RSSM CPA LLP v Unison Holdings LLC
2016 NY Slip Op 31267(U)
July 6, 2016
Supreme Court, New York County
Docket Number: 651882/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

RSSM CPA LLP,

INDEX NO. 651882/2015

Plaintiff,

MOTION DATE

-v-

UNISON HOLDINGS LLC,

MOTION SEQ. NO. 2
MOTION CAL. NO.

Defendant.

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

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

This is an action for breach of contract and account stated. Plaintiff, RSSM CPA LLP ("Plaintiff") claims that Defendant, Unison Holdings LLC ("Defendant"), failed to pay Plaintiff for the accounting services Plaintiff rendered to Defendant. Plaintiff further claims that Defendant received invoices from Plaintiff, Defendant retained them, Defendant never disputed or challenged their accuracy, and Defendant did not pay the outstanding balance due to Plaintiff for the services rendered by Plaintiff.

On October 21, 2015, Plaintiff filed a motion for summary judgment. The return date of the motion was November 12, 2015. Defendant did not oppose Plaintiff's motion for summary judgment. By decision dated January 28, 2016, the Court granted Plaintiff's motion for summary judgment and entered judgment in favor of Plaintiff against Defendant in the amount of $15,542.00, together with interest.

Defendant moves to vacate the January 28, 2016 order which awarded summary judgment in Plaintiff's favor and entered judgment against Defendant. Defendant also seeks thirty days to submit opposition papers to Plaintiff's summary judgment motion. Defendant submits the affidavit of Gerard F. Binder, Defendant's General Manager. Plaintiff opposes.

Pursuant to CPLR § 5015, the court which rendered a decision may, on motion, grant relief from the judgment or order upon the ground of "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." (CPLR § 5015[a][1]). In order to prevail on a motion to vacate a default judgment upon the ground of excusable default under § 5015, the moving party must show that its default was "excusable" and demonstrate a "meritorious defense" to the underlying action. (*Pena v. Mittleman*, 179 A.D.2d 607, 609 [1st Dep't 1992]; *Mutual Marine Office, Inc. v. Joy Const.*, 39 A.D.3d 417 [1st Dep't 2007]).

As for Defendant's purported "reasonable excuse" in failing to oppose Plaintiff's motion for summary judgment, Binder, Defendant's general manager, states that in December 15, 2015, after Plaintiff's motion for default judgment had been filed, Binder communicated "a settlement offer" to Plaintiff's counsel on behalf of Defendant. Binder states, "At that time, I also asked Mr. Cardinali [Plaintiff's attorney] about the pending summary judgment motion." Binder further states, "Mr. Cardinali expressed to me that he would take care of it and I did not worry about it." Binder further states, "Had I known that Mr. Cardinal would neither respond to Unison's settlement offer nor take care of the pending motion as he said he would do, I would have made sure that Unison sought more time to submit its response to the motion." Plaintiff claims that there was no discussion of the pending motion during his conversation with Binder.

Here, the deadline to file an opposition occurred prior to the conversation that took place between Binder and Mr. Cardinali. In fact, the motion had already been fully submitted to the court for thirty-four (34) days before the alleged conversation. Defendant provides no excuse for its failure to timely interpose an answer, which had been due on or before November 24, 2015. Defendant concedes in his affidavit that he missed the deadline. Whether a reasonable excuse has been offered is determined *sui generis* and it based on all relevant factors, including length of delay chargeable to the movant, whether the opposing party has been prejudiced, whether default was willful, and the strong public policy favoring the resolution of cases on the merits. (*Harcztark v. Drive Variety, Inc.*, 21 A.D.3d 876, 876-77 [2d Dep't 2005]). Partaking in settlement negotiations generally do not, without more, constitute a reasonable excuse for a defendant's default. (*Krell v. Pelham Syndicate, Inc.*, 14 A.D.2d 845 [1st Dep't 1995]). A defendant in a similar action was deemed to not have a reasonable excuse even though she believed she and the plaintiff "were working the issue out" over email. (*Patterson Belknap Webb & Tyler LLP v. Stewart*, 2014 N.Y. Misc. LEXIS 4525, *6 [1st Dep't 2014]). Default judgment was entered

in favor for the plaintiff because the defendant failed to respond in a timely manner and show up for oral argument. *Id.* Here, since the alleged conversation between Binder and Mr. Cardinali where Mr. Cardinali said "he would take care" of the motion occurred after Defendant's opposition had to been due and after the motion had been fully submitted, any statements made during that conversation do not excuse Defendant from having failed to submit opposition papers that had been due weeks before.

Assuming arguendo that Defendant has provided an excusable reason for its failure to timely interpose an answer, as for a "meritorious defense," Defendant does not submit a proposed opposition to the motion for summary judgment with proof in admissible form sufficient to raise an issue of fact. Through Binder's affidavit, Defendant argues that Defendant does not owe any money to Plaintiff because Defendant already paid an amount different from the amount being requested by Plaintiff. However, Defendant does not provide proof of the purported payment or a contract demonstrating that the amount due was different from the amount being requested by Plaintiff. Defendant also does not submit evidence that it disputed invoices.

The receipt and retention of an invoice without objection within a reasonable time period gives rise to an account stated claim. (*Morgan, Lewis & Bockius LLP v. IBuyDigital.com, Inc.*, 14 Misc.2d 1224(A) [N.Y. Sup. Ct. 2007]). Defendant in this case does not raise a defense to the account stated claim because he neither denies receiving the invoices nor avers that he objected to them within a reasonable timeframe. While oral objections to an account stated are sufficient to defeat a summary judgment, such objections must still be made within a reasonable timeframe. (*Shea & Gould v. Burr*, 194 A.D.2d 369, 370-71 [1st Dep't 1993]). Defendant provided no evidence or testimony to timely objections to the invoices he received.

Here, Defendant has failed to demonstrate a reasonable excuse for their failure to oppose Plaintiff's motion for default judgment or a meritorious defense to Plaintiff's underlying action.

Wherefore, it is hereby

ORDERED that Defendant's motion is denied.

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

Dated: JULY 6, 2016

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J.S.C.

HON. EILEEN A. RAKOWER