Columbus Sponsorship, LLC v Millenia Partners, LLC
2014 NY Slip Op 30384(U)
February 13, 2014
Sup Ct, New York County
Docket Number: 110957/2009
Judge: Louis B. York
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This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Columbus Sponsorship, LLC

-v-

Millenia Partners, Inc.

INDEX NO. 110957-2009

MOTION DATE

MOTION SEQ. NO. 8

The following papers, numbered 1 to ____, were read on this motion to ~~for~~ vacate default judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). ____

Answering Affidavits — Exhibits ____ No(s). ____

Replying Affidavits ____ No(s). ____

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/7/14

LOUIS B. YORK, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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COLUMBUS SPONSORSHIP, LLC,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 110957/2009

MILLENIA PARTNERS, LLC, ALAN GINSBURG, MILLENIA GALLERY, LLC, MILLENIA FINE ART COLLECTION, MILLENIA FINE ART, NORAM-LLC and NORAM-AGH, LLC

Defendants.

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A/R RETAIL, LLC,

Plaintiff,

Index No. 113412/2009

-against-

MILLENIA PARTNERS, LLC, d/b/a MILLENIA FINE ART COLLECTION, ALAN GINSBURG, MILLENIA GALLERY, LLC, MILLENIA FINE ART COLLECTION, MILLENIA FINE ART, NORAM-LLC and NORAM-AGH, LLC,

Defendants.

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Louis B. York, J.:

In this consolidated action seeking monies for unpaid rent, (1) defendants move to vacate this court's March 6, 2013 order (Order), which struck defendants' answer and granted plaintiffs a default judgment (motion sequence no. 008), and to stay any inquest and vacate the note of issue as there is outstanding

discovery;[1] (2) defendant Alan Ginsburg (Ginsburg) moves to renew and reargue the October 22, 2012 decision and order of this court (the Decision), in which the court denied Ginsburg's motion for partial summary judgment (motion sequence no. 009); and (3) plaintiffs Columbus Sponsorship, LLC (CS) and A/R Retail, LLC (A/R) cross-move to reargue the Decision to "correct" what plaintiffs believe to be "incorrect statements" made by the court concerning the doctrines of ratification and "two innocent parties."

Defendants' motion to vacate default

Defendants move to vacate the Order, pursuant to CPLR 5015 (a) (1), on the ground that defendants can establish both a reasonable excuse for the default and a meritorious defense; pursuant to CPLR 5015 (a) (4), on the ground that defendants were never notified of the conference scheduled on March 6, 2013; and pursuant to 22 NYCRR 202.21 (e), to vacate the note of issue as discovery is not yet complete.

"[T]o obtain relief from a judgment or order on the basis of an excusable default pursuant to CPLR 5015 (a) (1), the moving party must provide a reasonable excuse for the failure to appear and must further demonstrate that the case or defense has merit" (*Carroll v Nostra Realty Corp.*, 54 AD3d 623, 623 [1st Dept

[1] Although the Order was issued under index No.: 110957/2009, as the court noted in its October 22, 2012 Decision, "the two actions were joined for discovery and trial" (Kingsley aff, exhibit A at 3).

2008]). The determination of such a motion is within the discretion of the court, and is based upon: "the length of the delay, prejudice to the opposing party, and the strong public policy in this State favoring the resolution of matters on the merits [citations omitted]" (*Mejia v Ramos*, _AD3d _ , 2014 Slip Op 00173, 2014 WL 67309, *1 [1st Dept Jan. 9, 2014]).

According to defendants' submission, defendants' counsel were unaware of the March 6, 2013 conference scheduled by the court, which was posted on e-Track on February 14, 2013, and, therefore, failed to appear. On that date, pursuant to the Order, the defendants' answer was stricken.

The Order states:

> "Upon the defendants' default in appearing for today's conference and pursuant to Uniform State's [sic] 202.27 (a) defendant's [sic] Answer is stricken, plaintiff is granted judgment by default and plaintiff may proceed to inquest on damages. This matter is referred to the Referee's Clerk to assign to a Special Referee to hear and decide the Inquest and enter judgment thereon"

(Stark aff, exhibit A at 1).

In their reply papers, defendants' counsel, Jeffrey Stark and Robert C. Angelillo, elaborate on defendants' excuse for the default by detailing their use of court rules and communications with the court and opposing counsel in order to remain informed of court appearances. Defendants' counsel explain that their failure to appear at the March 6, 2013 conference resulted from their office practice to "rel[y] on the entry by its attorneys of

dates from all scheduling and other orders in their individual cases, which dates are then monitored by a centralized calendar clerk" (Angellilo aff, ¶ 8). Yet, according to defendants' submission, there was an online posting on the court's website, and in the New York Law Journal, effective February 19, 2013:

> "there appeared a sentence at the end of the notice stating that 'Notifications of various developments and scheduling on pending cases are not [sic] longer sent by the court by regular mail.' [citations omitted]."

(Stark aff, ¶ 3).

According to defendants' counsel, counsel were advised to sign up to the e-Track system. Yet, defendants' counsel did not sign up, and pleads, as its excuse, law office failure, as they were "unaware of these notices and did not sign up for e-Track or one of the other services which provide on-line notification" (Angellilo aff, ¶ 4).

The court may accept law office failure as a reasonable excuse for vacating a default (*Mejia*, 2014 WL 67309 at *1; *Sarcona v J & J Air Container Sta., Inc.*, 111 AD3d 914, 915 [2d Dept 2013]). In light of defendants' counsels' detailed and personal explanations concerning their failure to appear at the conference on this one occasion, and the lack of prejudice to plaintiffs, the court finds that this is an adequate excuse.

With respect to the second factor, the merits of their defense, the issue raised by the parties on these motions is whether Ginsburg can be bound to a personal guaranty, which he

did not sign, but which was signed, in his name, by his employee, Jeffrey Hall (Hall). Hall also signed Ginsburg's name on two leases, which are at issue in this action. On their motion to vacate, defendants' counsel refers the court both to Ginsburg's affidavit in support of the motion to reargue and renew his motion for partial summary judgment, in which he argues that he is not personally liable on the guaranty, and to Hall's affidavit, in which he avers that he did not have the authority to sign Ginsburg's name to documents that purportedly bound Ginsburg personally to the guaranty. Thus, with these affidavits, Ginsburg supports his defense that Hall forged Ginsburg's name on the guaranty, undermining any finding of liability against Ginsburg personally. Since Ginsburg's submission raises a question of fact as to whether Hall had the authority to sign Ginsburg's name, Ginsburg has established a meritorious defense. Thus, finding in defendants' favor on both factors, the court grants defendants' motion to vacate the default.

Motion to Reargue and Renew

Ginsburg moves to renew and reargue the Decision denying Ginsburg's motion for partial summary judgment. In the Decision, this court, upon a finding of factual questions, denied Ginsburg's motion for summary judgment, in which he sought to dismiss the causes of action based on piercing the corporate

veil/alter ego, and for Ginsburg's alleged breach of the personal guaranty. Additionally, in that order, the court found that Ginsburg cannot be "held bound by an allegedly forged guaranty based on the theory of ratification" (Stark aff, exhibit A at 10), and, likewise, in the Decision, the court found that "[t]here were no financial losses sustained by 'two innocent parties,' and that the concept is not relevant in the present circumstances" (*id.* at 11).

On his motion to reargue, Ginsburg argues that the court mistakenly supported its finding that there is a question of fact, allowing plaintiffs' arguments to pierce the corporate veil to go forward, with cases that are inapplicable. According to Ginsburg, in those cases, unlike here, the tenants allegedly committed fraud at the inception of the leases in question by providing false information to the landlord. Ginsburg argues that here, in contrast, plaintiffs do not claim that Ginsburg, the sole member of the corporate tenant, induced defendants to sign the leases at issue by misrepresenting the corporate assets or its business, or its intention to occupy the premises. In essence, Ginsburg argues in this motion, as he argued in his original motion, that in contract cases, a party must, in order to pierce the corporate veil, show not only a breach, but that the corporate form itself was used to mislead or defraud the plaintiff, and that, because Ginsburg had no knowledge of the

leases or the guaranty until this lawsuit was commenced, no such claims or evidence were set forth here.

Pursuant to CPLR 2221 (d) (2), a motion for leave to reargue:

> "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion."

A motion for a leave to reargue is not an opportunity to argue once again the "very questions previously decided" (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]); *see also William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] (a motion to reargue "is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided").

The court denies this motion, finding that Ginsburg's characterization of the cases cited by the court in the Decision is not accurate, and that the court did not misapprehend the law on this point. Furthermore, Ginsburg is simply putting forth the same arguments here that he made in his initial motion for summary judgment. Ginsburg's counsel admits throughout their submission on reargument that they "made the same point" on the original motion (*see* memorandum of law on behalf of defendant Alan Ginsburg in support of his motion for reargument and renewal at 3-4). Accordingly, this motion is denied.

On his motion to renew, Ginsburg claims to offer "new" facts

to challenge this court's denial of his motion to dismiss A/R's claim against him on the allegedly forged guaranty. Pursuant to CPLR 2221 (e) (2) and (3), a motion to renew requires the movant to show "new facts not offered on the prior motion that would change the prior determination" as well as a "reasonable justification for the failure to present such facts on the prior motion." "A motion 'to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation' [citations omitted]" (*Sobin v Tylutki*, 59 AD3d 701, 702 [2d Dept 2009]).

On the renewal motion, Ginsburg provides his responses to plaintiffs' fifth notice for discovery and inspection, which were outstanding at the time of the court's Order, as well as an affidavit from Hall. Ginsburg argues that these new documents provide the court with information that would permit a reversal of its denial of his motion. Specifically, Ginsburg argues that his responses to paragraphs "9" and "10" of plaintiffs' fifth notice for discovery and inspection, which demanded: "[t]o the extent not already produced, documents on which Hall signed or is suspected to have signed Ginsburg's name, including, without limitation, leases, tax documents, correspondence, agreements and/or documents relating to charity events" and "[t]o the extent not already produced, agreements signed by Hall in his own name or in Ginsburg's name, that bound or purported to bind, Millenia,

Ginsburg or any of Ginsburg's companies," show that defendants have no documents "in which Hall allegedly signed Ginsburg's name and which were not subsequently repudiated by Ginsburg" (Stark aff, ¶ 17).

Ginsburg further offers an affidavit, signed by Hall, which, according to Ginsburg, "confirms that although [Hall] signed many documents on behalf of the Gallery, 'Alan Ginsburg never authorized me to sign his name to any document which bound him personally'" (Stark aff at 7, Hall aff, ¶ 7). Hall further avers:

"The instances in which I did so - the guaranties of the three Gallery car leases and the guaranty of the A/R retail lease - were each without Alan's knowledge or authority - as I previously testified [citation omitted]. Also, I signed the lease documents in issue without Alan's knowledge or approval"

(*id.*).

In opposition to Ginsburg's renewal motion, plaintiffs argue that: (1) Halls' testimony contained in the affidavit is tailored to overcome issues raised in the Decision, and it contradicts his deposition testimony; and (2) Ginsburg's motion fails to offer any explanation as to why the Hall affidavit was not, or could not, have been presented on the initial motion for summary judgment. Plaintiffs further argue that there is discovery that needs to be completed concerning Hall's signing of

the guaranty.

The court denies Ginsburg's motion to renew, as Ginsburg has offered no sufficient explanation as to why this information was not included on the original motion. Ginsburg argues that he submits these documents now, because they are in response to the court's October 22nd finding: "even if Hall has signed Ginsburg's name in his place on the lease agreement, he may have authority to do so . . . and further discovery is necessary to determine whether it was indeed the case" (Kingsley aff, exhibit A at 9-10). Yet, these "new" facts offered by Ginsburg were apparently within his control during the life of this litigation and, thus, could have been, and, in fact, were, provided by him in his original motion papers. Any questions concerning Hall's authority with respect to both Millenia and Ginsburg, and any actions he took with respect to that authority, were in contention on Ginsburg's initial motion and the court's finding was simply a response to the parties' submissions. Additionally, on this motion to renew, Ginsburg admits that these facts were already known to plaintiffs, as Hall testified to them at his deposition (*see* reply affirmation in support of Alan Ginsburg's motion for reargument and renewal at 6 ["as he swore at his deposition, the Hall affidavit states . . ."]). There are no grounds provided for the court to find otherwise.

Further, that the parties argue about the consistency of

Hall's statements concerning whether he informed Ginsburg about the leases and the guaranty does not warrant the granting of renewal. The court acknowledged in the Decision that there exist questions of fact concerning Hall's authority, and that the parties may continue to engage in discovery on this point. If, as plaintiffs argue, there continue to be outstanding documents on this point, the discovery on this issue may be completed.

Plaintiffs cross-move for leave to reargue on the grounds that the court, in what the plaintiffs believe to be dicta, made the erroneous and unnecessary statements; "[Ginsburg] cannot be bound by an allegedly forged Guaranty based upon the theory of ratification," and that the "two innocent parties" doctrine does not apply. The court denies this motion. Upon review of the papers, the court does not find that, on this point, it overlooked or misapprehended matters of fact or law.

Accordingly, it is hereby

ORDERED that defendants' motion to vacate the default judgment and the note of issue (motion sequence no. 008) 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 158); and it is further

ORDERED that defendant Alan Ginsburg's motion for reargument and renewal (motion sequence no. 009) is denied; and it is

further

ORDERED that plaintiffs Columbus Sponsorship, LLC and A/R Retail, LLC's cross motion for reargument is denied; and it is further

ORDERED that the parties are directed to appear for a status conference in Room 425, on 3/5, 2014 at 2:15 p.m.

Dated:

J.S.C.

FILED

FEB 13 2014

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COUNTY CLERK'S OFFICE