

G & G Seafood, Inc. v MS Fish Corp.

2019 NY Slip Op 31006(U)

April 5, 2019

Supreme Court, New York County

Docket Number: 652978/2017

Judge: Gerald Lebovits

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. GERALD LBOVITS PART IAS MOTION 7EFM

Justice

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INDEX NO. 652978/2017

G & G SEAFOOD, INC. D/B/A UNIVERSAL SEAFOOD,

MOTION SEQ. NO. 002

Plaintiff,

- v -

MS FISH CORP. et al.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for VACATE THE DEFAULT JUDGMENT.

Stein & Stein, LLP (William M. Stein, Esq. of counsel) New York, for plaintiff.
Avrom R. Vann, Esq., New York, for defendants.

Gerald Lebovits, J.:

Defendant Moses Semel moves to vacate a default judgment that ordered him to pay plaintiff G & G Seafood, Inc. \$470,986.95.

G & G Seafood sued MS Fish Corp. to recover the outstanding balance on a food-supply contract between the two parties, and sued Semel as the guarantor of MS Fish's obligations under the contract. G & G Seafood moved for summary judgement, and MS Fish and Semel failed to oppose this motion. G & G Seafood then sought and obtained a default judgment in its favor for the outstanding balance on the contract plus contractual interest and litigation costs.

Semel now moves to vacate the default judgement.

DISCUSSION

A party moving to vacate a default judgment pursuant to CPLR 5015(a)(1) must prove that it had a reasonable excuse for defaulting and that its claim is meritorious. (*See* CPLR 5015(a)(1); *Gray v B.R. Trucking Co.*, 59 N.Y.2d 649, 650 [1983].)

Although Semel has a reasonable excuse for his default, he does not have a meritorious claim. Semel's motion to vacate the default judgment therefore is denied.

A. Reasonable excuse.

Semel contends that he never received notice of G & G Seafood's summary judgment motion due to law office failure — i.e., his counsel's failure to monitor the electronic docket for this case and see that G & G had moved for summary judgment.

Counsel's failure to monitor the docket does not appear to have been willful or contumacious, and Semel's reliance on his attorney in this respect was reasonable. Semel also moved to vacate the default less than a month after the judgment was granted. Semel therefore has provided a reasonable excuse for his default. (*See U.S. Bank National Assn. v Richards*, 155 AD3d 522, 522-23 [1st Dept 2017]); *Rivera v New York City Dept. of Sanitation*, 142 AD3d 463, 465 [1st Dept 2016].)

B. Meritorious Defense.

Semel has failed, however, to show that he has a meritorious defense against G & G Seafood' claims. To defeat a CPLR 3212 motion, a defendant must offer sufficient evidentiary proof to establish a genuine dispute of fact. (*Banco Popular N. Am. v Victory Taxi Mgmt., Inc.*, 1 NY3d 381, 383 [2004].) Semel proffers three defenses; none create a genuine dispute of fact warranting trial.

1. Semel's signature on the personal guaranty.

Semel argues that an ambiguity exists regarding whether he properly signed the personal guaranty making him responsible for MS Fish's obligations to G&G Seafood, and that this ambiguity must be resolved at trial. This court disagrees.

Semel asserts first that the contract is ambiguous because his signature stamp was stamped slightly below the signature line on the guaranty's signature page, rather than above it.

In deciding whether a contract is ambiguous because of the manner in which the contract was signed, courts consider whether a reasonable person could interpret the signature to have multiple meanings. (*Chen v Yan*, 109 A.D.3d 727, 730 [1st Dept 2013].)

The placement of Semel's signature stamp does not have multiple reasonable interpretations. Semel's signature stamp here is clearly placed at the end of the contract, below the list of the contract terms and adjacent to the signature line. And it is clear on the face of the document that the stamp would not have fit above the signature line, where Semel now suggests that the stamp should have appeared.

Semel also contends that he did not himself stamp the signature page. Rather, he suggests, the signature stamp must have been placed on that page without authorization by his late business partner. Semel's argument on this point is based on an affidavit by his daughter, Gitel Leibler. This court is not persuaded that the Leibler affidavit creates a genuine dispute of fact.

Leibler concededly lacks knowledge regarding Semel's business practices. Instead, she asserts only that Semel could not have signed the guaranty at the offices of G & G Seafood on the date the guaranty was executed, a Friday. Leibler states that due to observance of Shabbat, Semel's practice was to avoid travel on Fridays other than between his home and office. Leibler does not, however, provide any basis beyond speculation and hearsay to believe that Semel did in fact limit his travel on the particular Friday in question.

Additionally, G & G Seafood's secretary, Joseph Grippa not only attested in an affidavit that Semel traveled to Grippa's office on that Friday to sign the guaranty and provided Grippa with his driver's license and a copy of his social security card as proof of identity, but also attached copies of those documents to his affidavit. Leibler offers no explanation for how these documents could have come into Grippa's possession if not from Semel himself.

The Leibler affidavit thus is not sufficient to create a genuine dispute of fact warranting trial as to whether Semel actually signed the personal guaranty.

2. The scope of Semel's obligations under the guaranty.

Semel also argues that even if the personal guaranty was valid, an ambiguity exists regarding whether the terms of the guaranty render him liable for the full amount owed by MS Fish Corp. to G & G Seafood. This court again disagrees.

The guaranty has five paragraphs. Paragraph one states that "accounts unpaid 28 days after invoice date and receipt of merchandise are subject to a service charge 18% yearly (.05 per day)." This paragraph is, in essence, providing for accrual of interest on the amount of any unpaid balance owed by MS Fish Corp. to G & G Seafood.

Paragraph two provides an acceleration clause. It states that should G & G Seafood terminate the agreement, "all charges incurred shall be immediately due and payable."

Paragraph five provides that "the signatory [Semel] agrees to be personally liable for payments of all charges."

The guaranty is thus most naturally read as providing that Semel agreed to be responsible for all sums owed by MS Fish Corp. to G & G Seafood — both the outstanding balance owed on unpaid purchases, and any interest accrued on that balance.

Semel fails to explain why the guaranty might reasonably be read as making him responsible only for *part* of the sums owed by MS Fish Corp. — i.e., the service charges discussed in paragraph — notwithstanding the language in paragraph five making him responsible for *all* charges.

At most, Semel suggests that the guaranty might draw a distinction between "charges" and "invoice amounts," and make him personally responsible only for "charges" (i.e., interest). But paragraph two provides that when G & G Seafood terminates the agreement, "all charges incurred" shall become immediately due. On Semel's argument that "charges" in the guaranty

applies to interest rather than invoices, paragraph two would mean that if G & G Seafood were to terminate the agreement, it would be immediately entitled to collect the interest on MS Fish Corp.'s unpaid balance, but not the balance itself. That makes no sense.

The only reasonable reading of the personal guaranty is instead that Semel indeed agreed to make himself responsible for the full amount owed by MS Fish Corp. to G & G Seafood. There is thus no contractual ambiguity warranting a trial.

3. G & G Seafood's Failure to Comply with Section 130 of the General Business Law.

Finally, Semel contends that the default judgment should be vacated because G & G Seafood was not in compliance with the requirements of the General Business Law (GBL) for transacting business when the court entered judgment, and therefore could not properly maintain an action against him. This argument, too, is without merit.

GBL § 130 (1) provides that an entity must conduct its business under its legal name. A corporation may transact business under another name only if it files a certificate indicating this name, the counties in which it conducts business, and the address of its principal place of business and other locations where it transacts business in New York. (GBL § 130 (1) (b).) The purpose of this provision is to "protect the public" through affording it "information as to the identity of the persons conducting the business," thereby "prevent[ing] deception and confusion." (*Parks v. Steinbrenner*, 115 AD2d 395, 396-97 [1st Dept 1985] [quotation marks omitted].)

A company that fails to comply with § 130 (1) may not "maintain[] any action or proceeding in any court in this state on any contract . . . made in a name other than its real name until" the required certificate has been properly filed. (*See id.* § 130(9); *Replace Retail, LLC v Universal Renovation USA Corp.*, 2009 NY Slip Op 30889(U) at *17-18 [Sup Ct NY County 2009].)

Failure to file an accurate certificate, though, is not a jurisdictional defect. Absent a showing of an intent to deceive, the court may grant a party leave to amend its certificate to correct an inaccuracy at any point prior to entry of judgment. (*Robert v Ringerjeans, LLC*, 165 AD3d 609, 609-10 [1st Dept 2018].)

Here, G & G Seafood's legal and trade names have remained the same since before the parties entered into the personal guaranty. At most, G & G Seafood's certificate of assumed name did not list the correct business address at the time this court entered the default judgment. But there is no evidence that G & G Seafood intended thereby to defraud Semel or that Semel was prejudiced by the difference in addresses.

Therefore, had Semel raised this issue in opposition to plaintiff's summary judgment motion, G & G Seafood would have been able to amend its certificate to correct the business-address error and proceed on its contract claim against Semel. (*See Cohen v OrthoNet New York IPA, Inc.*, 19 AD3d 261, 261 [1st Dept 2005].) Indeed, G & G Seafood already *has* filed an

amended certificate of assumed name with the New York Secretary of State, bringing it into compliance with § 130 of the General Business Law. Thus, any defense that Semel might raise based on GBL § 130 (9) if he were permitted to vacate his default would be futile.

Accordingly, it is hereby

ORDERED that Semel's motion to vacate the default judgment is denied.

4/5/2019

DATE



GERALD LEOVITS, J.S.C.

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