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

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The Bank of Oklahoma, N.A.,

Plaintiff,

- v -

Vanguard Funding LLC,

Defendant.

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Index No.
652565/2016

DECISION and ORDER

Mot. Seq. 001

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

The above action seeks damages related to the breach of contract of a certain Masters Securities Forward Transaction Agreement, dated April 17, 2012, pursuant to which Vanguard, Vanguard Funding LLC ("Vanguard" or "Vanguard") was obligated to pay certain commission fees to plaintiff, The Bank of Oklahoma, N.A. ("Plaintiff" or "BOK") in connection with trades relating to the purchase and sale of asset backed mortgage securities ("Agreement").

This action was commenced by the filing of the Summons and Complaint on May 12, 2016. Vanguard was served with the Summons and Complaint on May 16, 2016 via the Secretary of State of New York pursuant to Section 303 of Limited Liability Company Law. By Notice of Motion dated July 1, 2016, Plaintiff moves for a default judgment in the amount of $141,332.16 plus 18% interest from February 22, 2016[1], with costs and attorney's fees against Vanguard pursuant to CPLR §3215 for failure to answer the Summons and Complaint. Plaintiff submits the attorney affirmation of Constantine T. Tzifas ("Tzifas"); affidavit of Merideth Watson, a Senior Vice President of BOK; Summons and Complaint; affidavit of service; and a copy of the Agreement. In Tsifas' affirmation, Tsifas states that on

[1] In the supporting attorney affirmation of Merideth Watson, Watson states that the amount due from Vanguard is $121,332.16, plus 18% interest from February 22, 2016.

June 16, 2016, he mailed an additional copy of the Summons and Complaint pursuant to CPLR 3215(g)(4) to Vanguard.

In Watson's affidavit dated June 27, 2016, Watson attests that on April 17, 2012, BOK and Vanguard entered into the Agreement pursuant to which Vanguard was obligated to pay certain commission fees to BOK in connection with trades relating to the purchase and sale of asset backed mortgage securities. Watson attests that BOK has performed all of the terms of the Agreement, and that Vanguard currently owes $33,549.62 to BOK for February Class A Obligation commissions and $87,782.54 to BOK for February Class C Obligation commissions under the terms of the Agreement. Watson attests that BOK mailed monthly statements of these balances, to which Vanguard did not object. Watson attests that as of February 22, 2016, Vanguard owes BOK $121,332.16 plus 18% interest.

Pursuant to the Stipulation filed on July 21, 2016, the parties adjourned the return date of the motion to August 12, 2016.

On August 5, 2016, Vanguard interposed an Answer.

On August 5, 2016, Vanguard also opposed Plaintiff's motion for default judgment. Vanguard requests that the Court exercise its discretion to excuse Vanguard's delay in filing an answer and deny Plaintiff's motion. Vanguard submits the attorney affirmation of Marcus Monteiro; Matthew Voss, Chief Operating Officer of Vanguard; and Wire Transfer Statements. As for Vanguard's "reasonable excuse" for failing to interpose a timely answer, Monteiro attests that Vanguard "was still determining the viability of an early settlement with BOK and determining the proper amount owed BOK to avoid undue litigation when BOK filed its default motion." Voss attests, "The reasons Vanguard failed to timely serve its Answer is that it was contemplating the correct amounts owed to BOK, determining the viability of a settlement, and was in the process of obtaining counsel to defend itself when it was served with BOK's default motion." As for Vanguard's potentially meritorious defense, Vanguard contends, "[T]here is a meritorious defense in that the amount BOK alleges it is owed from Vanguard is in dispute, not only by Vanguard, but by BOK itself." Furthermore, Vanguard contends that Plaintiff "failed to properly account for Vanguard's payments of February 26, 2016 ($25,000); March 15, 2016 ($25,000); April 20, 2016 ($25,000); April 28, 2016 ($25,000); and June 21, 2016 ($20,000)." Vanguard argues, "As such, there is a dispute over the amounts due and owing from Vanguard to BOK, including the crediting of all payments made (and how such payments were allocated). The dispute is highlighted

by BOK's default motion, which contradicts itself as to the amounts it claims are due and owing."

Plaintiff submits a reply, contending, "Vanguard acknowledges the debt, does not dispute the debt and has no excuse for failing to respond to the Summons and Complaint." Plaintiff states, "In fact, the parties engaged in a long series of communications between April 19, 2016 and July 19, 2016 during which Vanguard acknowledged the validity of the debt to BOK and made payments pursuant to the terms of the Settlement Agreement." The purported "Settlement Agreement" entered between the parties was allegedly forwarded to Vanguard by Plaintiff's counsel by email dated July 12, 2016, after the date this action was commenced. Plaintiff acknowledges that the Settlement Agreement was never executed.

Plaintiff contends, "To the extent the Vanguard's counsel asserts that its breaches of the Settlement Agreement were attributable to Vanguard's efforts to verify the debt to BOK, these arguments are flatly contradicted by Vanguard's actions. In fact, on July 12, 2016, Vanguard's Vice President of Business Administration, Laurie King, forwarded a payment detail to Mr. Semetis evidencing the debt and the payments made to that point in time – Vanguard's argument that the amount of the debt is unknown or disputed is wholly undermined by its own accounting which shows a balance due of $121,332.16."

Settlement negotiations are in themselves an insufficient excuse for default. (*Krell v. Pelham Syndicate, Inc.*, 220 N.Y.S.2d 966 [1st Dep't 1961]). However, in certain circumstances, settlement negotiations may constitute a reasonable excuse for a Vanguard's delay in answering. (*Finkelstein v. East 65th St. Laundromat*, 215 A.D.2d 178 [1st Dep't 1995] [finding that "settlement negotiations between plaintiff and defendant landowner's insurer constitutes a reasonable excuse for defendant's delay in answering"]; *Mendoza v. Bi-County Paving*, 227 A.D.2d 302, 302-03 [1st Dep't 1996] [granting motion for leave to serve a late answer and vacating default where "settlement negotiations then made it prudent to delay service of an answer").

Additionally, "As a matter of general policy, disposition of controversies on the merits is favored." (*Warbett v. Polokoff*, 250 N.Y.S.2d 633, 634 [1st Dep't 1964]).

Here, it has been shown that the parties were engaged in ongoing settlement negotiations after the action was commenced and the motion for default judgment was brought, Vanguard's delay was relatively short, and Plaintiff has not shown that

Plaintiff has been prejudiced. "Under these circumstances, defendants' excuse for the default is reasonable and will be accepted." (*Pieretti v. Flair De Art, Inc.*, 99 A.D.2d 980, 981 [1st Dep't 1984]; *Mendoza v. Bi-County Paving*, 227 A.D.2d 302, 302-03 [1st Dep't 1996]).

Wherefore, it is hereby,

ORDERED that the application of Plaintiff for a default judgment against Vanguard is denied; and it is further

ORDERED that Vanguard's Answer, efiled by Vanguard on August 5, 2016, is deemed timely served and filed *nunc pro tunc* upon 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: OCTOBER 26, 2016

OCT 26 2016

EILEEN A. RAKOWER, J.S.C.