

**Professional Offshore Opportunity Fund, Ltd. v
Braider**

2016 NY Slip Op 32515(U)

October 7, 2016

Supreme Court, Suffolk County

Docket Number: 8296-11

Judge: Thomas F. Whelan

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

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATES: 6/24/16
SUBMIT DATES: 8/5/16
Motion Seq. #007 - MG
Motion Seq. #008 - XMD
CASE DISP: Yes

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PROFESSIONAL OFFSHORE OPPORTUNITY FUND, LTD.,	: SULLIVAN & WORCESTER, LLP
	: Co-Attys. For Plaintiff
	: 1 Post Office Sq.
Plaintiff,	: Boston, MA 02109
	:
-against-	: BRACKEN, MARGOLIN &
	: BESUNDER, LLP
	: Attys. For Defendant Laura Braider
	: 1050 Old Nichols Rd. - Ste. 200
LLOYD J. BRAIDER, LAURA L. BRAIDER,	: Islandia, NY 11749
THE FIRST NATIONAL BANK OF LONG	:
ISLAND, JEANNE L. YANDOLINO, PASTA	: JAMES O'ROURKE, ESQ.
ITALIANA, INC., COMMACK, TOWN OF	: Atty. For Defendant Lloyd Braider
SMITHTOWN, NEW YORK STATE	: 235 Brookside Dr.
DEPARTMENT OF FINANCE,	: Hauppauge, NY 11788
	:
Defendants.	: ACKERMAN, LEVINE, CULLEN
	: Co-Attys. For Plaintiff
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	: Great neck, NY 11021
	:
-----X	

Upon the following papers numbered 1 to 22 read on this motion by the plaintiff for summary judgment dismissing answer of Laura Braider and cross motion by said defendant for summary judgment dismissing the complaint; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers 5-11; Answering papers _____; Reply papers 12-13; Other 14-15 (affirmation); 16-17 (memorandum); 18-19 (memorandum); 20-21 (memorandum); 22 Record on Appeal and other documents in court's file; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#007) by the plaintiff for summary judgment dismissing the answer served by defendant, Laura Braider, is granted; and it is further

ORDERED that the cross motion (#008) by defendant, Laura L. Braider, for summary judgment dismissing the complaint, with prejudice, to the extent that it asserts claims against her, is denied.

On March 16, 2011, the plaintiff commenced this action to foreclose a June 15, 2007 mortgage given by the moving defendant, Laura L. Braider, and her co-defendant husband, Lloyd J. Braider, on residential real property situated in Commack, New York. On April 8, 2011, service of the summons, complaint and relevant foreclosure notices was effected by the plaintiff on the Braiders by e-mail at the address set forth in a Service Agreement dated March 30, 2011 purportedly executed by both Braider defendants. An affidavit of service with respect thereto dated May 19, 2011 was filed in the office of the Clerk on June 6, 2011. The Braiders defaulted in answering or otherwise appearing in response to such service.

An order of reference entered upon the defaults in answering of all defendants issued on September 14, 2011 upon application of the plaintiff. By notice of motion served upon the moving defendant on March 13, 2012, and others, the plaintiff applied for a judgment of foreclosure and sale. The unopposed motion (#002) was granted by the court on April 26, 2012.

By motion (#003) returnable on May 22, 2012, defendant, Laura L. Braider, moved to be relieved from her default in answering and for an order vacating the fixation of such default by the court in the March 13, 2012 order of reference and for an order vacating the judgment entered thereon. The motion was predicated, in part, upon claims that the court had no personal jurisdiction over Ms. Braider because she did not execute a Service Agreement providing for service by e-mail to her husband's e-mail address. These portions of the motion to vacate the order of reference and judgment of foreclosure were considered by the court under CPLR 5015(a)(4). The motion was further predicated upon claims that Ms. Braider's default in answering should be vacated upon excusable default grounds and that she should be granted leave to appear and either move against the complaint or to serve a late answer thereto. The court considered these portions of the motion as made pursuant to CPLR 317 and 5015(a)(1).

In response to service of this motion, the plaintiff served defendant, Laura L. Braider, with the summons and complaint and other initiatory papers pursuant to CPLR 308(2) at the mortgaged premises on May 10, 2012, and it appeared in opposition to the defendant's motion. By order dated June 11, 2012, the court denied Ms. Braider's application to vacate her default and the order and judgment premised thereon pursuant to CPLR 5015(a)(4) and for a discretionary vacatur of the judgment and order of reference pursuant to CPLR 317 and 5015(a)(1).

By notice of motion returnable August 27, 2012, defendant, Laura L. Braider moved (#004) for an order granting her leave to reargue or renew her prior motion (#003) to vacate her default and the other relief outlined above. By order dated October 12, 2012, defendant Braider's application for reargument and/or renewal was denied and the plaintiff's cross application for leave to enter an amended judgment (#005) was granted, subject to the settlement of such amended judgment.

Thereafter, by motion (#006), defendant Braider moved for an order “pursuant to CPLR 317 allowing Defendant Laura L. Braider to defend this action and vacating the judgment of foreclosure and sale entered May 1, 2012 or in the alternative, vacating the judgment pursuant to CPLR 5015(a)(3)”. For the reasons stated in the court’s order of March 1, 2013, this third application for relief under CPLR 5015 and/or 317 was denied in its entirety.

Each of the above described orders were the subject of appeals therefrom by defendant, Laura L. Braider. In an opinion and order dated, October, 8, 2014, the Appellate Division, Second Department dismissed, in part, the appeal of the October 12, 2012 order and affirmed the remaining portions and it affirmed the March 1, 2013 order in its entirety. With respect to the June 11, 2012 order, the Appellate Division found that this court “properly denied those branches of the appellant’s motion which were pursuant to CPLR 317 and 5015(a)(1)”. With respect to the remaining portions of such order, which denied defendant Braider’s application to vacate on jurisdictional grounds pursuant to CPLR 50105(a)(4), the Appellate Division reversed and remitted the matter back to this court “for a hearing to determine the validity of service of process upon the defendant Laura L. Braider and whether the court had jurisdiction to render the default order and judgment against her, and thereafter for a new determination of that branch of her motion which was, in effect, pursuant to CPLR 5015(a)(4) to vacate the order dated September 14, 2011, insofar as against her, and the judgment of foreclosure and sale insofar as against her” (*Professional Offshore Opportunity Fund, Ltd. v Braider*, 121 AD3d 766, 994 NYS2d 619 [2d Dept 2014]).

On June 15, 2015, this court conducted a traverse hearing on the issue of this court’s personal jurisdiction over defendant, Laura L. Braider, as framed in the October 8, 2014 order of the Appellate Division, Second Department. By order dated August 20, 2015, this court found that it lacked jurisdiction over said defendant and granted those portions of Laura L. Braider’s first motion (#003) to vacate the order and judgment entered upon her default pursuant to CPLR 5015(a)(4) for lack of in personam jurisdiction. Accordingly, the order of reference and judgment of foreclosure and sale were therein vacated as to defendant Laura L. Braider, but they were expressly left in place as to the remaining parties (*see* page 4 of the August 20, 2015 Order). The court then directed “the *remaining parties* to the action to appear for a conference” the purpose of which was “to inform the court as to whether this action will proceed to sale or whether a strict foreclosure or reforeclosure action may be maintained” (citations omitted, emphasis added).

As indicated above, one of the plaintiff’s responses to the interposition of Ms. Braider’s motion (#003) to vacate the order of reference and judgment due to a lack of jurisdiction over her person was to effect a re-service of the summons and complaint and other initiatory papers on May 10, 2012. The record reflects that no answer was served by Ms. Braider until some time after May 8, 2015 when an answer of that date was executed containing five affirmative defenses and one counterclaim, in which the plaintiff is charged with negligence in failing to ascertain whether Larua L. Braider’s signature on the guaranty of the commercial borrower’s obligations under the mortgage note and her signature on the mortgage indenture were authentic. While the court is unaware of the date of service of Ms. Braider’s answer, as it not on file with the court, it is now alleged to have been

served in response to the plaintiff's purported service of the summons and complaint upon her counsel that was allegedly effected with her permission "at some point during this litigation" (see Affidavit of Laura L. Braider, dated July 14, 2016 in support of her cross motion). The plaintiff served a reply to the counterclaim set forth therein in October of 2015.

By the instant motion (#007) the plaintiff seeks summary judgment dismissing the answer served by defendant Braider as lacking in merit, while defendant Braider cross moves (#008) for summary judgment dismissing the plaintiff's complaint on the strength of the affirmative defenses asserted in her answer. No relief with respect to her counterclaim for recovery of damages sounding in negligence is requested in the cross moving papers.

CPLR 5015(a) provides both jurisdictional and discretionary grounds for the vacatur of a judgment or order entered upon the default of a party. The successful invocation of a jurisdictional defense is a complete defense to the complaint, as "all subsequent proceedings are thereby rendered null and void" (*Segway of New York, Inc. v Udit Group, Inc.*, 120 AD3d 789, 992 NYS2d 524 [2d Dept 2014, quoting *Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d 896, 897, 964 NYS2d 543 [2d Dept 2013], including any default order or judgment entered against the movant (see *Prudence v Wright*, 94 AD3d 1073, 1074, 943 NYS2d 185 [2d Dept 2012]; *U. S. Bank, N.A. v Bernhardt*, 88 AD3d 871, 931 NYS2d 266 [2d Dept 2011]; *Krisilas v Mount Sinai Hosp.*, 63 AD3d 887, 889, 882 NYS2d 186 [2d Dept 2009]; *Harkless v Reid*, 23 AD3d 622, 623, 806 NYS2d 214 [2d Dept 2005])). Where such defense is established, the dismissal of an action against a defendant is warranted without any demonstration of his or her possession of a meritorious defense or other elemental showing (see *Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 32 NYS3d 95 [1st Dept 2016]; *Prudence v Wright*, 94 AD3d 1073, 943 NYS2d 185 [2d Dept 2012]; see also *Dime Sav. Bank of Williamsburg v 146 Ross Realty*, 106 AD3d 863, 966 NYS2d 443 [2d Dept 2013]; *Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d 896, 964 NYS2d 543 [2d Dept 2013]; *Toyota Motor Credit Corp. v Hardware Lam*, 93 AD3d 713, 939 NYS2d 869 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co. v Pestano*, 71 AD3d 1074, 899 NYS2d 269 [2d Dept 2010])).

Nevertheless, because a lack of personal jurisdiction over a defendant, unlike a lack of subject matter jurisdiction over a cause put before the court, is a waivable defect, a movant successful in vacating an order or judgment on personal jurisdictional grounds pursuant to CPLR 5015(a)(4) may seek leave to appear and defend against the plaintiff's claims rather than a dismissal thereof, to avoid having to defend a second action commenced with no jurisdictional defect. To do so, however, the moving defendant must satisfy the two prong test applicable to motions for a discretionary vacatur on excusable default grounds of the type available under CPLR 5015(a)(1) and CPLR 3012(d) (see *Ramirez v Romualdo*, 25 AD3d 680, 808 NYS2d 733 [2d Dept 2006]; see also *Equicredit Corp. of Am. v Campbell*, 73 AD3d 1119, 900 NYS2d 907 [2d Dept 2010]). The elements of that two prong test are: 1) a showing of a reasonable excuse for the default, which the defect in service will likely provide (see *Equicredit Corp. of Am. v Campbell*, 73 AD3d 1119, *supra*); and 2) the movant's possession of a meritorious defense to the action (see *Ramirez v Romualdo*, 25 AD3d 680, *supra*; see also *Gershman v Ahmad*, 131 AD3d 1104, 16 NYS3d 836 [2d

Dept 2015]; *Ogman v Mastrantonio Catering, Inc.*, 82 AD3d 852, 918 NYS2d 375 [2d Dept 2011]; *Hossain v Fab Cab Corp.*, 57 AD3d 484, 868 NYS2d 746 [2d Dept 2008]). Alternatively, the defendant may seek vacatur of his or her default and leave to appear and defend pursuant to CPLR 317 upon a showing of that he or she was not served by personal delivery, did not receive notice of the action in time to defend and that he or she has a meritorious defense to the action (*see Eugene Di Lorenzo, Inv. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141, 501 NYS2d 8 [1986]; *PIII Mtge. Corp. v Muricy*, 135 AD3d 725, 24 NYS3d 137 [2d Dept 2016]).

Here, defendant Braider was repeatedly unsuccessful in establishing a basis for a discretionary vacatur of her default in answering on excusable default grounds due to her failure to establish a meritorious defense and unsuccessful at obtaining leave from this court to serve and file and answer in response to the plaintiff's re-service of the summons and complaint in May of 2012. The Appellate Division, Second Department affirmed all three decisions of this court which denied Ms. Braider's requests for discretionary vacatur of her default.

In addition, Ms. Braider was never granted leave to appear in this action so as to defend against it by answer or otherwise in any of the four orders issued by this court and no proposed answer was attached to any of her moving papers or otherwise presented to the court. Indeed, the defendant's demand to appear in the action and defend against it was considered by the court in the June 11, 2012 and October 12, 2012 orders to be attached only to Ms. Braider's application to vacate on the discretionary grounds of excusable default advanced therein pursuant to CPLR 5015(a)(1) and CPLR 317. This characterization of the nature of Ms. Braider's demands was confirmed by her on page 49 of the appellate brief served and filed by her on April 15, 2013, wherein she expressly sought to "dismiss the action" due to a lack of personal jurisdiction over her, "or, in the alternative," leave to appear and defend against the action by answer, pursuant to CPLR 317 and/or CPLR 5015(a)(1) and (3). Ms. Braider repeated her request for dismissal of the complaint on jurisdictional grounds and her alternate request for leave to appear on page 1 of her appellate reply brief dated May 24, 2013. So while there was no express demand for dismissal advanced in the original moving papers, such demand was made in Ms. Braider's appellate briefs and no expression of any waiver of the jurisdictional defect so as to permit defendant Braider to appear and employ the jurisdictional defect as a reasonable excuse for her default to support her alternative applications for a discretionary vacatur on excusable default grounds is discernable in any of the defendant's submissions to this court.

When the jurisdictional defense was sustained as meritorious by this court in the order dated August 20, 2015, following the traverse hearing held in accordance with the directives of the Appellate Division, both the order of reference and judgment of foreclosure and sale were vacated, but only as to defendant Laura L. Braider. All proceedings taken thereafter in the action, *viz a viz* defendant Braider, were thus nullities, including the service of the May 8, 2015 answer for which leave to serve had not been granted. The court thus finds that defendant Braider was thus without standing or other authority to serve the May 8, 2015 answer in response to the plaintiff's May, 2012 service of the summons and complaint or in response to the plaintiff's purported service of the

summons and complaint upon her counsel that was allegedly effected with her permission "at some point during this litigation" (see Affidavit of Laura L. Braider, dated July 14, 2016 in support of her cross motion).

Even if it were otherwise, the court finds that none of the defendant's asserted affirmative defenses, which distill into three, nor the counterclaim, in which the plaintiff is charged with negligence due to a purported lack of due diligence prior to advancing the monies loaned, have merit and are thus subject to dismissal pursuant to CPLR 3212 for the reasons advanced in the plaintiff's moving papers. The opposing papers of defendant Braider were insufficient to raise any genuine questions of fact. Accordingly, the plaintiff's motion for a dismissal of said answer pursuant to CPLR 3212 is granted while the cross motion by defendant, Laura L. Braider, for dismissal of the complaint "with prejudice" under CPLR 3212 is in all respects denied.

DATED: 10/7/16



THOMAS F. WHELAN, J.S.C.