Kennedy v Regency Global Solutions, Inc.
2016 NY Slip Op 31749(U)
September 19, 2016
Supreme Court, New York County
Docket Number: 653935/2015
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------X

JUSTIN KENNEDY,

Plaintiff,

Index No.
653935/2015
DECISION AND ORDER
Mot. Seq. #003

- against -

REGENCY GLOBAL SOLUTIONS, INC.,

Defendant.

----------X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Justin Kennedy ("Plaintiff"), commenced this action on November 30, 2015 by the filing of a Summons and Notice of Motion for Summary Judgment in Lieu of Complaint based upon Defendant, Regency Global Solutions, Inc. ("Defendant" or "Regency Global") default of its obligations under a promissory note dated October 11, 2011 (the "Note") between Plaintiff, as payee, and Defendant, as maker, in the principal amount of $80,000.00. Plaintiff submitted his affidavit, dated November 25, 2015, and a copy of the Note. Defendant did not oppose. By Decision and Order dated March 21, 2016, Plaintiff's motion for summary judgment in lieu of Complaint was granted. The Order stated, "Plaintiff has made a prima facie entitlement to summary judgment on the Note. Plaintiff has proven the existence of the Note, and Defendant's failure to repay the outstanding amount due." The Order entered Judgment in favor of Plaintiff and against Defendant Inc., in the amount of $73,256.00, together with interest (at the rate of 6% per annum from October 11, 2011). Calculation of the amount of reasonable attorneys' fees and costs owed under the Note was referred to a Special Referee to hear and report with recommendations.

By Notice of Motion filed on May 26, 2016, Defendant moves for an Order, pursuant to CPLR 317, 2221(a), and 5015(a)(1), to vacate the Decision and Order dated March 21, 2016. Defendant also moves pursuant to CPLR 5240 to quash an Information Subpoena served on Regency Global, as Judgment-Debtor, dated April 28, 2016. Defendant submits the affidavit of Alejandro Corral, the CEO of Regency Global. Plaintiff opposes.

CPLR § 317 provides, in relevant part:

> A person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense.

CPLR §5015(a)(1) provides that a court may vacate prior order or judgment on the grounds 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."

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]).

"The distinction between moving under CPLR §§ 5015 and 317 is that, on a motion under CPLR § 317, the defendant does not have to come forward with a reasonable excuse for his default. All that he need demonstrate is that he did not personally receive notice of the pending lawsuit. On a motion under CPLR § 5015, by contrast, the defendant must show that his default was 'excusable.'" (*Pena v. Mittleman*, 179 A.D.2d 607, 609 [1st Dep't 1992]).

"On a motion to vacate a default, it is not necessary for a defendant to prove its defense, but only to set forth facts sufficient to make out a prima facie showing of a meritorious defense." (*Aerovias De Mexico, S.A. v. Malerba*, 265 A.D.2d 214, 215 [1st Dep't 1999).

Here, service of Plaintiff's summons and motion in lieu of summary judgment was effected on Defendant on December 11, 2015 by way of the Secretary of State under Business Corporation Law. Serving a corporate defendant by delivering the summons to the Secretary of State under Bus. Corp. Law 304(a) does not constitute personal delivery on Defendant's agent for purposes of Rule 317. (*See Pabone v. Jon-Bar Enterprises Corp.*, 140 A.D. 2d 872 [3d Dept 1988]).

Through Mr. Corral's affidavit, Defendant claims that it did not receive actual notice of the action until after its time to oppose the motion for summary judgment had passed. Defendant argues that although Plaintiff knows that Defendant's principal place of business is in Las Vegas, Nevada, and it has a limited presence in New York, Plaintiff did not serve or send copies of the papers to Defendant's principal place of business in Nevada. Plaintiff effectuated service of process on Regency by serving the Secretary of State on December 11, 2015. Mr. Corral attests:

> The Secretary of State mailed the Summons and Notice of Motion, along with the papers supporting Plaintiff's motion, to P.O. Box 4668, 21731, New York, NY 10163. That address is the address on file for the mailing of process accepted on Regency's behalf by the New York Secretary of State. However, that is a virtual mail box under the control of a company called Earth Class Mail. Earth Class Mail receives mail addressed to Regency, scans it and delivers it electronically to us. Regency cannot access such mail until Earth Class Mail sends it to us. Earth Class Mail recently filed for bankruptcy, and since last year, became less reliable in providing us with timely copies of our mail. A copy of an article discussing the bankruptcy and the difficulties Earth Class Mail has been having with its business model is attached hereto as Exhibit A.

Mr. Corral further attests, "I did not actually receive a copy of the Summons and motion papers from Earth Class Mail until January 15, 2016, three days after Regency's opposition to Plaintiff's motion for summary judgment in lieu of complaint was due. A copy of the e-mail I received from Earth Class Mail (showing a copy of the envelope from the Secretary of State's office) is attached hereto as Exhibit F." Mr. Corral further states, "The copy of the Summons that Regency received from the Secretary of State was the only copy of the document ever received by Regency. Plaintiff never separately served or mailed a copy of the Summons on Regency."

Moreover, Defendant argues that it had a reasonable excuse because of Mr. Corral's medical problems. Defendant argues that Mr. Corral, the CEO of Regency,

is the person primarily responsible for handling legal matters on Defendant's behalf and the only person at Regency with first-hand knowledge of the facts and circumstances of this litigation. Mr. Corral states that he has had serious health problems in the last year which have interfered with his ability to address this litigation. Defendant contends that after Regency's default but before the Decision and Order was entered, Mr. Corral informed Plaintiff's counsel about his health issues and requested additional time to respond to Plaintiff's motion. Plaintiff's counsel refused to provide the additional time.

Plaintiff argues that Defendant's application for relief under CPLR 317 should "fail because Defendant freely admits that it had notice of this action and Kennedy's Motion as early as January 15, 2016 more than two months before the Court issued its March 21 Decision and Order." Plaintiff contends, "Although Defendant claims that the time for filing of its opposition had already expired, there is nothing in the record to suggest that Defendant even once attempted to contract the Court for adjournment of the motion or leave to appear, retain counsel, or submit an opposition out of time."

Plaintiff argues that Defendant is not entitled to relief under CPLR 5015(a) because Kennedy served the Summons and Complaint as required and demanded. In opposition, Plaintiff states that the address where the papers were forwarded by the Secretary of State - P.O. Box 4668 #21731, New York, New York 10163 – was not only the address designated for service of process by Defendant under B.C.L. 306-A, but also the address to which the Note requires all communications and notices to be sent and where Mr. Corral specifically demanded all further communications be sent. Plaintiff argues, "Thus, any failure to receive notice sent to the designated address is therefore a result solely of a lack of diligence by Defendant or its agents" which cannot constitute "a reasonable excuse for default."

Here, as for meritorious defenses, through Mr. Corral's affidavit, Defendant makes various arguments. Mr. Corral states that "it was never the intention of the parties that the execution of this Promissory Note would impose a specific deadline by which Regency would pay off its indebtedness." Mr. Corral attests that although the date of October 4, 2014 is referred to as "Maturity Date" in the Note, "it was never the parties' intention that the Promissory Note would have been paid by that date. Rather, the expectation was that, if Regency was unable to repay Plaintiff by

that date, the parties would negotiate in good faith on new payment terms."[1] Mr. Corral states:

> Consistent with the understanding between the parties, Section 2.1 of the Promissory Note required Regency to pay the entire amount owed to Plaintiff upon the receipt by Regency of proceeds in excess of $1,000,000 in connection with 'any investment, marketing contribution, loan or [sale of] all or a portion of' the Regency. No such payment was ever received by Regency since the Promissory Note was executed.[2]

Mr. Corral further states, "Similarly, the Promissory Note did not provide Plaintiff with the right to accelerate payments upon Regency's failure to make any weekly payments due to Plaintiff. Section 3(b) of the Promissory Note did, however, permit Plaintiff to accelerate payment in the event of the transfer of 50% or more of the outstanding voting power of Regency, or a sale of all or substantially all of the assets of Regency."[3]

---

[1] The Note states, "FOR VALUE RECEIVED, Regency Global Solutions, Inc., a Delaware corporation (the 'Company'), hereby promises to pay to the order of Justin Kennedy (the 'Holder') ... the principal amount of Eighty Thousand and 00/100 cents ($80,000) (the 'Principal Amount'), together with interest on the unpaid Principal Amount under this promissory note (the 'Note') at the per annum rate of six percent (6%) ..., compounded monthly, pursuant to the terms hereof, for the period beginning on the date hereof and continuing until October 4, 2014 (the 'Maturity Date'), unless sooner paid pursuant to the terms hereof."

[2] Paragraph 2.1 of the Note, "Mandatory Full Prepayment," states, "In the event the Company shall receive any investment, marketing contribution, loan or sell all or a portion of the Company, the proceeds of which are in excess of $1,000,000, then the Company shall be required to pay to the Holder the entire outstanding Principal Amount and any accrued but unpaid interest thereon, which payment shall be due upon the closing of any such transaction(s). Notwithstanding the foregoing, prior to making the mandatory full prepayment set forth above, the Company shall give Holder fifteen days' prior written notice of its intention to make such prepayment. Any prepayment amount shall be applied first to any accrued but unpaid interest on the outstanding Principal Amount and then to the Principal Amount."

[3] Paragraph 3 of the Note, "Acceleration of Payment," provides that "the entire unpaid Principal Amount and any accrued interest thereon shall become immediately

Defendant further contends that the Note memorialized certain loans that Plaintiff had previously made to Defendant that remained outstanding; however, "at the time the Promissory Note was executed, neither the Plaintiff nor Regency were aware of the exact amount that was owed to Plaintiff. The number $80,000 was inserted with the understanding that, at an appropriate time, if Regency had the money to pay Plaintiff, the parties would calculate the actual amount owe to Plaintiff."[4] Defendant further contends that "Regency paid Plaintiff at least $14,740 in connection with the Promissory Note, not only $6,474, as claimed by Plaintiff."

CPLR § 3213 provides that, "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." A document comes within CPLR § 3213 "if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms." (*Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 444 [1996] [internal citations omitted]).

To prevail on a motion for summary judgment in lieu of complaint arising out of a promissory note, "a plaintiff must show the existence of a promissory note executed by the defendant containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note's terms." (*Zyskind v. FaceCake Mktg. Tech., Inc.*, 101 A.D.3d 550, 551 [1st Dep't 2012]; *Matas v. Alpargatas S.A.I.C.*, 274 A.D.2d 327, 328 [1st Dep't 2000]).

It is the Court's responsibility, if possible, to determine the intent of the parties from the four corners of the document. (*Diversified Group Inc. v. Sahn*, 259 A.D.2d

---

due and payable upon demand made by Holder in its sole discretion ... upon the occurrence of one or more of the following events ... (a) The insolvency of the Company ...; (b) the closing of (i) an acquisition of the Company ... (ii) a sale ... or (iii) the liquidation, termination or dissolution of the Company; (c) the appointment of a receiver ...; (d) The determination by the Holder that any material representation or warranty ... was not true or accurate when given."

[4] The Note states, "Between June, 2010 and October, 2011, the Holder provided to Company multiple payments to be paid back over an unspecified period of time. During the course of this relationship, Company made multiple payments however received back multiple additional payments by Holder totaling a sum of Eighty Thousand and 00/100 cents ($80,000.00).

47 [1st Dep't 1999]). "[W]hen parties set down their agreements in a clear, complete document, their writing should . . . be enforced according to its terms." (*Vermont Teddy Bear, Inc. v. 538 Madison Realty Co.*, 1 N.Y. 3d 470, 475 [2004] [citations omitted).

Here, even assuming that Defendant did not personally receive notice of the summons in time to defend the action or has a reasonable excuse for the default, Defendant fails to present a meritorious defense to the enforcement of the Note, which is clear, complete and unambiguous on its face concerning its terms and obligations. It expressly states:

> FOR VALUE RECEIVED, Regency Global Solutions, Inc., a Delaware corporation (the 'Company'), hereby promises to pay to the order of Justin Kennedy (the 'Holder') ... the principal amount of Eighty Thousand and 00/100 cents ($80,000) (the 'Principal Amount'), together with interest on the unpaid Principal Amount under this promissory note (the 'Note') at the per annum rate of six percent (6%) ..., compounded monthly, pursuant to the terms hereof, for the period beginning on the date hereof and continuing until October 4, 2014 (the 'Maturity Date'), unless sooner paid pursuant to the terms hereof.

Thus, it makes clear that Kennedy loaned Regency the principal amount of $80,000.00 between June 2010 and October 2011, which becomes due on October 4, 2014. As the Note is unambiguous, Defendant's arguments concerning "intent" of the Note is unavailing. Furthermore, in opposition to a motion for summary judgment in lieu of complaint, it is Regency's burden to show, by proof in admissible form that Regency had not been credited payments as against the outstanding balance due under the Note. No such proof of payment in admissible form is provided.

Wherefore, it is hereby

ORDERED that Defendant's motion to vacate the Decision and Order dated March 21, 2016, is denied; and it is further

ORDERED that Defendant's motion to quash the Information Subpoena served on Regency Global, as Judgment-Debtor, dated April 28, 2016, is denied; and it is further

ORDERED that Defendant shall respond to the Information Subpoena within 20 days of service of a copy of this order with notice of entry.

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

Dated: SEPTEMBER 19, 2016

J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST X REFERENCE