

Morgenthau v Western Express Intl., Inc.
2014 NY Slip Op 31915(U)
July 23, 2014
Supreme Court, New York County
Docket Number: 406648/07
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARTIN SHULMAN, J S C

PART 1

Justice

Index Number : 406648/2007
MORGENTHAU, ROBERT M.

vs
WESTERN EXPRESS

Sequence Number : 005

DEFAULT JUDGMENT

INDEX NO. 406648/07

MOTION DATE _____

MOTION SEQ. NO. 005

The following papers, numbered 1 to _____, were read on this motion for Default judgment
Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits A-E | No(s) 1
Answering Affidavits — Exhibits A-P | No(s) 2
Replying Affidavits _____ | No(s) 3

Upon the foregoing papers, It is ordered that this motion is decided in
accordance with the attached decision
and order.

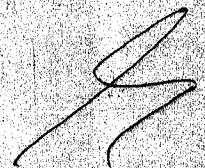
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S): _____

FILED

JUL 24 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 23, 2014



J.S.C.

HON. MARTIN SHULMAN, 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

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

PRESENT: Hon. MARTIN SHULMAN, JusticePART 1

 Robert M. Morgenthau, District Attorney of
 New York County,

Plaintiff-Claiming Authority,

- v -

 Western Express International, Inc., d/b/a Paycard 2000,
 d/b/a Dengiforum, d/b/a Autoexchanger, d/b/a
 Webexchanger, d/b/a Obmen Dengiforum, d/b/a
 Ruamerica, et al,

 Defendants.

INDEX NO.: 406648/07

Decision/Order

FILED

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COUNTY CLERK'S OFFICE
NEW YORK

In this CPLR Article 13-A forfeiture action, plaintiff-claiming authority ("plaintiff" or "DA") moves for a default judgment against defendants Western Express International, Inc. ("Western Express") and Vadim Vassilenko (collectively "defendants"). Plaintiff also requests an order of attachment.¹ Defendant Vassilenko, who is presently incarcerated, opposes the motion *pro se*.²

Defendants pleaded guilty to multiple counts of First Degree Scheme to Defraud and First and Second Degree Money Laundering, all felonies. They further pleaded guilty to one count of Fifth Degree Conspiracy, a misdemeanor. The complaint alleges *inter alia* that defendants and the co-defendants herein "engaged in an illegal identity theft conspiracy on the internet" and "laundered the illegal proceeds obtained by

¹ The DA also requests an order of attachment in motion sequence 1 which is the subject of a separate decision/order issued simultaneously herewith.

² Vassilenko purports to submit opposition on behalf of both himself and Western Express. However, corporations such as Western Express must be represented by counsel. See CPLR §321(a). Accordingly, this court must treat the opposition papers as having been interposed solely on Vassilenko's behalf.

individuals who trafficked in stolen credit card numbers". Complaint, Motion at Exh. A, ¶¶ 4-5.

The DA seeks judgment against defendants in the amount of \$48,732,000, representing the proceeds of the foregoing crimes. Plaintiff bases the calculation of damages upon Investigator Michael Wigdor's ("Wigdor") affidavit dated October 4, 2007 submitted in support of the DA's order to show cause (motion sequence 001) seeking an order of attachment and preliminary injunction. Specifically, Wigdor states that 97,464 stolen credit card numbers were found in accounts belonging to four (4) of the co-defendants herein and four (4) criminal defendants not named in this forfeiture action. Under Penal Law §155.20(2)(a), the value of a stolen credit card is "the greatest amount of economic loss which the owner of [an] instrument might reasonably suffer by virtue of the loss of the instrument." Wigdor avers that in conversations with representatives of the five (5) largest credit card companies from which the credit card numbers were stolen, he was informed that the minimum amount of credit extended is \$500. Plaintiff arrives at the figure of \$48,732,000 by multiplying 97,464 by \$500.

In order to successfully oppose a motion for a default judgment, Vassilenko must demonstrate a justifiable excuse for his default and a meritorious defense. *Johnson v Deas*, 32 AD3d 253 (1st Dept 2006). Vassilenko's opposition does not include any explanation for his failure to timely interpose an answer. With respect to a meritorious defense, his 32 page opposing affidavit³ *inter alia* challenges the underlying criminal

³ The affidavit of service of Vassilenko's opposition indicates that in addition to serving plaintiff, he also served it upon various court, government and political officials and/or entities, including but not limited to Chief Justice Jonathan Lippman, the Departmental Disciplinary Committee, New York State Attorney General Eric T.

arrest warrant as having been obtained under false pretenses, attacks the validity of his convictions for first and second degree money laundering⁴ and contends the DA deprived the grand jury of vital information. These arguments are unavailing in light of Vassilenko's guilty pleas, which he is collaterally estopped from disputing. See *Grayes v DiStasio*, 166 AD2d 261, 262-263 (1st Dept 1990) (a criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts; thus, a defendant who pleads guilty to a criminal charge is collaterally estopped from relitigating, in a subsequent civil action, the facts upon which the conviction is based). See also *S.T. Grand, Inc. v City of New York*, 32 NY2d 300 (1973).

In light of Vassilenko's failure to establish a reasonable excuse for his default and a meritorious defense, plaintiff is entitled to judgment on default as to liability. However, while Vassilenko's guilty plea precludes him from challenging plaintiff's entitlement to judgment on liability, he also challenges the amount of damages claimed. Specifically, Vassilenko notes that Wigdor submits no supporting proof to substantiate that \$500 is the minimum amount of credit extended for credit cards issued by the five (5) largest credit card companies.

Schneiderman, Mayor Bill DeBlasio, Governor Andrew M. Cuomo, Secretary of State John Kerry, the Securities and Exchange Commission and Russian President Vladimir Putin. Also included were media entities such as Yahoo!, Google, CBS Broadcasting Corp. (*60 Minutes*) and *The New York Times*.

⁴ Vassilenko contends that the proceeds of the underlying crimes were unrelated to the criminal sale of controlled substances. However, in addition to proceeds derived from criminal sales of controlled substances, first and second degree money laundering can also be based upon transactions involving proceeds derived from other felony crimes. See generally, Penal Law §§ 470.20 and 470.15.

This court agrees that the DA does not conclusively establish the amount of damages to be awarded. Wigdor's calculations are based upon hearsay, to wit, his conversations with representatives from various credit card companies. Accordingly, the portion of plaintiff's motion seeking judgment in the amount of \$48,732,000 is denied without prejudice. The DA is granted leave to renew its application on notice to Vassilenko, which shall include further supporting proof. For the above reasons, it is hereby

ORDERED that plaintiff's motion for a default judgment is granted to the extent that plaintiff is entitled to a default judgment against Vassilenko and Western Express International, Inc. solely as to liability.

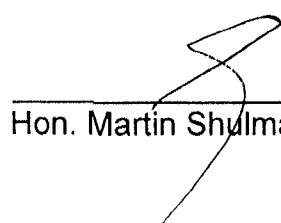
The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to plaintiff's counsel and defendant Vassilenko.

Dated: July 23, 2014

FILED

JUL 24 2014

**COUNTY CLERK'S OFFICE
NEW YORK**



Hon. Martin Shulman, J.S.C.