Summit Apparel, Inc. v Bally Realty Holdings, LLC
2015 NY Slip Op 32806(U)
September 4, 2015
Supreme Court, Suffolk County
Docket Number: 601932/15
Judge: Thomas F. Whelan

SHORT FORM ORDER

INDEX No. 601932/15

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

ORIGINAL

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 6/1/15
SUBMIT DATE 8/7/15
Mot. Seq. # 001 - MD
Mot. Seq. # 002 - XMD
CDISP Y____ N X

SUMMIT APPAREL, INC., Plaintiff, -against- BALLY REALTY HOLDINGS, LLC, Defendant.	RUSKIN MOSCOU FALTISCHEK Atty. For Plaintiff 1425 RXR Plaza Uniondale, NY 11556 MICHAEL M. YOUSSEF, ESQ. Atty. For Defendant 4012 Quentin Rd. Brooklyn, NY 11234

Upon the following papers numbered 1 to 8 read on this motion for default judgment and cross motion to vacate the default in answering ____; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers 5-7; Answering papers ____; Reply papers 8; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the plaintiff's motion (#001) for a default judgment on its complaint against the defendant is considered under CPLR 3215 and is denied; and it is further

ORDERED that the defendant's cross motion (#002) for an order to vacate its default in answering and for leave to serve a late answer is considered under CPLR 5015 and 3012(d) and is denied.

The plaintiff commenced this action to recover damages incurred by reason of the plaintiff's purported breach of a commercial lease which obligated it to make structural repairs to the building that was the subject of the plaintiff's leasehold. In addition, the plaintiff seeks a judicial declaration that it properly renewed the lease for the additional two year term provided therein. The summons

and complaint were served upon the defendant on March 6, 2015 by service upon the office of the Secretary of State pursuant to LLCL §303. The defendant defaulted in timely answering the summons and complaint.

The plaintiff interposed its motion (#001) for a default judgment by service thereof on May 1, 2015 to the defendant at three separate locations. The return date of such motion was set as June 1, 2015. On May 13, 2015, the defendant's managing member, responded by directly contacting the plaintiff's counsel by e-mail. Therein, said managing member advised that he had just been apprised of the existence of this lawsuit and that he had appointed counsel who would be contacting the plaintiff's counsel. The original return date of the plaintiff's motion was administratively adjourned by the court to the date of June 5, 2015, and thereafter, by stipulation of counsel dated May 19, 2015, to June 19, 2015. A further adjournment of the plaintiff's motion to August 7, 2015 was granted by the court upon the stipulation of counsel dated June 16, 2015.

The defendant opposes the plaintiff's motion in cross moving papers (#002) in which said defendant seeks to vacate its default and for leave to serve a late answer. The cross motion is predicated upon the discretionary vacatur grounds of the type contemplated by CPLR 5015(a)(1) and 3012, namely the movant's possession of a reasonable excuse for the default and a meritorious defense to the claims interposed against it. Specifically, the defendant claims that his counsel's engagement in settlement negotiations with the plaintiff's counsel constitute a reasonable excuse for the default and that it possesses a meritorious defense to the plaintiff's claims for damages and declaratory relief by virtue of the terms of the lease. The plaintiff opposes the cross motion by way of an affirmation of its counsel which further serves as a reply to its motion-in-chief.

For the reasons stated, the cross motion by the defendant is denied.

A defendant who has defaulted in answering may seek to vacate the default and appear by service of a late answer by demonstrating its possession of a reasonable excuse for the default in answering and possession of a meritorious defense to the plaintiff's claim for such relief by way of affidavit or proposed verified answer by one with knowledge of the facts asserted (*see* ***Wells Fargo Bank, N.A. v Krauss***, 128 AD3d 813, 10 NYS3d 257 [2d Dept 2015]; *see also* ***Liberty Mutual Ins. Co. v Avenue I Med., P.C.***, 129 AD3d 783, 11 NYS2d 623 [2d Dept 2015]). Contrary to the contentions of defense counsel, this standard governs applications made on grounds of excusable default that are interposed both prior and subsequent to a formal fixation of a default on the part of the defendants by the court pursuant to CPLR 5015(a)(1) or 3012(d) (*see* ***Kennedy v City of New York***, 114 AD3d 831, 980 NYS2d 779 [2d Dept. 2014]; ***Bank of New York v Espejo***, 92 AD3d 707, 939 NYS2d 105 [2d Dept 2012]; ***Integon Natl. Ins. Co. v Norterile***, 88 AD3d 654, 930 NYS2d 260 [2d Dept 2011]; ***Juseinoski v Board of Educ. of City of New York***, 15 AD3d 353, 790 NYS2d 162 [2d Dept 2005]; ***Ennis v Lema***, 305 AD2d 632, 760 NYS2d 197 [2d Dept 2003]; *cf.*, ***Guzetti v City of New York***, 32 AD3d 234, 820 NYS2d 29 [1st Dept 2006]).

The defendant's claim that its counsel's engagement in settlement negotiations with the plaintiff's counsel constitutes a reasonable excuse for its default is untenable since the defendant was

already in default when its current counsel and only attorney of record was retained and the plaintiff's motion for a default judgment was already pending prior to that retention [1] (*see* ***Karalis v New Dimensions HR, Inc.***, 105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]). In addition, those allegations are unsubstantiated (*see* ***Juseinoski v Board of Educ. of City of New York***, 15 AD3d 353, *supra*). While the court acknowledges that claims of ongoing settlement negotiations between a defendant and a plaintiff to a pending action may, under certain circumstances, constitute a reasonable excuse for a default in answering (*see* ***Scarlett v McCarthy***, 2 AD3d 623, 768 NYS2d 342 [2d Dept 2003]), the movant must demonstrate a good faith belief in a settlement that is supported by substantial evidence (*see* ***Armstrong Trading, Ltd. v MBM Enter.***, 29 AD3d 835, 815 NYS2d 689 [2d Dept 2006]) and the defendant's justifiable reliance thereon (*see* ***American Shoring, Inc. v D.C.A. Constr., Ltd.***, 15 AD3d 431, 789 NYS2d 722 [2d Dept 2005]). Absent such a showing, vague and unsubstantiated claims of on-going settlement negotiations, such as the ones advanced here, will not be accepted as a justification for a default (*see* ***Community Preserv. Corp. v Bridgewater Condominiums, LLC***, 89 AD3d 784, 932 NYS2d 378 [2d Dept. 2011]; ***Mellon v Izmirligil***, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011]; ***Maspeth Federal Sav. and Loan Ass'n v McGown***, 77 AD3d 889, 909 NYS2d 403 [2d Dept. 2010]; ***Kouzios v Dery***, 57 AD3d 949, 950, 871 NYS2d 303 [2d Dept 2008]; ***Antoine v Bee***, 26 AD3d at 306, 812 NYS2d 557 [2d Dept 2008]; ***Majestic Clothing Inc. v East Coast Stor., LLC***, 18 AD3d 516, 518, 795 NYS2d 289 [2d Dept 2006]).

The defendant's failure to advance a reasonable excuse for its default renders it unnecessary to determine whether it possesses a meritorious defense to the plaintiff's claims for relief (*see* ***TD Bank, N.A. v Spector***, 114 AD3d 933, 980 NYS2d 836 [2d Dept 2014]; ***Diederich v Wetzel***, 112 AD3d 883, 979 NYS2d 605 [2d Dept 2013]). The defendant's cross motion (#002) is thus denied.

The plaintiff's motion-in-chief (#001) is also denied. Entitlement to a default judgment rests upon the plaintiff's submission of proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the defaulting party's default in answering or appearing (*see* CPLR 3215[f]; ***U.S. Bank Natl. Ass'n v Alba***, 130 AD3d 715, 11 NYS2d 864 [2d Dept 2015]; ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 4 NYS2d 47 [2d Dept 2015]; ***Todd v Green***, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; ***U.S. Bank, Natl. Ass'n v Razon***, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; ***Green Tree Serv., LLC v Cary***, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; ***Dupps v Betancourt***, 99 AD3d 855, 855, 952 NYS2d 585 [2d Dept 2012; ***Triangle Prop. #2, LLC v Narang*** 73 AD3d 1030, 903 NYS2d 424 [2d Dept 2010]). To satisfy the "facts constituting the claim" element of CPLR 3215(f), the plaintiff must advance facts from which the court may discern the plaintiff's possession of one or more viable claims for relief against the defaulting defendant in an affidavit or verified complaint (*see* ***DLJ Mtge. Capital, Inc. v United***

[1] It appears from the record that the defendant retained its attorney of record herein subsequent to May 13, 2015 as indicated in his May 13, 2015 e-mail to plaintiff's counsel and prior to May 19, 2015, the date the first stipulation adjourning the plaintiff's motion on consent to June 16, 2015 was executed by the defendant's current counsel and plaintiff's counsel.

Gen. Title Ins. Co., 128 AD3d 760, 9 NYS3d 335 [2d Dept 2015]; ***Williams v North Shore LIJ Health Sys.***, 119 AD3d 937, 989 NYS2d 887 [2d Dept 2014]; ***Atlantic Cas. Ins. Co. v RJNJ Serv., Inc.***, 89 AD3d 649, 932 NYS2d 109 [2d Dept 2011]; ***Church of So. India Malayalam Congregation of Greater New York v Bryant Installations, Inc.***, 85 AD3d 706, 925 NYS2d 131 [2d Dept 2011]; ***CPS Group, Inc. v Gastro Enter. Corp.***, 54 AD3d 800, 863 NYS2d 764 [2d Dept 2008]; ***Resnick v Lebovitz***, 28 AD3d 533, 813 NYS2d 480 [2d Dept. 2006]; ***Beaton v Transit Fac. Corp.***, 14 AD3d 637, 789 NYS2d 314 [2d Dept 2005]), together with proof of the amount due, if sufficiently certain (*see* CPLR 3215[f]). Where these elements are established, a motion for entry of a default judgment should be granted (*see* ***Woodson v Mendon Leasing Corp.***, 100 NY2d 62, 760 NYS2d 727 [2003]; ***Csaszar v County of Dutchess***, 95 AD3d 1009, 943 NYS2d 610 [2d Dept 2012]; ***King v King,*** 99 AD3d 672, 951 NYS2d 565 [2d Dept 2012]; ***Tarrytown Professional Ctr., Inc. v Family Medicine of Tarrytown***, 93 AD3d 712, 939 NYS2d 868 [2d Dept 2012]). Where they are not, the motion should be denied (*see* ***Interboro Ins. Co. v Johnson***, 123 AD3d 667, 1 NYS3d 111 [2d Dept 2014]; ***Peniston v Epstein***, 10 AD3d 450, 780 NYS2d 916 [2d Dept 2004]).

Here, the plaintiff failed to satisfy the "facts constituting the claim" element imposed by CPLR 3215(f) as a condition upon the granting of a motion for a default judgment even in the absence of opposition (*see* ***DLJ Mtge. Capital, Inc. v United Gen. Title Ins. Co.***, 128 AD3d 760, *supra*). The complaint served herein is not verified and the affirmation of plaintiff's counsel wherein he asserts factual allegations in support of the plaintiff's demands for relief without any allegations as to the source of such facts is insufficient (*see* ***Triangle Props. # 2, LLC v Narang***, 73 AD3d 1030, 903 NYS2d 424 [2d Dept 2010]; ***Henriquez v Purins***, 245 AD2d 337, 666 NYS2d 190 [2d Dept 1997]). In addition, counsel's affirmation failed to include allegations of fact from which the court can discern the elements of viable claims for recovery of damages by reason of the defendant's purported breach of the lease and viable claims for the declaratory relief regarding the plaintiff's purportedly valid exercise of its option to renew. The affidavit of the defendant's Vice President, which merely incorporated the insufficient allegations of facts advanced in the affirmation of its counsel, was itself insufficient to demonstrate the plaintiff's possession of viable claims for recovery of damages and for the declaratory relief demanded by it in its complaint (*see* ***Beaton v Transit Fac. Corp.*** 14 AD3d 637, *supra*; *see also* ***Atlantic Cas. Ins. Co. v RJNJ Serv., Inc.***, 89 AD3d 649, *supra*; ***CPS Group, Inc. v Gastro Enter. Corp.***, 54 AD3d 800, *supra*; ***Henriquez v. Purins***, 245 AD2d 337, *supra*; *cf.*, ***Thattil v Mondesir***. 253 AD2d 809, 677 NYS2d 513 [2d Dept 1998]).

In view of the foregoing, the plaintiff's motion (#001) for a default judgment and the cross motion (#002) by the defendant for a vacatur of its default in answering and leave to serve a late answer are denied.

DATED: 9/4/15

THOMAS F. WHELAN, J.S.C.