

Sarker Bus. Sys., Inc. v City Bldrs., Inc.

2015 NY Slip Op 30735(U)

May 4, 2015

Supreme Court, New York County

Docket Number: 600788/09

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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SARKER BUSINESS SYSTEMS, INC., BIDYUT
SARKER and A & Z EMPIRE, INC.

Plaintiffs,

Index No. 600788/09

-against-

CITY BUILDERS, INC. and ABU Z. HOSSAIN,

Defendants.

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Anil C. Singh, J.:

The court will here address the motion brought by defendants City Builders, Inc. and Abu Z. Hossain (Hossain) for an order vacating a judgment obtained against them on default, and in favor of plaintiffs Sarker Business Systems, Inc. and Bidyut Sarker (together, Sarker), on September 8, 2014, in the sum of \$600,000, plus interest at the statutory rate from January 1, 2009 until the date the judgment is entered (September 2014 Order). Notice of Cross Motion, exhibit 3.¹ This order was obtained after an inquest was held, on April 24, 2014, upon which date defendants also defaulted. Plaintiff A & Z Empire, Inc. (A&Z) cross-moves for an order confirming another referee's report, dated October 9, 2014, in the sum of \$668,604, which was

¹This order appears to be one to confirm the referee's report after inquest. It does not appear that A&Z has made any attempt to have a judgment entered on this order by the Clerk Of the Court.

also rendered upon defendants' default (A&Z Referee's Report). A&Z also seeks to amend its complaint to add new causes of action and a new party defendant.

This consolidated action is a muddle of two actions brought against defendants, concerning two construction projects, one involving Sarker and defendants, and one involving A&Z and defendants. The actions were consolidated under the above caption by order dated March 3, 2010.

The actions stem from contracts in which defendants promised to construct buildings, which were to be paid for by plaintiffs, on various properties. The contracts were allegedly breached, with the parties blaming each other.

Defendants' motion appears to be aimed only at the September 2014 Order, in the sum of \$600,000, not the A&Z Referee's Report, in the sum of \$668,604, although they defaulted on both proceedings. A&Z's motion is aimed at confirming the A&Z Reference Report.

Motion to Vacate Default

In order to vacate a default, the party must "demonstrate . . . a reasonable excuse for [its] default in opposing the motion and a potentially meritorious opposition to the motion." *Bethune v Prioleau*, 82 AD3d 810, 810 (2d Dept 2011). "The determination of whether an excuse is reasonable in any given instance is committed to the sound discretion of the motion court." *Giglio v*

NTIMP, Inc., 86 AD3d 301, 308 (2d Dept 2011).

Defendants' excuse is twofold. Hossain claims, in an affidavit attached to defendants' notice of motion, that he was the sole shareholder in City Builders, Inc. From October 2013 to late July 2014, he claims that, "because of my dangerously failing health I had to return to Bangladesh to allow my family to nurse me back to health. I was unable to care for myself." Hossain aff, ¶ 7. Hossain does not attest to the nature of his ailment, but his attorney says that he "is a cardiac patient," who was "dangerously close to death" Bigelow aff in support of motion, ¶ 5.

Defendants also claim that their then attorney abandoned them, and that they were unable to obtain new counsel before the default. Hossain says that he "believed my former attorney was representing me." Hossain aff, ¶ 7. He only retained his present attorneys in August 2014. *Id.*, ¶ 8.

Upon being called out by plaintiffs' attorneys that the excuse proffered by Hossain was conclusory in the extreme, defendants' attorney, in defendants' reply papers, states that a letter produced therein by Hossain's cardiologist details Hossain's "real and painful coronary intervention and myocardial infarction," and that, "[w]ithout counsel and desperately ill halfway across the world, defendant's 'default' was unavoidable." Bigelow aff in reply, ¶ 7. Hossain provides no second affidavit.

Defendants' attorney provides a unsworn letter from a doctor, all of five sentences long, in which the doctor claims that Hossain "has a history of coronary artery disease, previous coronary intervention, status post myocardial infarction and bradycardia." The letter states that "[p]atient requires regular visits to the doctor to treat his condition. The patient is on chronic medications," and that he "generally see[s] the patient every 3-4 months or sooner if needed to assess his condition."

Defendants have totally failed to provide a reasonable excuse for their default. Firstly, plaintiff may not provide new evidence upon reply. See *Poole v MCPJF, Inc.*, __AD3d__, 2015 NY Slip Op 03142 (2d Dept 2015) (party could not sustain prima facie burden on evidence first provided in reply). Secondly, Hossain's unsworn doctor's letter has no evidentiary value, nor does any unsupported statement made by defendants' attorney in his affirmation. Thirdly, even if the court were to consider the letter seriously, it is clear that nowhere in it does the doctor claim Hossain was "dangerously close to death," or in anything like critical condition at the time of the defaults. Neither does Hossain ever say that he was "dangerously close to death." The doctor claims that Hossain only needed checkups every three to four months, which apparently Hossain missed while he was away in Bangladesh for seven months. There is no credible evidence at all that Hossain could not respond to the reference, or the

motion to confirm the reference, because of his health. He merely chose to go to Bangladesh.

Defendants cannot claim that their attorney abandoned them. Defendants' attorney moved to be relieved as defendants' attorney due to his inability to contact Hossain for a protracted period of time. His motion was granted on February 11, 2014, and he was relieved as counsel. Hossain returned from Bangladesh in July 2014, but did not obtain new counsel until August 2014. Defendants cannot claim that their attorney abandoned them because Hossain made himself unavailable and unreachable, a fact which Hossain does not deny.

Because defendants have failed to provide a reasonable excuse for their default, there is no cause to address their claim to have a meritorious defense. Plaintiffs are free to have the September 2014 Order entered as a judgment by the Clerk of the Court.²

Motion to Confirm Referee Report

A&Z cross-moves to confirm the A&Z Referee's Report. It does not offer any CPLR section, or any argument at all, to support this motion. However, upon a motion to confirm a referee's report, a judge "may confirm or reject . . . the report of a referee" CPLR 4403; see *GMS Batching, Inc. v TADCO*

²Plaintiffs could have done so at any time prior to this motion.

Constr. Corp., 120 AD3d 549, 551 (2d Dept 2014). Defendants do not give any reason to deny this motion, as their motion to vacate is addressed only to the earlier \$600,000 verdict.

This court finds no reason to deny this motion, and the A&Z Referee Report is hereby confirmed. Plaintiffs are free to have the present order entered as a judgment by the Clerk of the Court.

Motion to Amend

Plaintiffs ask to be allowed to amend their complaint to add claims and a party defendant based on the allegedly wrongful transfer of one of the properties to Hossain's wife. In order to be permitted to amend a complaint, a proposed amended complaint must be attached to the motion. See *Fernandez v HICO Corp.*, 24 AD3d 110, 111 (1st Dept 2005) (motion for leave to amend properly denied for failure to provide a copy of the proposed pleading). Plaintiffs did not provide a copy of a proposed complaint in their cross motion, which might have allowed the court and defendants to address the merit of the pleading. Plaintiffs have not even offered a proposed complaint in reply, even when, on defendants' reply, defendants alerted plaintiffs of the need to provide a proposed complaint. Plaintiffs merely state that "the relief required and requested . . . is plain on its face,"

because they described the proposed action on their motion.³ Russell aff in reply, ¶ 2. Plaintiffs offer a jumble of causes of action, which do not provide proper notice to defendants of the form the proposed complaint would have. The cross motion must be denied.

Accordingly, it is

ORDERED that the motion brought by defendants City Builders, Inc. and Abu Z. Hossain for an order vacating the order for a default judgment obtained against them, and in favor of plaintiffs Sarker Business Systems, Inc. and Bidyut Sarker, on September 8, 2014, in the sum of \$600,000, plus interest at the statutory rate from January 1, 2009 until the date the judgment is entered, is denied; and it is further

ORDERED that the part of the cross motion brought by plaintiff A & Z Empire, Inc. to confirm the referee report dated October 9, 2014 is granted, and the report is confirmed in the sum of \$688,604, plus interest at the statutory rate from January 1, 2009; and it is further

ORDERED that the part of plaintiff A & Z Empire, Inc.'s cross motion for leave to amend its complaint is denied; and it

³Offering a proposed amended complaint on reply would be of no avail in any event. Plaintiffs had the opportunity on their cross motion to convince the court that amendment was appropriate, by actual production of the pleading, and failed. It is too late. See *Sicilia v City of New York*, __AD3d__, 2015 NY Slip Op 03464 (1st Dept 2015) (court need not consider belated arguments presented first on reply).

is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 5/4/15

ENTER:



A handwritten signature in black ink, appearing to read 'Anil C. Singh', is written over a horizontal line. The signature is stylized and cursive.

J.S.C.

ANIL C. SINGH