SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

DAVID ECKER,

Plaintiff,

- v -

INGK LABS, LLC, PAYZ, INC., DAMION HANKEJH, INDIVIDUALLY AND AS GENERAL PARTNER OF INGK LABS, LLC AND PAYZ, INC., AND ANTHONY CRAIG ALBERINO, INDIVIDUALLY AND AS PRESIDENT/CEO OF INGK LABS, LLX AND PAYZ INC.,

Defendants.

INDEX NO. 157437/2012

MOTION DATE

MOTION SEQ. NO.
MOTION CAL. NO. 005

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ..	1-2
Answer — Affidavits — Exhibits _____	3-4
Replying Affidavits _____	5

Cross-Motion: **X** Yes No

Plaintiff, David Ecker ("Plaintiff"), commenced this action with the filing of the Summons and Complaint dated October 19, 2012. Individual Defendants, Damion Hänkejh ("Hänkejh"), and Anthony Craig Alberino ("Alberino"), are alleged to be the owners of corporate defendants Ingk Labs, LLC ("Ingk") and Payz, Inc. ("Payz").

The Complaint alleges five causes of action. The first cause of action alleges that Plaintiff was an employee of Defendants within the meaning of Labor Law §190(2) and that they failed to pay him in wages in violation of Labor Law §191(1)(d). The second alleges that Ingk breached a contract between the parties. The third alleges fraud based on Alberino and Hänkejh's misrepresentations that Ink and Payz had secured capital commitments that would be called upon at any time, Hänkejh would personally fund Ingk and Payz until they called-in the capital

commitments, and Hänkejh was able and intended to pay Plaintiff's wages out of his own funds until they called-in capital investments. The fourth and fifth causes of action seek to pierce Ingk and Payz's corporate veils and hold Alberino and Hänkejh personally liable for their debts.

Plaintiff sought default judgment against all defendants. By Order dated June 18, 2013, a default judgment was entered against Ingk and Payz, the corporate defendants who had not appeared by attorney in violation of CPLR 321. More specifically, the Order (1) entered judgment in favor of Plaintiff, and against Ingk, in the amount of $44,111.34, together with interest, (2) ordered and adjudged that the Convertible Promissory Note issued on April 30, 2012 between Plaintiff and Payz to be void, (3) and referred the issue of attorneys' fees owed by Ingk, to Plaintiff to a Special Referee to hear and report with recommendations.

The Court denied Plaintiff's motion for default judgment as against individual defendants, Alberino and Hänkejh, because the latter had interposed an answer pro se. The Court ordered Plaintiff's action against Hänkejh and Alberino to be severed and proceed.

As per the Court's June 18, 2013 Order, a hearing was thereafter held by the Honorable Ira Gammerman, JHO, on September 9, 2013, in which the Honorable Ira Gammerman, JHO, recommended that this Court enter a judgment in the amount of $33,398.00 for attorneys' fees in Plaintiff's favor as against Ingk. By Order dated October 22, 2013, the Court entered judgment in favor of Plaintiff, and against Ingk, in the amount of $33,398.00, representing reasonable attorneys' fees, with interest.

Ingk and Payz now move to vacate, pursuant to CPLR 5015(a) and 2004, to vacate the Judgments entered on August 20, 2013. Ingk and Payz also seek 30 days to retain substitute counsel for Latham & Watkins LLC, who appear on behalf of Movants for the limited purpose of seeking vacatur of the Judgments.

Plaintiff cross moves, for an Order, (1) pursuant to New York Rules of Court 130-1.1-2, sanctioning Defendants and awarding the Plaintiff reimbursement of expenses and reasonable attorneys' fees from Defendants' frivolous conduct intended to delay or prolong the resolution of this litigation; (2) directing Alberino and Hänkejh to pay the fees and sanctions assessed against Ingk and Payz; (3) directing Defendants to appear in court within 5 days and produce (a) bank statements for all bank accounts held in their name and/or for their benefit; (b) a schedule of all transfers and conveyances from Ingk's accounts, (d) a list of all assets belonging to Ingk; (4) directing Alberino and Hänkejh appear in court within

5 days to produce their own bank account records on the grounds that there "exists evidence that they used" Ingk as "their alter ago"); (5) freezing all accounts in which Ingk, Payz, Alberino, Hänkejh have assets; (6) directing, within 5 days, the return of assets that were transferred from Ingk's accounts; (7) directing Ingk and Payz to "put up a bond in the amount of the judgments entered against them"; and (8) striking those portions of Defendants' motion papers "containing scandalous and unnecessary allegations meant to maliciously harm" Plaintiff from the record.

CPLR § 5015(a) provides that a court may vacate prior order or judgment on the grounds of:

> 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; . . .

It is well settled that a court may, in its discretion, vacate a default if the party seeking to vacate can show a reasonable excuse for the delay and a meritorious defense. (*Mutual Marine Office, Inc. v. Joy Const.*, 39 A.D.3d 417 [1st Dept. 2007]).

As for "excusable default" for its failure to answer, Defendants allege:

> The co-owners of Ingk and Payz [Alberino and Hänkejh], who were not being advised at the time, mistakenly believed that this service was not proper because they were not personally served (as described in their previous filings), and that the deadline to respond had not begun to run. In addition, the co-owners made a settlement proposal that they mistakenly believed constituted a response to the lawsuits . . . The co-owners mistakenly believed they could file these documents on behalf of all four defendants and thereby present a defense for the two corporations.

Defendants' motion to vacate is denied. Defendants have failed to show a reasonable excuse for failing to answer the Complaint. "[E]ven if defendant[s] [Alberino and Hänkejh mistakenly believe[d] [they] could represent a corporation, courts in this department have not recognized a violation of CPLR 321(a) to constitute a reasonable excuse for vacating a default judgment under CPLR 5015(a)(1)." *Lopez-reyes v.Heriveaux*, 2014 WL 3753333 at *2 [Supreme Court of New York, July 28, 2014]. *See also Jimenez ex. rel. Dista v. Brenilee Corp.*, 48

A.D. 3d 351, 352 [1st Dept 2008](citations omitted)("A corporate defendant's failure to comply with CPLR 321 provides no basis for vacating a judgment entered against that defendant, since the rule is not intended to penalize an adverse party for the corporation's improper appearance, but is rather to ensure that the corporation has a licensed representative who is 'answerable to the court and other parties for his or her own conduct in the matter.'").

Here, as set forth in Plaintiff's opposing affirmations, "While the Defendants claim that they were unaware that corporations must be represented by counsel, the record indicates otherwise." Defendants used a form answer available on the New York Courts' website, which had an informational link providing instructions for litigations, stating, "If you are a corporation or voluntary association, you must appear by attorney." Furthermore, prior to their filing of the motion for default judgment against Defendants, Plaintiffs' counsel had been contracted by two lawyers on behalf of Defendants requesting extensions of time to answer.

As Defendants have failed to demonstrate a reasonable excuse for their delay, the Court need address whether they established the existence of a meritorious defense.

Plaintiff's cross motion, which seeks, among other relief, sanctions against Defendants and post judgment relief, is denied. As for Plaintiff's efforts to hold Alberino and Hänkejh liable for the debts of the corporate defendants, Plaintiff must first prove their piercing the corporate veil claim against said individuals.

Wherefore it is hereby

ORDERED that Defendants' motion to vacate is denied; and it is further

ORDERED that Plaintiff's cross motion is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: SEPTEMBER 3, 2014

HON. EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE