Ostreicher v Halberstam
2017 NY Slip Op 31401(U)
June 26, 2017
Supreme Court, Kings County
Docket Number: 502214/2015
Judge: Sylvia G. Ash

At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of June, 2017.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

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SHEA OSTREICHER and ETTA OSTREICHER,

Plaintiff(s),

- against -

MENACHEM HALBERSTAM, MICHEL ROTTENBERG a/k/a MICHAEL ROTTENBERG and REGAL WINDOWS & DOORS LLC,

Defendant(s).

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DECISION AND ORDER

Index # 502214/2015

The following papers numbered 1 to 6 read herein: Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-5
Opposing Affidavits (Affirmations)	6
Reply Affidavits (Affirmations)	

Upon the foregoing papers, the motion by Defendants, MENACHEM HALBERSTAM ("Halberstam"), MICHEL ROTTENBERG a/k/a MICHAEL ROTTENBERG ("Rottenberg") and REGAL WINDOWS & DOORS LLC ("Regal"), to vacate their default and dismiss the action, or, in the alternative, to compel arbitration and dismiss the action is granted to the extent that Defendants' default is hereby vacated but that the motion is otherwise denied. Plaintiffs' cross-motion for various discovery sanctions is denied.

Plaintiffs commenced this action on February 25, 2015, alleging thirteen causes of action against Defendants that center on an investment opportunity that Plaintiffs were allegedly deprived of relating to the purchase of certain assets of a company called Black Millwork Co., Inc. ("BMC"). According to Defendants, they submitted an informal *pro se* "answer" dated March 18, 2015, to Plaintiffs' counsel by certified mail which denied, generally, the allegations in the complaint and

asserted several defenses including submitting the matter to arbitration pursuant to a written agreement.

On May 22, 2015, Plaintiffs filed a motion for default judgment against Defendants. By Decision and Order dated January 7, 2016, the Court (Hon. Carolyn Demarest) denied Plaintiffs' motion for default judgment without prejudice for their failure to attach the asset purchase agreement, a document relied upon in their motion, and for otherwise failing to support their motion with documentary evidence. Although Defendants did not appear before the Court on the motion's return date, Justice Demarest was evidently in possession of Defendants' informal "answer" as the January 7, 2016 Order directs Defendants "to file an answer, or file an appropriate motion, within 30 days of this order, or they will remain in default."

Thereafter, Plaintiffs renewed their motion for a default judgment, which was returnable on March 30, 2016. By then, the case had been transferred to the Hon. Sylvia G. Ash. By Order dated March 30, 2016, this Court granted Plaintiffs' motion, Defendants having failed to appear, and marked the case for an inquest and assessment of damages.

On August 26, 2016, Defendants filed the instant motion to vacate their default. Defendants argue that their default should be excused because they submitted a timely, albeit informal, "answer" sufficiently denying all claims and asserting their defenses. Defendants state that they mistakenly relied on their informal "answer" and neglected to re-submit any formal pleadings. Despite this procedural oversight, Defendants submit that they have meritorious defenses to Plaintiffs' action. Specifically, that the parties' partnership agreement contains an arbitration clause requiring this dispute to be arbitrated. Secondly, that Plaintiffs' allegations are refuted by litigation in Bergen County, New Jersey between Plaintiffs and BMC, which also concerns the purchase of BMC's assets and Plaintiffs' alleged failure to timely close on the purchase agreement with BMC.

In opposition, Plaintiffs argue that Defendants fail to provide a reasonable excuse explaining their failure to answer the complaint for approximately one year and that Defendants do not have a meritorious defense insofar as they failed to submit a proposed answer addressing the 134 paragraphs of allegations and 13 causes of action set forth in the complaint.

A defendant seeking to vacate a default pursuant to CPLR 5015[a][1] must demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action (*see Skutelsky v JN Natural Fruit Corp.*, 138 AD3d 1099, 1100 [2d Dept 2016]). Other factors the court should consider are potential prejudice to the opposing party, whether the default was willful or evinced an

intent to abandon the litigation, and whether vacating the default would serve the public policy of resolving actions on their merits (*see Needleman v Tornheim*, 106 AD3d 707, 708 [2d Dept 2013]). "The determination of what constitutes a reasonable excuse generally lies within the sound discretion of the trial court" (*Golden v Romanowski*, 128 AD3d 1009, 1009 [2d Dept 2015]).

Here, Defendant's informal but timely response to Plaintiffs' complaint evinced an intent to defend against this action and not to abandon it. Also, given that Defendants were *pro se* at the time Plaintiffs renewed their motion for default judgment, the Court accepts as reasonable Defendants' mistaken reliance that their informal response would be sufficient to counter Plaintiffs' second default motion. Moreover, upon Notice of Entry of the Order granting Plaintiffs' second motion for default judgment, Defendants moved relatively quickly to retain counsel and seek appropriate relief (*see Matter of Kumar v Motor Veh. Acc. Indem. Corp.*, 139 AD3d 731, 732 [2d Dept 2016]). Finally, there is no evidence of prejudice to Plaintiffs and Defendants have demonstrated a potentially meritorious defense to this proceeding.

Having vacated the default, the Court declines to dismiss the action based on Defendants' argument that it should, in essence, be awarded summary judgment because the New Jersey litigation completely undermines Plaintiffs' allegations. At this juncture, where discovery has yet to commence, the Court finds this argument to be premature.

With regards to that part of Defendants' motion seeking to compel arbitration, the Court finds Defendants have waived their right to arbitration. Although arbitration is highly favored as a means to resolve disputes (*see Shah v Monpat Constr., Inc.*, 65 AD3d 541, 543 [2d Dept 2009]), a party can be deemed to have waived his or her right to arbitrate depending on the facts and circumstances of each particular case (*see Reynolds & Reynolds Co., Auto. Sys. Div. v Goldsmith Motor Corp.*, 251 AD2d 312, 313 [2d Dept 1998]). "Among the factors to be considered are the extent of the party's participation in litigation and conduct inconsistent with the assertion of a right to arbitrate, the delay in seeking arbitration, and whether the other party has been prejudiced" (*Id.*).

Here, it is undisputed that, pursuant to the parties' partnership agreement dated February 7, 2013, the parties agreed to submit "any dispute whatsoever arising between the parties...for arbitration exclusively before tribunal of Mechon Lehoraya by Rabbi Avrum B. Rosenberg." According to Plaintiffs, on or around April 23, 2013, upon learning of the impending purchase of BMC's assets by Defendant Halberstam, Plaintiffs attempted to seek a stop order from Mechon Lehoraya headed by Rabbi Avrum B. Rosenberg but was told that Mechon Lehoraya had not

arranged tribunals with Rabbi Avrum B. Rosenberg for five years. As a result, Plaintiffs state that they sought and obtained a Beth Din restraining order from the Even Hamishpot directing Halberstam and Rottenberg to stop their attempts to buy BMC. However, that Halberstam and Rottenberg disregarded the Beth Din restraining order and proceeded to purchase BMC's assets using their entity, Regal, in May 2013. Plaintiffs argue that Defendants, by ignoring a Rabbinical Court's order and failing to seek dispute resolution before a Rabbinical Court tribune, Defendants waived their rights to enforce the arbitration provision.

The Court finds the foregoing contentions, which Defendants fail to dispute, along with Defendants' delay in seeking arbitration when this dispute arose in 2013 and their delay in properly responding to this lawsuit, are sufficient to support a finding that Defendants waived their rights to arbitration (*see Willer v Kleinman*, 114 AD3d 850, 852 [2d Dept 2014]).

Plaintiffs' cross-motion seeking sanctions against Defendants for their failure to respond to discovery demands is denied at this time. A preliminary conference shall be scheduled as set forth below to address discovery which has yet to commence.

Accordingly, it is hereby

ORDERED that Defendants' motion is GRANTED to the extent that the default judgment entered against them is hereby vacated and Defendants are directed to file and serve their answer within twenty (20) days of notice of entry of this Order, but that the motion is otherwise DENIED; it is further

ORDERED that Plaintiffs' motion is DENIED; and it is further

ORDERED that a preliminary conference shall be held on Thursday, September 14, 2017, at 10:00 a.m. in Room 541.

This constitutes the Decision and Order of the Court.

E N T E R,

Sylvia G. Ash, J.S.C.