2009 adjournment, was returned as "unclaimed," and "unable to forward." (R. Baum Aff. in Opp. ex. J). He also does not explain how it was that the court's August 22, 2009 decision holding defendant in default, was not received by him. Notably, he states that he lived at the same Sunny Isles Beach address until April 2010 (OSC Drimmer Aff. ¶ 5); his relocation is the apparent reason he gives for why he did not receive plaintiffs' motion to vacate his answer and enter a default judgment.[3] Of course, he never formally or informally notified the court of any change of address.

Plaintiffs submit two other documents that they argue show that defendant was indeed aware of the litigation's continuation. The first is a proposed agreement drafted by plaintiffs, dated April 27, 2009, in which it is stated that defendant would send them "five" paintings by the grandfather, and a "monthly check in the amount of $500.00 until at which time the balance of your debt totaling $199,500.00 is paid back to us," and that they would forgo interest on the debt and would "disband the lawsuit . . . providing [defendant] adhere to [his] end of the bargain." (Baum Aff. in Opp. ex. D). According to Denise Baum, defendant did not execute this document and made no further payments (Baum Aff. in Opp. ¶¶ 21-22). The second is an e-mail from Denise Baum to defendant dated May 14, 2009, copied to her attorney, demanding to know the whereabouts of the fifth painting, and exclaiming that if she did not receive the fifth painting, she had "every intention of re in stating [sic] the lawsuit" (Baum Aff. in Opp. ex. F [e-mail of 5/14/2009]). Reading these emails in conjunction with the history of adjournments of the court conferences, it appears that the April 29, 2009 conference date was adjourned based on what

[3]He currently lives in Aventura, Florida, as stated on his affidavit of October 20, 2011.

appeared to be a tentative resolution to the litigation, but which defendant knew he had not consented to by the time of the May 27, 2009 conference date. This May 27th conference date was adjourned in part because plaintiffs had decided to go forward with the litigation following Denise Baum's May 14, 2009 e-mail and both the court and plaintiffs' counsel wanted defendant's presence and or participation in any compliance conference. Inasmuch as defendant concedes he was still living at the Sunny Isles address at the time, it appears defendant purposefully left "unclaimed' the notice that the May 27, 2009 date had been rescheduled to July 22, 2009.

It is well-settled that a default judgment will only be vacated where the movant provides a justifiable excuse for the default and a meritorious cause of action or defense (*Barasch v Micucci*, 49 NY2d 549 [1980]). In assessing a motion to vacate a default judgment, the court will consider, among other factors, the presence of excusable neglect, the absence of deliberateness and brevity of the delay, an absence of prejudice, a meritorious cause of action or defense, the nature of injuries, and good faith in prosecuting or defending the action (*Heffney v Brookdale Hosp. Center*, 102 AD2d 842, 842 [2d Dept], *app. dismissed* 63 NY2d 770 [1984]).

Defendant argues that the loan was made to his business and not to him personally, that his sister and brother-in-law understood this, that the business did well for several years but then collapsed, and that he is not personally liable for repayment. Plaintiffs concede that the check was made out to the family business, but that this was for the convenience of defendant in establishing the business, and that it was fully understood that the money was to be repaid to them. Both sides call the veracity of the other side into question. Finding that defendant has asserted a meritorious defense does not require the court to find that he will or is likely to succeed, only that he has a potential to successfully defend the action. Without commenting on

his likelihood of success, it is clear that defendant has a potentially meritorious defense to personal liability on these loans.

What gives the court pause on this motion to vacate the default judgment is whether the defendant has a reasonable excuse for his delay. In evaluating this particular situation, it is clear that the defendant has engaged in a pattern of conduct to delay the resolution of this matter on its merits.

First is the confusion in defendant's appearance. Defendant's counsel explicitly indicated at the preliminary court conference held on January 14, 2009, that he was authorized to appear on defendant's behalf only for that one appearance. He did not make a formal notice of appearance then, and apparently still has not done so, although he appends a notarized letter from defendant stating that he is defendant's legal counsel and is authorized to appear and represent defendant (OSC Strougo Aff. ex. A). Nonetheless, according to the County Clerk's office, defendant was (and is) self-represented. Attorney Strougo's statement is essentially meaningless that although he had been retained for only the one court appearance, he had informed plaintiffs' counsel that "if there were any problems I could be called by [plaintiffs' counsel] and will make myself available in trying to resolve the dispute" (OSC, Strougo Aff. ¶ 24). Absent a formal appearance by counsel, plaintiffs were correct in mailing all documents to defendant personally, and defendant's own actions are attributable to him.

Second, as argued by plaintiffs, is that defendant never responded to the Notice to Admit, let alone the other discovery demands. They were twice mailed to him and requested by plaintiffs' attorney on at least one other occasion and, as provided for in the preliminary conference order, the court extended the time to respond to all demands to April 2, 2009 (Aff. in Opp. Schultz Aff. ex. F [Prelim. Conf. Order]). Plaintiffs thus argue that under CPLR 3123,

because defendant never responded to the Notice to Admit, the statements in the Notice are deemed admitted for the purposes of the trial, including that defendant received a "personal loan" from plaintiffs, that he has no intention of repaying the loan, and that an email sent by him dated November 26, 2007 to Denise Baum admits the indebtedness and the promise to repay it when he obtained money (Aff. in Opp. Schultz Aff. ex. C, Notice to Admit ¶¶ 2, 14, 20). Defendant does not address this issue.

Third, as pointed out by defendant, is that plaintiffs made their motion for entry of a default judgment more than a year after the court found defendant to be in default and granted them leave to move for a default judgment. CPLR 3215 (c) provides that where a plaintiff fails to take proceedings to enter judgment within a year, the complaint should be dismissed. Defendant thus argues that the court should dismiss the complaint. This statutory provision, however, applies only when a defendant has never answered (*see Gildston v Travelers Inc. Co.*, 168 AD2d 481, 482 [2d Dept 1990], citing *Myers v Slutsky*, 139 AD2d 709, 710 [2d Dept 1998]). Here defendant "answered" the summons with notice. Furthermore, he appeared by counsel at the preliminary conference. Thus, by law he is deemed to have appeared in this action (*see* CPLR 320 [a]).

Even where a party may have a potentially meritorious defense, a default judgment will not be vacated when a party has stood by "idly, willfully and persistently, while the action proceeded to judgment and enforcement proceeds." (*Wilf v Halpern*, 234 AD2d 154, 154 [1st Dept 1996] ["An intentional default is ipso facto inexcusable, and should not be vacated."]). Here, defendant fails to satisfactorily explain what appears to be a willful intent to ignore the proceeding against him, and denial of his motion to vacate is appropriate. Therefore, it is

ORDERED that defendant's motion to vacate this court's January 13, 2011 decision and order and the money judgment entered by the Clerk of Court on February 16, 2011 is denied; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry on the defendant at his Aventura, FL address contained in Exhibit A to his Notice of Motion, as well as on attorney Robert Strougo, at 286 Madison Avenue, ste. 2200, New York, NY 10017.

This constitutes the decision and order of the court.

Dated: April 17, 2012
New York, New York

Paul A. Feinman
J.S.C.