Federated Fin. Corp. of Am. v Arch Angel Enters., Inc.
2018 NY Slip Op 30466(U)
March 9, 2018
Supreme Court, Suffolk County
Docket Number: 06638/2009
Judge: William G. Ford

SHORT FORM ORDER **INDEX NO.: 06638/2009**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motions Submit Date: 09/14/17
Mot Seq 002 MD
Mot Seq 003 MD; RTH

PLAINTIFF'S COUNSEL:
Platzer Swergold Levine Goldberg Katz & Jaslow, LLP.
By: Nicolleta Lakatos, Esq.
40 Daniel St., Ste 7
Farmingdale, NY 11735

DEFENDANT'S COUNSEL:
Murtha Law Group, LLC.
By: Michelle Murtha, Esq.
4940 Merrick Road, No. 102
Massapequa Park, NY 11762

FEDERATED FINANCIAL CORPORATION OF AMERICA, as Assignee of ADVANTA BANK CORP.,

Plaintiff,

-against-

ARCH ANGEL ENTERPRISES, INC., & LAURENT TAYLOR, individually,

Defendants.

On the motions pending before the Court, the following papers were considered:

1. Order to Show Cause dated July 19, 2017, Affirmation in Support dated July 14, 2017, Affidavit in Support dated July 14, 2017 and supporting papers
2. Notice of Cross Motion & Affirmation in Support & Opposition dated August 16, 2017, Affidavit in Support & Opposition dated August 15, 2017 and supporting papers;
3. Affirmation in Opposition to Cross-Motion & In Reply dated August 22, 2017 and supporting papers;
4. Reply Affirmation in Further Support of Cross-Motion dated September 11, 2017; it is

ORDERED that defendant's motion pursuant to 22 NYCRR § 130.1-1 for an award imposing sanctions, costs, and attorney's fees against the plaintiff is **denied**; and it is further

ORDERED that plaintiff's cross-motion pursuant to CPLR 5015(a)(1) to vacate a prior Order of this Court is **denied**; and it is further

ORDERED that plaintiff serve a copy of this decision with notice of entry on counsel for the plaintiff by certified first class mail, return receipt requested on or before March 26, 2018; and it is further

ORDERED that this matter is set down for a status conference with a ready appearance by all counsel to schedule a *Traverse* Hearing in this matter before this Court on April 10, 2018 at 10:00 a.m.

Before the Court is plaintiff Federated Financial Corporation of America's ("plaintiff") action against defendants Arch Angel Enterprises, Inc. and Laurent Taylor for breach of contract. Plaintiff is the putative assignee and purchaser of debt due, owing and outstanding to Advanta, a corporate credit card issuer. Plaintiff generally alleges that on or May 1, 2002, Taylor, in his capacity as president for Arch Angel applied for, received, and utilized a Advanta corporate expense credit card. Plaintiff additionally claims that on July 12, 2005, Taylor defaulted on his obligation to render timely monthly payments on his account, thus promoting the commencement of this action.

After serving process on defendant at an address in Queens County, and expiration of the appropriate statutory time period for him to join issue, plaintiff sought entry of default judgment with the Suffolk County Clerk. A money judgment in the amount of $ 24,959.22 entered on June 4, 2009.

Thereafter, plaintiff began enforcement of its judgment, by "domesticating" its judgment in Hillsborough County, Florida based upon locating a Laurent Taylor residing there, employed by Humana, Inc. The Florida judgment entered on October 22, 2014. Income executions garnishing Taylor's wages commenced soon thereafter.

Not until October 2016, did Taylor claim he became aware of the judgment forming the basis of his wage garnishment. He moved by Order to Show Cause dated October4, 2016 at Special Term to vacate his default and the subsequent judgment in an effort to stop plaintiff's collection efforts, to include income execution in Florida. Defendant based his application on his sworn denial by affidavit of having any knowledge or connection to co-defendant Arch Angel Enterprises, Inc., or having ever resided at the Queens County address where process was served. Defendant's motion to vacate under CPLR 5015(a) was unopposed.

This Court in a Short-Form Order dated January 17, 2017 granted defendant's motion, vacated his default and the subsequent New York money judgment, and set the matter down for conference to schedule a *Traverse* hearing, where plaintiff would bear the burden of proof and persuasion to establish proper service of process and personal jurisdiction over Taylor.

In the interim, the parties conferenced this matter with the Court, appearing on July 11, 2017 and September 14, 2017 on the status conference calendar. At that time, defendant advised the Court that despite the Court's prior order, his wages had been garnished twice in 2017: on July 11, 2017 in the amount of $566.09 and on July 14, 2017 in the amount of $ 329.62. This Court directed plaintiff to cease enforcement efforts of the vacated New York money judgment. Neither party raised any argument concerning any domesticated Florida judgment at that time. In the alternative, this Court granted defendant leave to move to seek any and all appropriate sanctions in the event the wage garnishment continued.

The present applications followed. Taylor now moves seeking the imposition of costs and fees against plaintiff as sanctions for frivolous conduct. He argues that plaintiff willfully ignored and disobeyed the Court's prior ruling and has continued to seek enforcement via

income execution of the vacated New York judgment in Florida. Additionally, Taylor seeks recovery in the amount of all garnished wages. He argues that in 2016 $14,152.96 and in 2017 $10,938.50 has been garnished, and now seeks to be made whole.

Plaintiff has opposed defendant's application in its entirety, and has also cross-moved for affirmative relief. Relying on CPLR 5015(a)(1), plaintiff seeks to vacate the prior Order of this Court, arguing excusable default in failing to oppose defendant's own motion to vacate his default. More specifically, plaintiff's counsel disputes receipt of defendant's motion papers served by his counsel, and more generally by counsel's affirmation, suggests law office failure as a reasonable excuse. Otherwise, plaintiff argues it has a meritorious cause of action for breach of a credit card agreement.

I. Vacatur of the Court's Prior Order

To vacate a default in opposing a motion, movant has been required to demonstrate both a reasonable excuse for the default and a meritorious cause of action (***Piton v Cribb***, 38 AD3d 741, 742, 832 NYS2d 274, 274 [2d Dept 2007]). "The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court" (***Wells Fargo Bank, N.A. v Cervini***, 84 AD3d 789, 789, 921 NYS2d 643, 644 [2d Dept 2011]). Although CPLR 2005 allows courts to excuse a default due to law office failure, it was not the Legislature's intent to routinely excuse such defaults, and mere neglect will not be accepted as a reasonable excuse unless the movant submits sufficient supporting facts in evidentiary form to justify the default (***Inc. Vil. of Hempstead v Jablonsky***, 283 AD2d 553, 553–54, 725 NYS2d 76, 77–78 [2d Dept 2001]; ***White v Inc. Vil. of Hempstead***, 41 AD3d 709, 710, 838 NYS2d 607, 608 [2d Dept 2007]; (***Papandrea v Acevedo***, 54 AD3d 915, 916, 864 NYS2d 138, 139 [2d Dept 2008][finding excusable default premised on reasonable excuse corroborated by notarized affidavit];***People's United Bank v Latini Tuxedo Mgt., LLC***, 95 AD3d 1285, 1286, 944 NYS2d 909 [2d Dept 2012][" where a party asserts law office failure, it must provide a detailed and credible explanation of the default"]).

The Second Department on occasion has accepted that "miscommunications that may occur between counsel and its client could constitute law office failure sufficient to support excusable default (***Madonna Mgt. Services, Inc. v Naghavi***, 123 AD3d 986, 988, 999 NYS2d 858, 860 [2d Dept 2014]). However, the general rule stills holds that "a conclusory and unsubstantiated excuse of law office failure did not amount to a reasonable excuse for his failure to oppose the petition (***Elrac, Inc. v Holder***, 31 AD3d 636, 637, 817 NYS2d 916 [2d Dept 2006]). Moreover, it is settled that "an affirmation by counsel lacking direct firsthand and personal knowledge of the relevant and material facts underlying the controversy are insufficient to raise a triable issue of fact" (***Benitez v. Village of Lake Grove***, 2017 WL 7736110, *3, 2017 N.Y. Slip Op. 32795(U) [Sup Ct Suffolk Co, 2017]).

Turning to the merits of plaintiff's application, this Court remains unpersuaded that sufficient cause has been adduced to relitigate vacatur of defendant's default. On this point and in support of their application, plaintiff submits counsel's affirmation essentially laying the blame for defaulting on the motion on a former legal assistant. Notably missing however is any affidavit by any office personnel in charge of calendaring motions or appearances for the law practice, other than counsel's affirmation. Thus, Court determines that counsel's affirmation, being unsworn is conclusory in nature, and therefore is insufficient to substantiate or constitute

viable law office failure as a reasonable excuse (*e.g.* ***Indus., Inc. v Innovative Beverages, Inc.***, 55 AD3d 903, 904, 866 NYS2d 357, 358 [2d Dept 2008][law office failure should not be excused where allegations of law office failure are conclusory and unsubstantiated]).

Moreover, despite plaintiff's claims underlying its original complaint concerning defendant's breach, those arguments at the present time are misplaced as the law clearly holds that where movant fails to demonstrate a reasonable excuse for their default, it is unnecessary to determine whether it demonstrated the existence of a potentially meritorious claim (***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 567, 914 NYS2d 647, 648 [2d Dept 2011]; ***Maspeth Fed. Sav. and Loan Ass'n v McGown***, 77 AD3d 889, 890, 909 NYS2d 403, 404 [2d Dept 2010]).

Given plaintiff's failure under both prongs of CPLR 5015(a)(1) to establish excusable default meriting vacatur of this Court's prior Order, accordingly plaintiff's motion is hereby **denied**.

Thus, it is

ORDERED that the parties are additionally directed to make a ready appearance for a *Traverse* hearing consistent with the Court's prior Short-Form Decision and Order of January 1, 2017 for plaintiff to prove by competent and admissible evidence proper service of process on defendant Taylor sufficient to establish the existence of personal jurisdiction over him.

II. Sanctions for Frivolous Conduct

Defendant moves to sanction plaintiff for frivolous or baseless conduct in this litigation. The sole support for this application is defendant's contention that despite this Court's prior Order vacating his default and the subsequent money judgment, plaintiff knowingly and willfully refused to cease income execution in Florida, resulting in two subsequent wage garnishments on July 11 and July 14, 2017 respectively. Defendant further argues that plaintiff's counsel engaged in bad faith also independently worthy of sanction to the extent that counsel was actually aware of the Court's Order and the lack of legal or factual basis to continue to collect on a vacated money judgment. Despite this, defendant contends that plaintiff took no responsibility for what transpired in Florida, offering shifting explanations that local Florida collections counsel and/or plaintiff itself were ultimately responsible for complying with this Court's prior ruling.

Plaintiff for its part makes several substantive arguments seeking to defeat defendant's motion on the basis that its litigation conduct was not frivolous. First, it notes that Supreme Court lack any jurisdiction to affect, vacate, annul or otherwise modify a valid out-of-forum judgment in Florida, entitled to full force and effect. Thus, plaintiff states defendant's arguments are in essence a misplaced collateral attack on a valid Florida judgment. Plaintiff points out that defendant could have availed himself of Florida state law remedies to lift either the judgment or income execution, neither of which have occurred to date. Moreover, plaintiff emphasizes that once directed in July 2017 to cease Florida wage garnishment of defendant, it did so immediately, but not before income executions already in processing occurred.

Lastly, plaintiff disputes the notion that defendant is entitled to any affirmative monetary relief at this time given that defendant has not yet joined issue to interpose any defenses in the

action. For the same or similar reasons, plaintiff claims defendant cannot attack its standing to litigate this dispute either.

An award of sanctions is permissible pursuant to 22 NYCRR 130–1.(a) for costs and attorneys' fees on movant's demonstration of frivolous conduct in commencing an action, which further completely lacked merit in law, or could not be supported by a reasonable argument for an extension, modification, or reversal of existing law (***Greene v Rachlin***, 154 AD3d 818, 819, 62 NYS3d 472, 475 [2d Dept 2017]).

Conduct that has been found to be frivolous is it is (1) undertaken completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (***Strunk v New York State Bd. of Elections***, 126 AD3d 779, 780–81, 5 NYS3d 498, 499 [2d Dept 2015]). The decision of whether to award sanctions and the amount or nature of those sanctions is generally entrusted to the trial court's sound discretion (***Khan-Soleil v Rashad***, 111 AD3d 727, 728, 974 NYS2d 798 [2d Dept 2013]).

Here, this Court remains unpersuaded that plaintiff has engaged in frivolous conduct warranting the imposition of sanctions at this juncture. Defendant's motion appears premature, based on the additional information supplied by plaintiff, which was not raised before to the Court concerning the civil process underway out-of-forum in Florida. This Court lacks jurisdiction to effectuate the change in status of an out-of-forum Florida money judgment, regardless of whether that judgment was domesticated from a now vacated New York judgment. This Court finds persuasive Florida authority consistent with the notion that defendant has available to him remedies codified in FLA Stat. Ann. § 55.509 *et seq.* Particularly, this Court notes that under Florida law, "judgments of foreign courts are to be given full faith and credit of the law by courts in every jurisdiction, except when the foreign court lacked either personal or subject matter jurisdiction (***Whipple v JSZ Fin. Co., Inc.***, 885 So 2d 933, 936 [Fla Dist Ct App 2004]; *see also* ***Spano v Wells Fargo Equip. Fin.***, 165 So 3d 834, 836 [Fla Dist Ct App 2015][if a foreign court lacked personal jurisdiction, the "foreign judgment need not be recognized"]).

Moreover, Florida's state law statutory remedies include

> (1) If, within 30 days after the date the foreign judgment is recorded, the judgment debtor files an action contesting the jurisdiction of the court which entered the foreign judgment or the validity of the foreign judgment … the court shall stay enforcement of the foreign judgment and the judgment lien upon the filing of the action by the judgment debtor.
>
> (2) If the judgment debtor shows the circuit or county court any ground upon which enforcement of a judgment of any circuit or county court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment which is required in this state.

Fla Stat Ann § 55.509 [West 2018]

It does not go without mention that defendant to date has not availed himself of any of these remedies in the proper forum, but rather has sought relief in New York. Defendant concedes as much in his motion papers and has suggested that process is underway in Florida. Therefore, this Court finds that the imposition of sanctions is all the more premature at this stage of the proceedings, and will leave that determination for another day with leave to renew should it be determined appropriate on the submission of proper proof.

More important, defendant's arguments concerning standing have been improperly raised for the first time on reply and thus will not be considered (***Congel v Malfitano***, 61 AD3d 809, 810, 877 NYS2d 411, 412 [2d Dept 2009][arguments improperly raised for first time on reply not considered]; *accord* ***Yechieli v Glissen Chem. Co., Inc.***, 40 AD3d 988, 989, 836 NYS2d 668, 669 [2d Dept 2007]; *but see* ***Gluck v New York City Tr. Auth.***, 118 AD3d 667, 668, 987 NYS2d 89, 91 [2d Dept 2014][arguments raised for the first time on reply may be considered if the original movant is given the opportunity to respond and submits papers in sur-reply]). While plaintiff was given the final word in briefing, their point is well taken that defendant has not answered the complaint and interposed any defenses at this juncture to include dispute of the debt, ineffective assignment *inter alia*. Thus, the determination of plaintiff's standing will be delayed until a more appropriate state of this litigation.

Therefore, it is

ORDERED that defendant's motion for the imposition of sanctions seeking the recovery of litigation costs, attorney's fees, and affirmative monetary relief is **denied** with leave to renew as consistent with this decision and order.

The foregoing constitutes the decision and order of this Court.

Dated: March 9, 2018
Riverhead, New York

WILLIAM G. FORD, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**