

Jeffrey Gardens Apt. Corp. v SMS Mgt. LH Mgt., Inc.
2016 NY Slip Op 32869(U)
February 1, 2016
Supreme Court, Queens County
Docket Number: 21341/13
Judge: Janice A. Taylor
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

-----X Index No.: 21341/13
JEFFREY GARDENS APARTMENT CORP., DANIELA Motion Date: 11/6/15
CROCCHIOLA, Motion Cal. No.: 54
Motion Seq. No: 5
Plaintiff(s),

- against -

SMS MANAGEMENT LH MANAGEMENT, INC.,
KATHY MAZZO, SMSLSH, L.P., MERILL REALTY
CO. and LISA HADAR,

Defendant(s).
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FILED

FEB 16 2016

COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 - 10 read on this motion by plaintiff pursuant to CPLR §§ 3215, 5015(a)(1) and (a)(3) vacating the default judgment entered with the Queens County Clerk on August 10, 2015 and preliminarily enjoining SMS Management, LH Management, Inc., Kathy Mazzso, SMSLSH, L.P. Merill Realty Co. and Lisa Hadar from enforcing, collecting on, or otherwise seeking to execute and/or collect on the default judgment from any and all Reserve Accounts, Operating Accounts or encumbering and/or garnishing any other assets maintained by plaintiff Jeffrey Gardens Apartment Corp.

Papers
Numbered

Order to Show Cause-Affirmation-Exhibits-Service..... 1 - 4
Affirmation in Opposition-Exhibits-Service..... 5 - 7
Reply Affirmation-Exhibits-Service..... 8 - 10

Upon the foregoing papers it is **ORDERED** that this motion is determined as follows:

This is an action seeking an accounting and alleging, *inter alia*, conversion, theft of services, misappropriation and breach of implied contract. This action was commenced on November 20, 2013 by the filing of the summons and complaint. On or about December 16, 2013, defendants served an answer to the complaint with counterclaims. The defendants then moved for a default judgment

alleging that the plaintiff had failed to serve an answer to the counterclaims. This Court based on the uncontested representation from the defendant that the plaintiff never served an answer to the counterclaim granted the default judgment on the counterclaims in an order dated June 26, 2015. The clerk of the court then entered a judgment on August 10, 2015. The plaintiff has moved to vacate the granting of a default judgment on the defendants' counterclaim.

In order to vacate a default in answering and appearing and to extend the time to appear or compel the acceptance of an untimely answer a defendant must establish a reasonable excuse for the default and a potentially meritorious defense (*Wells Fargo, N.A. v Cervini*, 84 AD3d 789 [2011]; *Midfirst Bank v Al-Rahman*, 81 AD3d 797 [2011]; *HSBC Bank, USA v Dammond*, 59 AD3d 679 [2009]; *NYCTL 1997-1 Trust v Villa*, 19 AD3d 382 [2005]). The determination of what constitutes a reasonable excuse is left to the sound discretion of the court (see *Abrams v City of New York*, 13 AD3d 566 [2004]; *Scarlett v McCarthy*, 2 AD3d 623 [2003]; *Westchester Med. Ctr. v Clarendon Ins. Co.*, 304 AD2d 753 [2003]). In appropriate circumstances a court has the discretion to find that law office failure is a reasonable excuse (see *Sarcona v J&J Air Container Sta., Inc.*, 111 AD3d 914 [2d Dept. 2013]; *Embraer Fin. Ltd. v Services Aereos Profesionales, S.A.*, 42 AD3d 380 [1st Dept 2007]). The counsel for plaintiff stated that after the defendants filed their motion for a default judgment on the counterclaims his office became counsel for the plaintiff. As part of the substitution, the former counsel provided him with all relevant case files. At that time he noticed that the plaintiff's answer to the defendants' counterclaims was missing from the file. He then contacted the former counsel asking about the answer and was told that such an answer was prepared and had been served. However, he was unable to locate the answer to the counterclaims and could not include a copy of the answer in opposition. Plaintiff's counsel has now located the misplaced answer, which includes an affidavit of service, and has submitted these documents on this motion. Additionally the plaintiff submitted the affirmation of its former counsel who stated that he served an answer to the counterclaim on February 28, 2014, and included an affirmation of service. Here, given the strong public policy in resolving cases on the merits, the plaintiff's counsel detailed and credible account of law office failure was a reasonable excuse for the default in answering the counterclaim (see *Lyubomirsky v Lubov Arulin, PLLC*, 125 AD3d 614 [2d Dept 2015]; *Needleman v Tornheim*, 106 AD3d 707 [2d Dept 2013]). Moreover, plaintiff has demonstrated a potentially meritorious opposition to the counterclaim. The necessary amount of proof required to show a meritorious defense is not as high as required to defeat a summary judgment motion (see *Clark v MGM Textiles Indus.*, 307 AD2d 520 [3d Dept 2003]). Plaintiff alleges that

defendant Hadar abused her position of authority as president of the co-op's board to retain defendant LH Management, a corporation controlled by Hadar. Plaintiff alleges that there was, thus, a conflict of interest and the defendant Hadar should have recused herself from such a vote, and therefore the validity of the contract is in doubt.

Where a default is found to be excusable, the underlying default judgment must be vacated as well (*Stephan B. Gleich & Assoc. v Gritsipis*, 87 AD3d 216 [2d Dept 2011]). Inasmuch as this Court is vacating the underlying default in answering the counterclaim and vacating the order dated June 26, 2015, the Judgment entered with the Clerk on August 10, 2015 must be vacated.

Additionally, no judgment should have been entered with the clerk as the default judgment was not for a sum certain judgment. While the motion for a default judgment on the counterclaim requested a judgment in the amount of \$132,000, when this Court granted the default judgment it did not direct entry of judgment for a sum certain. Therefore, no judgment should have been entered until there was an assessment of damages. Furthermore, the counterclaim is not for a sum certain. The term sum certain is intended to apply to those cases where there can be no dispute as to the amount due, such as actions on money judgment and negotiable instruments (*Reynolds Sec. V Underwriters Bank & Trust Co.*, 44 NY2d 568 [1978]; *Stephan B. Gleich & Assoc.*, 87 AD3d at 222). That is not the case here as the damages are not undisputable. Therefore, no judgment should have been entered before an assessment of damages had occurred.

Finally, the argument that it is procedurally improper for the plaintiff to seek to vacate its default because they opposed the original motion is without merit. Even if this Court were to treat this motion as a motion to renew it would still be granted. A motion to renew must be supported by new or additional facts not offered on the prior motion that would change the prior motion and must contain a reasonable justification for why the facts were not presented on the prior motion. A court may grant renewal based on new facts that were known at the time of the original motion, if there is a reasonable justification as to why these new facts were not submitted in the original motion (see *Lawman v Gap, Inc.*, 38 AD3d 852 [2d Dept 2007]; *Simpson v Cook Pony Farm Real Estate, Inc.*, 12 AD3d 496 [2d Dept 2004]). Here, while the answer to the counterclaim and the affidavit of service might have been available to the plaintiff at the time of the default judgment motion, the plaintiff has provided a reasonable justification for the delay in presenting these facts and has shown that it exercised due diligence in locating these documents (see *Matter of Surdo v*

diligence in locating these documents (see *Matter of Surdo v Levittown Pub. School Dist.*, 41 AD3d 486 [2d Dept 2007]; *Bank One v Mon Leang Mui*, 38 AD3d 809 [2d Dept 2007]; *Gomez v Needham Capital Group, Inc.*, 7 AD3d 568 [2d Dept 2004]).

Accordingly, the motion to vacate the plaintiff's default in answering the counterclaim is granted. The order dated June 26, 2014 is vacated to the extent that the branch of the order granting the default judgment on the defendants' counterclaims is vacated. The default judgment entered with the Clerk on August 10, 2015 is vacated. Additionally, in light of the vacatur of the default judgment all efforts by the defendants to enforce the judgment must cease and all encumbrances currently in place pursuant to the default judgment shall be removed.

Dated: February 1, 2016


JANICE A. TAYLOR, J.S.C.

FILED

FEB 16 2016

**COUNTY CLERK
QUEENS COUNTY**