SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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INDEX NO. 657141/2017

GEM INVESTMENTS AMERICA LLC

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. (MS) 002; 003

- v -

JULIO MARQUEZ,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 33, 34, 53, 54, 55, 56, 57, 58, 59, 62, 63, 64, 66, 67, 68, 69

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 51, 52, 60, 61

were read on this motion to/for STAY.

In this action to recover on a promissory note, in which plaintiff GEM Investments America LLC's (GEM) was previously granted summary judgment in lieu of complaint without opposition (NYSCEF # 18 – MS 1 – Decision and Order of this court dated September 21, 2018), defendant Julio Marquez now moves in MS 2 pursuant to CPLR 5015, 3211 (a)(7); 3211(a)(8), 3211(c), 3213, 3215 (g)(1), 7503, 2004 and 2201 for assorted relief, and in MS 3 to restrain Plaintiff from entering the judgment. In brief, Defendant seeks to vacate this court's September 21, 2018 Order and dismiss Plaintiff's claims. In MS3, Defendant argues that Plaintiff should be restrained from entering the judgment it obtained in MS1. This court granted a temporary restraining order to that effect on October 25, 2018 (NYSCEF #60 – Signed Order to Show Cause MS3). Plaintiff opposes both motions. The decision and order is as follows:

FACTS

Plaintiff commenced this action by filling a summons and a motion for summary judgment in lieu of complaint pursuant to CPLR 3213 on November 29, 2017 (NYSCEF ## 1 and 2). Plaintiff's affidavit of service, as sworn by process server Nicholas DiCanio, indicates that the summons and the motion for summary judgment in lieu of complaint were delivered to an alleged co-worker of defendant Marquez named Jonathan Stein on December 4, 2017 at 12:07 PM at 140 Broadway, 46th Floor in the city, county, and state of New York (NYSCEF #11 –

Affidavit of Service). Plaintiff additionally mailed Defendant the summons and motion within 20 days of substituted service (*id.*). Plaintiff's notice of motion afforded Defendant until January 26, 2018, to respond to the motion (NYSCEF # 2). Defendant did not respond. Plaintiff, in accordance with CPLR 3215(g)(3), again mailed the summons and motion to Defendant at his office on January 29, 2018 (NYSCEF # 12 – Affidavit of Service Add'l Mailing).

On March 13, 2018, three different attorneys for Defendant each filed Notices of Appearance in the instant matter (NYSCEF #13-15). Curiously, even after having filed the notices of appearance, neither Defendant nor any of his attorneys sought to extend their time to respond to the then open motion, file a motion to dismiss, or submit an answer. As such, on May 15, 2018, the motion was marked fully submitted, with no opposition, and a decision was rendered on the motion on September 21, 2018 ("the September 21 Order") (NYSCEF # 18).

Subsequently, on October 1, 2018, Defendant filed MS 2 to reopen Plaintiff's summary judgment in lieu of complaint and dismiss the matter (NYSCEF # 21). On October 22, 2018, Plaintiff filed a proposed judgment consistent with the September 21 Order after providing Defendant with seven days' notice (NYSCEF # 35 and # 40 – Affidavit of Service of Notice of Judgment Submission to Clerk and Proposed Judgment). Plaintiff's counsel affirms that the notice was delivered to Defendant's counsel by hand on October 14, 2018 (NYSCEF # 56 – Affirmation of Venturini at ¶14). Defendant responded by filing an order to show cause and temporary restraining order (MS3) on October 23, 2018 to prevent Plaintiff from entering judgment (NYSCEF # 46). This court issued a stay on October 25, 2018, and scheduled argument on the order to show cause (NYSCEF # 60).

Defendant argues that this matter should be reopened and dismissed in favor of Defendant. First, Defendant argues that there was "sewer service". Defendant claims that service was attempted at his place of work, NY Bay Capital, which was formerly located on the 46th floor of 140 Broadway, New York, NY (NYSCEF #23 – Affidavit of Marquez). Plaintiff's summons and notice of motion show the service address as Marquez's home address at 305 East 86th Street, New York, NY, however, Plaintiff claims that the service was attempted at his business address, 140 Broadway (*id.* at ¶ 8). Defendant avers that Plaintiff's process server lied about delivering substituted service upon Marquez's co-worker, Jonathan Stein (*id.* at ¶10). Defendant claims that nobody could get to the 46th floor of 140 Broadway without clearing security, presenting a photo ID, and having a photo taken (*id.* at ¶9). Defendant claims there is no record of the process server in the building (*id.*). Additionally, Jonathan Stein avers that he did not work at NY Bay Capital in December 2017, and that he had in fact stopped working there in August 2017 (NYSCEF #24 – Jonathan Stein Aff at ¶1-2). Stein also claims that he does not answer to the physical description in the affidavit of service, stating that he is in his 20s and does not pass for someone between the ages of 36-50 (*id.* at ¶3). Defendant

swears that he was present at 140 Broadway on November 29, 2017 and did not receive the summons or hear from anyone of any delivery of papers (NYSCEF #23 at ¶11). The Affidavit of Service is from December 4, 2017 – not November 29, 2017.

DISCUSSION

Defendant's motions are denied. Defendant's default in MS1 was willful and there is no basis on which to vacate the prior decision and order.

Defendant's motion sounds in CPLR 5015(a)(1), (3), and (4). CPLR 5015 provides that the court may relieve a party from a judgment or order on the grounds of: (1) excusable default; (2) newly-discovered evidence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) lack or jurisdiction to render the judgment; or (5) reversal, modification or vacatur of a prior judgment upon which it is based. In addition to the grounds outlined in CPLR 5015(a), "a court may vacate its own judgment for sufficient reason and in the interest of substantial justice" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]).

Defendant argues that the prior order should be vacated because Plaintiff engaged in "sewer service" and failed to provide CPLR 3215(g)(1) notice. Defendant argues that failure to provide the requisite CPLR 3215(g)(1) notice is a jurisdictional defect which deprives the court of jurisdiction to enter judgment (*see Paulus v Vacirca, Inc.*, 128 AD3d 116 [2d Dept 2015] [stating that plaintiff's failure to provide CPLR 3215(g)(1) notice requires vacatur pursuant to CPLR 5015(a)(4)]). Defendant also argues without much elaboration that the prior order should be vacated because it was obtained by misrepresentation, fraud, or mistaken information. All of Defendant's arguments are without merit.

First, Defendant's argument that the alleged sewer service in this matter necessitates vacatur of the prior order is rejected. Defendant, by filing formal notice of appearance on March 13, 2018, consented to this court's jurisdiction, and CPLR 320(b) provides that "an appearance of defendant is equivalent to personal service of the summons" unless an objection to jurisdiction under CPLR 3211(a)(8) is asserted by motion or answer. Additionally, CPLR 321 provides that an attorney may appear on behalf of the. Defendant, instead of filing a CPLR 3211(a)(8) motion to dismiss or submitting an answer preserving his claim of improper service, sat on his defense for months. As such, "service of the notice of appearance conferred jurisdiction" in this matter, and Defendant cannot utilize his dilatory tactics to unravel the prior order (*Bal v Court Employment Project, Inc.*, 73 AD2d 69, 71 [1st Dept 1980]; *see also Aversano v Town of Brookhaven*, 77 AD2d 641, 642 [2d Dept 1980] ["service of the notice of appearance should be held to confer jurisdiction unless it is lacking on some ground other than the adequacy of the notice"]). There is no basis under CPLR 5015(a)(4) to vacate the prior order because this court properly obtained jurisdiction over Defendant.

Next, CPLR 3215(g)(1) is inapplicable here because Plaintiff did not seek a default judgment under CPLR 3215. Plaintiff, in MS1, sought summary judgment in lieu of complaint pursuant to CPLR 3213 and Defendant failed to oppose the motion after appearing. As such, the prior order was on the merits and was not simply a default judgment. Defendant does not cite any case law indicating that Plaintiff was required to provide notice pursuant to CPLR 3215(g)(1) in such a circumstance. Furthermore, Defendant appeared in this electronically filed matter and had immediate access to all filings in this case. Defendant was not deprived of notice of the motion and experienced no prejudice. Thus, the absence of a CPLR 3215(g)(1) notice by Plaintiff is of no moment and does not deprive this court of jurisdiction.

Defendant cannot succeed on CPLR 5015(a)(1) grounds because he has proffered no reasonable excuse for his failure to respond to Plaintiff's motion. To obtain vacatur based on excusable default per CPLR 5015(a)(1), Defendant "must provide a reasonable excuse for the failure to appear and demonstrate the merit of the cause of action or defense" (*Dormitory Authority of State v M.T.P. 59 St. LLC*, 103 AD3d 602 [1st Dept 2013]). While Defendant attempts to provide a meritorious defense, arguing that there are setoffs and that the agreement requires mandatory arbitration, these arguments are too little and too late. Absent a reasonable excuse for failing to respond to Plaintiff's motion, the prior order will not be vacated. As there is no basis to vacate the prior order, Defendant is unable to obtain CPLR 3211 dismissal as requested and the remainder of his motions to variously extend time, compel arbitration, and obtain a stay, all fail.

While Defendant does not explicitly argue that Plaintiff engaged in bad faith and obtained its judgment through misconduct, misrepresentation, fraud, or misinformation, Defendant implicitly makes the argument that CPLR 5015(a)(3) should apply here. To wit, Defendant's primary argument in his motion papers is that Plaintiff failed to attach a separation agreement that governed the note at issue in this matter and that the agreement prevented the assignment of the note to GEM, thus depriving plaintiff GEM of standing to sue here (NYSCEF #30 at 7-9). However, this court's review of the supposed non-assignment language does not back up Defendant's argument – the non-assignment clause is purely retrospective and does not preclude assignment. The separation agreement states: "The Parties to this Agreement warrant and represent that no other person or entity has an interest in the matters released herein, and that they have not assigned or transferred or purported to assign or transfer to any person or entity all or any portion of the matters released herein" (NYSCEF #26 – Separation Agreement). While Plaintiff does not address this argument in its opposition papers, a reading of the plain language of the clause does not preclude assignment of the note. The clause indicates that the parties warranted at the time of the agreement that none of the claims were assigned to any other parties. Even reading this clause in

tandem with the merger clause, the language of the separation agreement does not preclude assignment.

As such, the note is not rendered ineligible for CPLR 3212 treatment merely because it contains a reference to a separation agreement (*see Shearson Lehman Hutton, Inc. v Myerson & Kuhn*, 197 AD2d 410, 410-11 [1st Dept 1993] [reference to settlement agreement in guarantee for definition of default was not bar to CPLR 3213 motion]). So long as the monetary instrument's reference to another agreement does not alter the monetary nature of the instrument, the instrument remains for the payment of money only (*see id.*). This court found in MS1 that the note is purely monetary in nature and suitable for CPLR 3123 adjudication. Accordingly, there is no basis to vacate the prior order on the basis of misinformation, fraud, or misrepresentation pursuant to CPLR 5015(a)(3) as the failure to include the Separation Agreement does not alter the prior judicial calculus.

Accordingly, it is hereby ORDERED that Defendant's motion to vacate the court's September 21, 2018 decision and order (MS2) is denied in its entirety; it is further

ORDERED that Defendant's motion to stay Plaintiff's entry of judgment (MS3) is denied; it is further

ORDERED that the temporary stay issued on October 25, 2018 is lifted, and Plaintiff is entitled to submit its proposed judgment consistent with this court's September 21, 2018 decision and order; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the decision and order of the court.

4/16/2019
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE