

Gerber Fin. Inc. v Mango Sedans LLC

2015 NY Slip Op 30329(U)

March 11, 2015

Supreme Court, New York County

Docket Number: 155176/2014

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

GERBER FINANCE INC.,

Plaintiff,

-against-

INDEX NO. 155176/2014
MOTION DATE 03-04-2015
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

MANGO SEDANS LLC, TERENCE TALERMAN,
and SELWYN GLASSER,

Defendants,

The following papers, numbered 1 to 7 were read on this motion to vacate default judgment.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	<u>1 - 4,</u>
Answering Affidavits – Exhibits _____	<u>5</u>
Replying Affidavits _____	<u>6 - 7</u>
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff’s motion to vacate a default judgment is granted, upon vacatur, plaintiff’s motion for summary judgment is restored, on restoration, plaintiff’s motion for summary judgment is granted.

This is an action to recover damages pursuant to a breach of a loan agreement. Plaintiff Gerber Finance, Inc. granted Mango Sedans LLC (herein “Mango”) a revolving line of credit in the amount of \$250,000 pursuant to a Loan and Security Agreement and a Promissory Note (herein “Loan”). Defendants Terence Talerma and Selwyn Glasser (collectively known herein as “Defendants”) signed separate personal guaranties of the Loan and agreed to guaranty repayment of the Loan (herein “Guaranty”). Plaintiff also perfected a first priority security interest in all of the assets and personal property of Mango by filing a UCC Financing Statement with the Office of the New York Secretary of State on June 7, 2012, Filing Number 201206075655702 (herein “Lien”).

Plaintiff claims Mango defaulted on the Loan in June 2013 and commenced the instant action by summons and complaint dated May 22, 2014 asserting causes of action for breach of contract, account stated, unjust enrichment, for possession of assets and personal property of Mango pursuant to the UCC filing, for breach of guaranty as against Defendants. Only defendant Glasser has answered the Complaint, and Mango and Talerma are in default.

Plaintiff moved for summary judgment on all of its causes of action as against Glasser and to dismiss his affirmative defenses asserted in his Answer. Plaintiff also moved for a default judgment as against Mango and Talerma for failing to answer, appear, or plead in this action. The motion was opposed only by Glasser. The parties were scheduled for oral argument on January 7, 2015. Neither counsel for Plaintiff nor Glasser appeared for oral argument. In an Order dated January 7, 2015, this Court denied the motion for failure of either side to appear for oral argument.

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

Plaintiff now moves by Order to Show Cause to vacate this Court's prior Order denying summary judgment and rescheduling oral argument on the summary judgment motion. Glasser opposes vacatur, arguing that Plaintiff has not demonstrated that the underlying motion has merit.

In order to obtain relief from an order or judgment 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 has merit" (*Navarro v. A. Trenkman Estate, Inc.*, 279 A.D.2d 257, 258, 719 N.Y.S.2d 34 [1st Dept., 2000]). "Assessment of the sufficiency of the excuse proffered for the delay and the adequacy of the merit of the action are consigned to the sound discretion of the court" (*Bengal House Ltd. v 989 3rd Ave., Inc.*, 118 A.D.3d 575, 576, 988 N.Y.S.2d 586 [1st Dept., 2014]). "The determination whether a reasonable excuse has been offered is sui generis and should be based on all relevant factors, among which are the length of the delay chargeable to the movant, whether the opposing party has been prejudiced, whether the default was willful, and the strong public policy favoring the resolution of cases on the merits (*Chevalier v 368 E. 148th St. Assoc., LLC*, 80 A.D.3d 411, 414, 914 N.Y.S.2d 130 [1st Dept., 2011] citing to, *Harcztark v. Drive Variety, Inc.*, 21 AD3d 876, 876-877, 800 NYS2d 613 [2005]).

Plaintiff states that the e-Track failed to notify the parties that oral argument had been scheduled, and that Plaintiff realized that oral argument had been scheduled after receiving notification that summary judgment had been denied for failure of either party to appear. Glasser does not dispute that he also failed to receive notice of oral argument. Plaintiff contends that his default was not willful or intentional, and that vacatur is proper as against Mango and Talerman because neither has appeared or opposed the motion. The Court agrees.

Vacatur of Plaintiff's default as against Glasser is also proper. Plaintiff states a meritorious position in support of summary judgment. Plaintiff annexes the Loan documents, the Guaranty, and the Lien. These documents along with the accompanying affidavits put forward a meritorious position in favor of summary judgment.

Upon vacatur, the Court addresses the underlying summary judgment motion.

Plaintiff argues that the documentary evidence submitted in support - the Loan and Guaranty - establish, as a matter of law, plaintiff's entitlement to summary judgment and dismissal of Glasser's affirmative defenses. Plaintiff further contends that Glasser fails to submit any evidence rebutting plaintiff's showing.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

The documents submitted by Plaintiff in support of its motion for summary judgment make a prima facie showing of entitlement to judgment as a matter of law against Mango. The documents show that a loan was issued to Mango, that Talerman and Glasser agreed to be held liable for a default by Mango, and the parties do not dispute that Mango is in default.

The Guaranty, in relevant part states that:

The undersigned [Glasser] further waives (i) notice of the acceptance of his Guaranty, of the making of any such loans or extensions of credit, and of all notices and demands of any kind to which the undersigned may be entitled, including, without limitation, notice of adverse change in [Mango's] financial condition or of any other fact which might materially increase the risk of the undersigned and (ii) presentment to or demand of payment from anyone whatsoever liable upon any of the Obligations, protest, notices of presentment, non-payment or protest and notice of sale of any collateral security or any default of any sort. (see Moving Papers, Exhibit E, PP 3(b)).

The Guaranty further states that:

The undersigned [Glasser] hereby waives all suretyship defenses and any rights to interpose any defense, counterclaim or offset of any nature and description which the undersigned may have or which may exist between and among Lender, Borrower and/or the undersigned [the Grantor] with respect to the undersigned's obligations under this Guaranty, or which [Mango] may assert on the underlying debt, including but not limited to failure of consideration, breach of warranty, fraud, payment (other than cash payment in full of the Obligations), statute of frauds, bankruptcy, infancy, statute of limitation, accord and satisfaction and usury (see Moving Papers, Exhibit E, PP 3(a)).

The Guaranty's clear and unequivocal language waives the affirmative defenses asserted in Glasser's Answer. In opposition to the motion for summary judgment, Glasser fails to rebut plaintiff's prima facie showing by only annexing a self-serving affidavit alleging that he was ousted from Mango. Glasser does not come forward with evidence in admissible form to support these allegations, or the allegations in his Answer.

Accordingly, it is hereby ORDERED that plaintiff's motion to vacate this Court's Order dated January 7, 2015 denying summary judgment in favor of plaintiff is granted, and it is further,

ORDERED, that upon vacatur, plaintiff's motion for summary judgment, dismissal of the affirmative defenses asserted in the Answer, and for a default judgment against MANGO SEDANS LLC, TERENCE TALERMAN is restored, and it is further,

ORDERED, that upon restoration plaintiff's motion is granted in its entirety, and it is further,

ORDERED, that summary judgment as against defendants MANGO SEDANS LLC, TERENCE TALERMAN is granted, on default, and it is further,

ORDERED, that summary judgment as against defendant SELWYN GLASSER is granted, and it is further,

ORDERED, that all of the affirmative defenses asserted in defendant SELWYN GLASSER's Answer are hereby severed and dismissed, and it is further,

ORDERED, that plaintiff serve a copy of this Order with Notice of Entry upon the parties, and upon the General Clerk's Office (Room 119) and the Special Referee Clerk's Office (Room 119M) who upon the filing of a Note of Issue and payment of the appropriate fees, if any, shall assign this matter to a Special Referee to hear and determine the judgment amount to be awarded the moving party.

ORDERED, that the clerk of the court enter judgment accordingly.

MANUEL J. MENDEZ
J.S.C.

ENTER:



MANUEL J. MENDEZ
J.S.C.

Dated: March 11, 2015

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