

Berry v Hand in Hand Prop. Corp.

2013 NY Slip Op 33545(U)

November 7, 2013

Sup Ct, New York County

Docket Number: 100035/12

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

JOSHUA BERRY,

INDEX No. 100035/12

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 003

HAND IN HAND PROPERTY CORP.,

Defendant.

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1

Answering Affidavits- Exhibits _____

Replying Affidavits _____

CROSS-MOTION: YES NO

FILED
JAN 13 2014
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 1/7/14

Donna M. Mills
J.S.C.
DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 58

-----X
 JOSHUA BERRY,

Plaintiff,

-against-

Index No.

HAND IN HAND PROPERTY CORP., **FILED**

100035/12

Defendant,

JAN 13 2014
 -----X

DONNA MILLS, J. :

NEW YORK
 COUNTY CLERK'S OFFICE

Defendant Hand in Hand Property Corp. (Hand) moves for a vacatur of a default

judgment.

This is an account stated and breach of contract action. Plaintiff, a former attorney for Hand, is seeking recovery of allegedly overdue legal fees. The complaint alleges that plaintiff served Hand invoices for services rendered in 2005 and 2008, which were only partially paid. An invoice served in 2010 was never paid.

Plaintiff appeared in court on September 19, 2013, and took a default judgment against Hand, who failed to appear. On October 9, 2013, Hand received a restraining notice. Thereafter, Hand moved for an order to vacate the default judgment.

“A party seeking relief from an order or judgment on the basis of excusable default pursuant to CPLR 5015 (a) (1) must provide a reasonable excuse for the failure to appear and demonstrate the merit of the cause of action or defense [citation omitted].” *Goldman v Cotter*, 10 AD3d 289, 291 (1st Dept 2004). “What constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court.” *Rodgers v 66 E. Tremont Hgts Hous. Dev. Fund Corp.*, 69 AD3d 510, 510 (1st Dept 2010).

Hand argues that plaintiff had originally moved for summary judgment in this court. On September 16, 2013, Hand's counsel notified plaintiff's counsel that, since a signed affidavit in opposition to this motion was not ready at that time, Hand's counsel sought a two-week extension, promising the delivery of the affidavit within a week. Plaintiff's counsel allegedly assented to the extension, though informing Hand's counsel that he would appear in court on September 19 in any event. On that date, plaintiff's counsel appeared in court, but rather than seeking an adjournment, moved for a default. The following day, Hand's counsel contacted plaintiff's counsel to inquire why an adjournment was not requested. Hand states that plaintiff's counsel responded by claiming that Hand had failed to prepare a stipulation for an adjournment. Thereafter, plaintiff allegedly refused to reconsider an adjournment, leading to the commencement of this motion to vacate.

Hand contends that it has a reasonable excuse for the default. It claims that it was led to believe that plaintiff's counsel assented to an adjournment, and that it had no awareness that the preparation of a stipulation was a part of the agreement.

Hand also contends that it has a meritorious defense in this action. An affidavit from Hand's president, Parsauram Shiwdin, is submitted, as it was originally intended to be used in opposition to plaintiff's motion for summary judgment. Shiwdin asserts that the dispute arose because plaintiff performed services on a continuing monthly basis, but rendered bills only once or twice a year. Shiwdin states that the collection of a bill for services performed three years earlier is barred by the statute of limitations. He also states that the billing was difficult to review and evaluate. He contends that he agreed to pay plaintiff \$15,000 in settlement of an April 2005 invoice, and paid the sum within one year. He claims that he terminated services with plaintiff in

early 2007 and informed plaintiff of his refusal to pay the March 2008 invoice. After receiving a September 2010 invoice, he did not respond, but avers that his refusal to object to the bill did not constitute an account stated. He insists that he had already objected to the prior invoice and expressed an unwillingness to make any further payments.

In opposition to the motion to vacate, plaintiff argues that there is no accord and satisfaction between the parties. Referring to the 2005 invoice, he claims that the payments made by Hand were deemed an account stated. Plaintiff contends that the payments were for services clearly rendered in the past, and that upon the establishment of an account stated, the statute of limitations was extended through agreement. Plaintiff also contends that the default was of a deliberate nature and should not be vacated.

The first issue is the reasonableness of Hand's excuse for its counsel's failure to appear. CPLR 2104 provides that any agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in writing subscribed by him or her or his or her attorney, or reduced to the form of an order. *See Tate v Fusco*, 103 AD2d 869 (3d Dept 1984); *Kahn v Friedlander*, 90 AD2d 868 (3d Dept 1982). Here, defendant Hand has not shown any evidence of a written, subscribed agreement, or any proof that counsel would have convened in open court to adjourn the hearing. Therefore, any agreement on plaintiff's counsel's part to postpone the court proceeding would not be binding, despite oral assurances.

However, this court has the discretion to excuse such a failure. *See Auerbach v Tregerman*, 106 AD3d 633 (1st Dept 2013). Here, the default can be viewed as a law office failure. There is sufficient evidence that the default was not actually willful and there was no

serious delay in proceedings as a result. In addition, there is a strong public policy in favor of disposing cases on their merits. *See DaimlerChrysler Ins. Co. v Seck*, 82 AD3d 581, 582 (1st Dept 2011). Thus, the court finds that there is a reasonable excuse for the default.

The next issue is whether Hand has demonstrated a meritorious defense. Hand alleges accord and satisfaction as a defense to plaintiff's claim of an account stated. "An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account terms and balance due [citation omitted]." *Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250 (1st Dept 2007). "Essential elements of an accord and satisfaction are disputes as to the amount due and knowing acceptance by the creditor of a lesser amount." *Consolidated Edison Co. of N. Y. v Jet Asphalt Corp.*, 132 AD2d 296, 303 (1st Dept 1987). Inasmuch as an accord and satisfaction constitutes a contract, it must be shown that the parties set forth the essential elements thereof and had a meeting of the minds to resolve the disputed claim. *See Sorrye v Kennedy*, 267 AD2d 587, 589 (3d Dept 1999).

In this case, there is a dispute as to the validity of an account stated claim. With respect to the 2005 invoice, Hand argues that there was an agreement between the parties that altered the amount due. The altered amount was thereafter paid, according to Hand, which amounted to an accord and satisfaction. This is a colorable defense as to that invoice. *See Merrill Lynch Realty /Carll Burr, Inc. v Skinner*, 63 NY2d 590, 596 (1984). Hand also claims that he objected to the subsequent 2007 invoice upon receipt, indicating that there may be a timely objection, resulting in a defense to an account stated. It is not clear whether Hand's alleged objection to the 2010 invoice was sufficient, raising an issue of fact as to an account stated.

The court finds that Hand has made a sufficient defense with respect to the three invoices.

Consequently, this case shall continue.

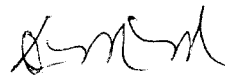
Accordingly, it is

ORDERED that defendant Hand in Hand Property Corp.'s motion to vacate its default herein is granted; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry on the County Clerk (Room 141B) and upon the Trial Support Office (Room 118).

DATED: 11 / 7 / 13

ENTER



J.S.C.

DONNA M. MILLS, J.S.C.

FILED

JAN 13 2014

NEW YORK
COUNTY CLERK'S OFFICE