SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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HILLAIR CAPITAL INVESTMENTS L.P.,

Plaintiff,

- v -

ASP OF DICKINSON LLP, UGHS SURGICARE-WOODLANDS, LLC, SYBARIS GROUP, INC.

Defendant.

DECISION AND ORDER

Index No. 654424/2015
Mot. Seq. No. 003

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HON. SALIANN SCARPULLA:

In this action to recover damages for breach of contract, defendants ASP of Dickinson LLP, UGHS Surgicare-Woodlands, LLC, and Sybaris Group, Inc. move by order to show cause to vacate a prior order and judgment entered June 13, 2016, pursuant to CPLR 5015(a)(1), and to grant leave to defendants to oppose plaintiff's motion for summary judgment *nunc pro tunc*.

Background

Plaintiff Hillair Capital Investments L.P. is an investment fund that entered into a series of loan transactions with University General Health Systems, Inc. ("UGHS"). Defendants are subsidiaries of UGHS that executed a guarantee on July 15, 2014 ("July Subsidiary Guarantee"), which provides that defendants jointly and severally guarantee to

plaintiff "the prompt and complete payment and performance when due . . . of the Obligations."

On December 31, 2014, UGHS entered into a securities exchange and amendment agreement with plaintiff to amend the previous loan transactions ("December Exchange Transaction"). Section 3(d) of the December Exchange Transaction provides "*that the [July] Subsidiary Guarantee remains effective and applicable[,]*" and section 3(e) adds that UGHS "shall use best efforts to deliver to [plaintiff] a subsidiary guarantee . . . as soon as practicable following the date hereof." (Emphasis added.) UGHS never delivered a subsequent guarantee that extinguished or replaced the July Subsidiary Guarantee.

On February 27, 2015, UGHS filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code. After defendants failed to honor the July Subsidiary Guarantee, Plaintiff commenced this action for breach of contract in December, 2015. Defendants filed and served their answers on February 16, 2016.

Plaintiff moved for summary judgment in March, 2016. Plaintiff's motion was marked fully submitted, without opposition or other response from defendants, on April 11, 2016, and I granted the motion on default on April 18, 2016, directing plaintiff settle the order on notice.

Plaintiff served and filed a proposed order and judgment on notice on May 18, 2016. Defendants again did not respond or object to the proposed order and judgment. Accordingly, on June 13, 2016, I signed the order and judgment against defendants in the amount of $9,738,961.00, plus pre-judgment interest; awarded plaintiff its attorneys' fees

and referred the issue of reasonable amount of attorneys' fees and costs to a special referee ("Default Judgment").

On September 20, 2016, special referee Joseph Burke reported with a recommendation that the reasonable attorneys' fees and costs be set at $39,154.96. Notably, defendants failed to appear before the special referee as well. Defendants now move to vacate the Default Judgment and for leave to oppose plaintiff's motion for summary judgment.

Discussion

Pursuant to CPLR 5015(a)(1), a party seeking to vacate a default judgment must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action. *See Trepel v Greenman-Pedersen, Inc.*, 99 A.D.3d 789, 791 (2d Dep't 2012) ("In support of its motion pursuant to CPLR 5015(a)(1), [defendant] was required to demonstrate a reasonable excuse for its default . . . and a potentially meritorious defense to the action").

Here, defendants have failed to establish their entitlement to relief from the Default Judgment because they have failed to allege a meritorious defense.
For the first time on this motion to vacate, defendants assert that their general counsel (and a director of the corporation) essentially forged the signature of Michael L. Griffin, the Chief Financial Officer who executed the July Subsidiary Guarantee. Defendants then claim that their general counsel/ director was not authorized to execute the July Subsidiary Guarantee.

Defendants never raised the July Subsidiary Guarantee's validity as a defense in its answer or at any other time during the pendency of this action and only now, after the default judgment was entered, do defendants belatedly claim that the corporate officers/directors who executed the July Subsidiary Guarantee acted without authority.

The July Subsidiary Guarantee clearly and unambiguously provides that defendants guarantee UGHS's obligations, and was executed by a qualified corporate executive with, at the very least, apparent authority to do so. I find that defendants newly asserted claim that the July Subsidiary Guarantee was unauthorized is not a meritorious defense sufficient to warrant vacatur of the judgment.

Defendants also assert that the December Exchange Transaction is ambiguous because, as understood between the parties, the July Subsidiary Agreement was eliminated and defendants were to be replaced with another guarantor. This claim is belied by the December Exchange Transaction itself, in which the parties clearly and unambiguously agreed that the "[July] Subsidiary Guarantee remains effective and applicable. . . . Further, pursuant to the December Exchange Transaction, the onus was on University General Health System, Inc., not plaintiffs, to use its "best efforts to deliver to [plaintiffs] a subsidiary guarantee . . .as soon as practicable."

It is undisputed that the parties never executed a subsequent guarantee, and defendants' submission of parol evidence is insufficient to refute the terms of the plain, unambiguous executed agreements. *See Silveri v Laufer*, 179 A.D.2d 633 (2d Dep't 1992) (denying a motion to vacate default as without merit because the parol evidence rule bars defendants' evidence that an alleged oral understanding between the parties

contradicts the contract). For the foregoing reasons, I deny defendants' motion brought by order to show cause to vacate the judgment.

Finally, CPLR § 4403 states that upon the motion of any party or upon the judge's initiative, the judge "may confirm or reject, in whole or in part, the verdict of an advisory jury or the report of a referee to report." I confirm, *sua sponte*, the special referee's report in its entirety as to reasonable attorneys' fees and costs.

In accordance with the foregoing, it is hereby

ORDERED that the motion by defendants ASP of Dickinson LLP, UGHS Surgicare-Woodlands, LLC, and Sybaris Group, Inc. by order to show cause for entry of an order (1) vacating the Court's order and judgment dated June 13, 2016, pursuant to CPLR § 5015(a)(1); and (2) granting leave to defendants to oppose plaintiff Hillair Capital Investments L.P. motion for summary judgment *nunc pro tunc* is denied in its entirety; and it is further

ORDERED that special referee Joseph Burke's report and recommendation dated September 20, 2016 as to reasonable attorneys' fees and costs for a total amount of $39,154.96 is confirmed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Hillair Capital Investments L.P. and against defendants ASP of Dickinson LLP, UGHS Surgicare-Woodlands, LLC, and Sybaris Group, Inc., for attorneys' fees and costs in the amount of $39,154.96.

This constitutes the decision and order of the Court.

6/29/17
DATE

SALIANN SCARPULLA J.S.C.