

**Bank of Am., N.A. v Superior Maintenance Supply,  
LLC**

2015 NY Slip Op 32903(U)

October 1, 2015

Supreme Court, Nassau County

Docket Number: 602050-2015

Judge: Timothy S. Driscoll

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This opinion is uncorrected and not selected for official publication.

ORIGINAL

**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----X

**BANK OF AMERICA, N.A.,**

**Plaintiff,**

**TRIAL/IAS PART: 14  
NASSAU COUNTY**

**-against-**

**SUPERIOR MAINTENANCE SUPPLY, LLC and  
JASON P. BRAND,**

**Index No: 602050-2015  
Motion Seq. Nos. 1 and 2  
Submission Date: 8/25/15**

**Defendants.**

-----X

**Papers Read on these Motions:**

- Notice of Motion.....X**
- Affirmation in Support and Exhibits.....X**
- Affidavit of Merit in Support and Exhibits.....X**
- Affidavit of Non-Military Service.....X**
- Affirmation of Legal Fees, Costs and Expenses.....X**
- Notice of Cross Motion, Affirmation in Opposition/Support and Exhibits....X**
- Affirmation in Reply/Opposition.....X**
- Memorandum of Law in Reply/Opposition.....X**

This matter is before the court on 1) the motion by Plaintiff Bank of America, N.A. ("BOA" or "Plaintiff") filed June 22, 2015, and 2) the cross motion by Defendants Superior Maintenance Supply, LLC ("Superior") and Jason P. Brand ("Brand") ("Defendants") filed August 17, 2015, both of which were submitted August 25, 2015. For the reasons set forth below, the Court 1) denies Plaintiff's motion; and 2) grants Defendants' cross motion to the extent that the Court will permit Defendants to file and serve their proposed Verified Answer (Ex. A to Minero Aff. in Opp./Supp.), and hereby deems the proposed Verified Answer filed and served. The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on November 5, 2015 at 9:30 a.m.

## BACKGROUND

### A. Relief Sought

Plaintiff moves for an Order 1) pursuant to CPLR § 3215, awarding Plaintiff a default judgment against Defendants or, in the alternative, for an Order that proceedings for the entry of a judgment or the making of an assessment, the taking of an account or proof, or the direction of a reference be conducted at the time of or following the trial or other disposition of the action against the Defendant who has not answered pursuant to CPLR § 3212; 2) awarding Plaintiff judgment against Superior a) restraining and enjoining Superior, its agents, employees, accountants, attorneys and such other persons acting at the direction or on behalf of Superior from selling, moving, liquidating, disposing or permitting the removal of the collateral (“Collateral”); b) compelling Superior, its agents, employees, accountants, attorneys and such other persons acting at the direction or on behalf of Superior to segregate in an account controlled by BOA all proceeds of accounts receivable; c) compelling Superior, its agents, employees, accountants, attorneys and such other persons acting at the direction or on behalf of Superior to turn over to BOA, in their original form, all payments of accounts receivable now and hereafter received; d) compelling Superior, its agents, employees, accountants, attorneys and such other persons acting at the direction or on behalf of Superior to turn over to BOA a statement setting forth the names and addresses of Superior’s account debtors and the amount owed by each of them; e) compelling Superior, its agents, employees, accountants, attorneys and such other persons acting at the direction or on behalf of Superior to assemble and make the Collateral available or deliver the Collateral to BOA for inspection, appraisal and sale or other disposition pursuant to the Uniform Commercial Code in order to satisfy the amounts due to BOA; f) authorizing BOA to sell, liquidate, dispose of or retain the Collateral in a commercially reasonable manner, with the proceeds from same being applied first to the costs of such sale or other disposition, including reasonable attorney’s fees, and then in reduction of the amounts due BOA from Superior; g) appointing a receiver, or other agent of this Court, to manage the affairs of Superior and, as an alternative to the relief requested in (e) and (f) above, to take possession of the Collateral on behalf of BOA and any other creditors of Superior and to hold the Collateral pending further order of this Court; h) ordering that the sheriff of any county of the State of New York wherein the Collateral is found, be directed to seize the Collateral at issue, and for the purpose, if the Collateral is not delivered to him or her, to break open, enter, and search for the Collateral in the place specified, and to hold the Collateral pursuant to CPLR § 7101, *et al.*;

i) issuing a Writ of Replevin directed to the Sheriff or other lawfully authorized officers of Nassau County where the Collateral may be found and directing that such Sheriff or other officers seize and/or take immediate possession of the Collateral and deliver same to BOA, the court-appointed receiver or other court-appointed agent, as this Court may direct; j) barring and foreclosing Superior from all equity of redemption in and to the Collateral; and k) directing that, to the extent any of such Collateral has already been sold or otherwise liquidated, Defendants account for the proceeds derived from such sale or liquidation and remit such proceeds to BOA.

Defendants cross move for an Order 1) pursuant to CPLR § 2201, staying this action until the resolution of a criminal proceeding being prosecuted by the New York State Office of the Attorney General (“AG”) against Defendant Brand and entities controlled by and affiliated with Brand, including Defendant Superior; or, alternatively, 2) pursuant to CPLR § 2004, permitting Defendants to file and serve the proposed Verified Answer annexed to the cross motion (“Proposed Answer”) (Ex. A to Minero Aff. in Opp./Supp.).

#### B. The Parties’ History

The Verified Complaint (“Complaint”) (Ex. A to Grantz Aff. in Supp.) alleges as follows:

On or about December 12, 2011, Superior (“Borrower”) and BOA executed a line of credit agreement titled “Loan Agreement” (“LOC Agreement”) pursuant to which BOA extended a \$200,000 line of credit to Borrower (“LOC”). On November 12, 2013, Borrower and BOA executed an amendment to the LOC agreement (“Amendment to LOC Agreement”) (collectively with LOC Agreement, “Amended LOC Agreement”) pursuant to which the availability of the LOC was extended to December 12, 2014. Plaintiff alleges that the LOC is in default due to Borrower’s failure to make required payments.

On or about November 12, 2013, BOA and Borrower executed a loan agreement (“Term Loan Agreement”) pursuant to which BOA provided a \$100,000 term loan (“Term Loan”) to Borrower. Plaintiff alleges that the Term Loan is in default due to Borrower’s failure to make required payments, and due to cross-default provisions in the Term Loan Agreement triggered by the LOC Defaults.

On December 12, 2011, Brand (“Guarantor”) executed and delivered to BOA his Continuing and Unconditional Guaranty (“Guaranty”) to secure payment of the amount due on the LOC and all future extensions of credit. On February 23, 2015, BOA declared Borrower in default under the Amended LOC Agreement and Term Loan Agreement (“Loan Agreements”).

Despite due demand, Guarantor has failed to pay his obligations as required by the Guaranty.

On December 12, 2011, Borrower executed and delivered to BOA a security agreement titled Security Agreement (Multiple Use) ("LOC Security Agreement") pursuant to which Borrower granted to BOA a blanket security interest in all of Borrower's equipment, machinery, fixtures, furniture, inventory, supplies and accounts receivable, including all present or future personal property and fixtures of Borrower now existing or hereafter acquired and wherever located, as more fully described in the LOC Security Agreement ("LOC Collateral"). On November 12, 2013, Borrower executed and delivered to BOA a security agreement titled Security Agreement (Multiple Use) ("Term Loan Security Agreement") pursuant to which Borrower granted to BOA a blanket security interest in all of Borrower's equipment, machinery, fixtures, furniture, inventory, supplies and accounts receivable, including all present or future personal property and fixtures of Borrower now existing or hereafter acquired and wherever located, as more fully described in the Term Loan Security Agreement ("Term Loan Collateral") (collectively with the LOC Collateral, the "Collateral"). BOA's continuing security interest in the Collateral was perfected by a UCC-1 Financing Statement, filed against Borrower on December 14, 2011. Borrower's default under the LOC and Term Loan Security Agreements entitles BOA to pursue its remedies against the Collateral.

The Complaint contains four (4) causes of action related to Defendants' default under the applicable Agreements and Guaranty. Plaintiff seeks relief including a monetary judgment, attorney's fees pursuant to the applicable agreements, the appointment of a receiver and injunctive relief similar to that sought in Plaintiff's motion.

In support of Plaintiff's motion, Paul Soltys ("Soltys"), an Assistant Vice President of BOA, affirms the truth of the allegations in the Complaint regarding Defendants' execution of the Agreements and Guaranty and Defendants' default thereunder. Soltys provides copies of the applicable Agreements and Guaranty, Financing Statement, and BOA correspondence to Defendants declaring them in default and demanding immediate payment in full of all amounts due on the loans (Exs. 1-8 to Soltys Aff. in Supp.).

In further support of Plaintiff's motion, counsel for Plaintiff ("Plaintiff's Counsel") affirms that Defendants were served with the Summons and Complaint on April 13, 2015 and provides copies of the applicable affidavits of service (Exs. B and D to Grantz Aff. in Supp.). Plaintiff also provides a copy of the May 28, 2015 Affidavit of Mailing with respect to Defendant Superior (Ex. C to Grantz Aff. in Supp.) and April 27, 2015 Affidavit of Mailing with

respect to Defendant Brand (Ex. E to Grantz Aff. in Supp.). Plaintiff's Counsel affirms that more than thirty (30) days have passed since Defendants were served with the Summons and Complaint and, based on their failure to answer or otherwise plead, they are in default.

In opposition to the motion and in support of Defendants' cross motion, counsel for Defendants ("Defendants' Counsel") affirms that in October of 2014, the AG indicted Defendant Brand on numerous criminal offenses. Defendants provide a printout of the Unified Court System (Ex. B to Minero Aff. in Opp./Supp.) reflecting that Brand was charged with crimes including the felonies of Grand Larceny in the Second Degree and Insurance Fraud in the First Degree ("Related Criminal Proceeding"). Defendants' Counsel affirms that the Related Criminal Proceeding involves Brand and entities controlled by and affiliated with Brand, including Superior. Defendants' Counsel affirms that the Related Criminal Proceeding has not yet been resolved.

Defendants ask the Court to stay this action until the Related Criminal Proceeding is resolved or, alternatively, permit Defendants to serve the Proposed Answer. In the Proposed Answer, Defendants deny many of the allegations in the Complaint and assert two (2) affirmative defenses: 1) Plaintiff fails to state a cause of action on which relief may be granted against either Defendant; and 2) Plaintiff failed to comply with conditions precedent to enforcing the agreements identified in the Complaint. Defendants' Counsel affirms that the reason that Defendants did not timely serve an answer to the Complaint is that they needed to retain new counsel because the law firm that Defendants intended to retain in this action had a conflict as a result of its representation of Plaintiff on other matters.

In opposition to Defendants' cross motion, Plaintiff's Counsel affirms that on July 14, 2015, Linda Agnew, Esq. ("Ms. Agnew"), an attorney from the law firm of Jaspan Schlesinger, LLP, contacted Plaintiff's Counsel and requested a 45 adjournment of the pending motion. On July 15, 2015, Plaintiff's Counsel advised Ms. Agnew that Plaintiff would consent to a two-week adjournment and were informed that Ms. Agnew would convey that request to the Court. The motion was subsequently adjourned to July 29, 2015. On July 27, 2015, Megan E. Yllanes, Esq. from the law firm of Kaufman Dolowich Voluck, which currently represents Defendants, advised BOA that Kaufman Dolowich Voluck represents Defendants and requested that BOA either withdraw the pending motion and permit Defendants to file an answer, or grant a one-week adjournment of the pending motion in order to provide Defendants with time to file an opposition to that motion.

### C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to judgment by producing the Complaint and Solyts affidavit which establish that Defendants entered into the subject Agreements and Guaranty and are in default of their obligations under those instruments. Plaintiff has also provided proof of Defendants' default in answering or appearing.

Defendants oppose the motion, and cross move for an Order staying this action, or permitting Defendants to file the Proposed Answer. Defendants attribute their failure to answer in a timely fashion to an issue with their initial legal representation, and have provided a Proposed Answer. Defendants submit that a stay is appropriate, in light of the Related Criminal Proceeding, to protect Brand's constitutional right against self-incrimination. Defendants contend, further, that Plaintiff will not be prejudiced by the stay.

Plaintiff opposes the cross motion submitting that 1) Defendants have failed to establish the requisite relationship between the Related Criminal Proceeding and this action to warrant a stay and, relatedly, have failed to demonstrate that there exist Fifth Amendment implications to Brand's defense of this action; 2) Defendants' search for new counsel does not provide Defendants with an excuse for failing to answer the Complaint in light of the fact that their time to answer expired prior to their issues with prior counsel; and 3) even assuming *arguendo* that Defendants have provided a valid reason for their default, Defendants have failed to proffer a meritorious defense to the claims set forth in the Complaint.

## RULING OF THE COURT

### A. Default Judgment

On a motion for leave to enter a default judgment pursuant to CPLR § 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defaulting party's default in answering or appearing. *Oak Hollow Nursing Center v. Stumbo*, 117 A.D.3d 698, 698-99 (2d Dept. 2014), citing CPLR § 3215(f); *Atlantic Cas. Ins. Co. v. RJNJ Servs., Inc.*, 89 A.D.3d 649, 651 (2d Dept. 2011); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008).

A party seeking to vacate an order entered upon his default is required to demonstrate, through the submission of supporting facts in evidentiary form, both a reasonable excuse for the default and the existence of a meritorious cause of action or defense. *White v. Incorp. Village of Hempstead*, 41 A.D.3d 709, 710 (2d Dept. 2007). Public policy favors the resolution of cases on the merits. *Bunch v. Dollar Budget, Inc.*, 12 A.D.3d 391 (2d Dept. 2004).

### B. Stay of Civil Action

Pursuant to CPLR § 2201, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just. The issuance of a stay pursuant to CPLR § 2201 is in the discretion of the trial court. *Research Corporation v. Singer-General Precision, Inc.*, 36 A.D.2d 987, 988 (3d Dept. 1971).

Although the pendency of a criminal proceeding does not give rise to an absolute right to a stay of a related civil proceeding, the court may exercise its discretion to stay proceedings in a civil action until the resolution of the related criminal dispute. *Matter of Astor*, 62 A.D.3d 867, 868-869 (2d Dept. 2009), citing *DeSiervi v. Liverzani*, 136 A.D.2d 527 (2d Dept. 1988), quoting *Klitzman, Klitzman & Gallagher v. Krut*, 591 F. Supp. 258, 269-270 n. 7 (D.N.J. 1984), *aff'd* 744 F.2d 955 (3d Cir. 1984). Although a defendant in an ongoing criminal prosecution faces a dilemma whether to defend a civil proceeding involving the same subject matter or to assert the Fifth Amendment privilege, a court need not permit a defendant to avoid this difficulty by staying a civil action until a pending criminal prosecution has been terminated, and the fact that the witness may invoke the privilege against self incrimination is not a basis for precluding civil discovery. *El-Dehdan v. El-Dehdan*, 114 A.D.3d 4, 20 (2d Dept. 2013), quoting *Matter of Astor*, 62 A.D.3d at 869.

### C. Application of these Principles to the Instant Action

The Court 1) denies Plaintiff's motion; and 2) grants Defendants' cross motion to the extent that the Court will permit Defendants to file and serve their Proposed Answer (Ex. A to Minero Aff. in Opp./Supp.), and hereby deems the proposed Verified Answer filed and served. The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on November 5, 2015 at 9:30 a.m.

The record supports the conclusion that Defendants intended to answer the Complaint, as evidenced by the conversations between Defendants' prior counsel and Plaintiff's Counsel regarding an adjournment of the motion. In consideration of that fact, and the public policy supporting the resolution of cases on the merits, the Court denies Plaintiff's motion for a default judgment and other relief. The Court denies Defendants' motion for a stay of this action, in part because of the limited information provided regarding the relationship between this action and the Related Criminal Proceeding and because the fact that Brand may invoke the privilege against self incrimination is not a basis for precluding civil discovery.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on November 5, 2015 at 9:30 a.m., as directed herein.

DATED: Mineola, NY

October 1, 2015

ENTER

  
HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**

OCT 08 2015

NASSAU COUNTY  
COUNTY CLERK'S OFFICE