

Banco Popular N. Am. v GMM Baking Corp.
2019 NY Slip Op 32377(U)
March 29, 2019
Supreme Court, New York County
Docket Number: 101824/09
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. DORIS LING-COHAN, Justice PART 36

BANCO POPULAR NORTH AMERICA,
Plaintiff,

-against-

GMM BAKING CORP. and ABRAHAM KAFF,
Defendants.

INDEX NO. 101824/09
MOTION DATE
MOTION SEQ. 010
MOTION CAL.NO.

The following papers, numbered 1 - 4 were considered on this motion to inter alia, vacate judgment(s):

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>
Cross-Motion: [] Yes [X] No	_____

FILED

APR 11 2019

COUNTY CLERK'S OFFICE
NEW YORK

Defendants motion for an order "(i) vacating the judgment(s) granted in favor of the plaintiff pursuant to CPLR 308 (2), CPLR 320 (a) and CPLR 3211; (ii) Deny [sic] and/or dismissing the Summary Judgment Motion in Lieu of complaint pursuant to CPLR 3213 as jurisdictionally defective; and (iii) for further relief that this Court deems to be just and proper...", is denied for the reasons stated below.

At the outset, the Court notes that the relief requested in section "(i)" of the notice of motion is denied as CPLR 308 (titled "Personal service upon a natural person") and CPLR 320 (titled "Defendant's appearance") cited in the notice of motion do not provide an appropriate basis for vacating a judgment, nor any of the relief requested by defendants herein. Further, movants failed to provide in its notice of motion the alleged section and grounds for dismissal as listed in CPLR 3211 as required, merely citing to "CPLR 3211". Since CPLR 3211 contains nine (9) distinct grounds for dismissal, the basis relied upon is required to be supplied in the notice of motion for the benefit of opposing counsel and the Court (*see Rubin v. Rubin*, 72 AD2d 536 (1st Dept 1979); CPLR §2214(a); CPLR §3211(e).

Further, this case, which was commenced by plaintiff against defendants in February 2009, almost ten (10) years ago, has a long history in this Court. The instrument at issue in this matter is a note on a small business line of credit executed, on or about December 15, 2006, by defendant GMM Baking Corp., with a personal guaranty by defendant Kaff, President of GMM Baking Corp. On or about May 6, 2009, plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213 was granted upon defendants' first default in this case. On July 14, 2009 a money judgment was entered against both defendants in the amount of \$105,641.35.

On or about February 7, 2014, almost five (5) years after the entry of the 2009 default judgment, defendant Kaff filed his first motion to vacate a judgment in this matter, which was granted, by order dated October 16, 2015, after a traverse hearing. Notably, the default judgment was vacated as to defendant Kaff only, since corporate defendant, GMM Baking, had yet to take any action with respect to its default and the 2009 judgment, despite that defendant Kaff is the President of defendant GMM Baking and certainly had the authority to seek vacatur of the judgment as to the corporation, if warranted.¹ The October 16, 2015 order also granted plaintiff's cross-motion for an extension of time to serve defendant Kaff, and, defendant Kaff's motion to dismiss was denied without prejudice.

Thereafter, in accordance with this Court's October 16, 2015 order, plaintiff re-served defendant Kaff, who appeared, filing opposition papers to plaintiff's motion for summary judgment in lieu of complaint dated March 16, 2016. Significantly, in his opposition, defendant Kaff failed to raise any jurisdictional defenses and, in particular, did not allege that he was not properly served. Moreover, defendant Kaff did not move to dismiss for lack of personal jurisdiction within 60 days, as required by CPLR 3211 (e). As such, defendants' attorney's arguments herein as to jurisdictional defects pertaining to plaintiff's motion for summary judgment in lieu of complaint

¹ As detailed below, defendant GMM Baking failed to take any action with respect to the commencement of this lawsuit and the entry of the 2006 default judgment, until June 2018, despite knowledge of this case and the judgment from as early as 2009.

are without merit (*see Fleet Bank, N.A. v Riese*, 247 AD2d 276 (1st Dept 1998)).

By order dated July 17, 2017, this Court granted summary judgment in favor of plaintiff and against defendant Kaff on the issue of liability, and ordered that an inquest be held, before a Special Referee, on the issue of damages.²

On December 11, 2017, an inquest was ultimately held before Special Referee Jeffery A. Helewitz, at which defendant Kaff failed to appear, despite several courtesy adjournments at defendant Kaff's request. Pursuant to the Special Referee's order, judgment was entered against defendant Kaff in the amount of \$187,407.75, on February 16, 2018.

Defendant Kaff filed his second motion to vacate a judgment in this case (the February 16, 2018 judgment)(Motion Sequence Number 008), which was denied by order dated May 31, 2018, by Special Referee Helewitz, who found, *inter alia*, that, "even if one were to deem [defendant Kaff's] excuses reasonable, he failed to provide any defense, meritorious or otherwise, to the...action in which he is liable as the guarantor of the corporate defendant" (Exhibit I, Affirmation in Opposition). It is noted that defendant Kaff also defaulted at the oral argument scheduled on May 31, 2018, before Special Referee Helewitz.

Rather than appealing the May 31, 2018 order by Special Referee Helewitz, in June 2018, defendant Kaff filed his third application to vacate a judgment in this matter, this time by Order to Show Cause (Motion Sequence Number 009), joined, for the first time in this action, by corporate defendant GMM Baking. By order dated June 5, 2018, this Court declined to sign defendants' Order to Show Cause, noting, *inter alia*, that by order dated May 31, 2018, Special Referee Helewitz declined to vacate the February 16, 2018 judgment.

Before this Court is defendant Kaff's fourth application to vacate a judgment in this case (motion

² The Court notes that during the course of the within litigation it attempted to settle this matter with the parties.

sequence number 010), and he is again joined by corporate defendant GMM Baking. Significantly, however, in seeking the relief requested herein, including to vacate the judgment(s) in this case, only an attorney affirmation is supplied, lacking in personal knowledge, which is insufficient (*see Moyer v City of New York*, 168 AD2d 342 [1st Dept 1990]). No affidavit is supplied by defendant Kaff in his personal, nor corporate capacity, and no affidavit is supplied by any other corporate member of defendant GMM Baking. Thus, denial of this motion is warranted (*see Tandy Computer Leasing, etc. v Video X Home Library*, 124AD2d 530 [1st Dept 1986])[the prerequisites to vacate a default judgment, both a valid excuse for the default and a meritorious defense to the underlying action, must be established through facts contained in affidavits submitted in support of the application]; *Abrams v Abrams*, 56 AD2d 775 [1st Dept 1977][an affidavit disclosing a meritorious defense must be presented in seeking vacatur of a default judgment).

Further, it is well established that a party's default, or in this case numerous defaults, should not be vacated absent a showing of a justifiable excuse for the default/s and a meritorious defense (*see Uram v Smith*, 138 AD3d 553 [1st Dept 2016]; *Dash Rlty. Corp. v Barbosa*, 198 AD2d 89 [1st Dept 1993]; *Tandy Computer Leasing, v Video X Home Library*, 124 AD2d 530 [1st Dept 1986]). Here, neither defendant offers any excuse for their numerous defaults in this case over the course of the past almost ten (10) years, nor a defense to this action which was commenced almost ten (10) years ago, based upon the failure to pay a note on a business line of credit, together with a personal guarantee (*Luong v 173 Lafayette Corp.*, 266 AD2d 26 [1st Dept 1999] [motion to vacate default judgment properly denied where defendant failed to offer adequate affidavit of meritorious defense]).

Additionally, as to defendant GMM Baking, no excuse is supplied for its failure to move to vacate the 2006 default judgment, within one (1) year of its entry, as required, or, when it learned of the entry of such default judgment, via its president and co-defendant Kaff, in February 2014 (*see CPLR §5015(a)(1)*; *Cedeno v Wimbledon Building Corp.*, 207 AD2d 297 [1st Dept 1994]; *Pina v Jobar U.S.A. LLC*, 104 AD3d 544 [1st Dept 2013])[corporate defendant's motion to vacate default judgment untimely where designated agent receipt of notice of entry in 2008, yet

defendant did not seek vacatur until 2011]). As indicated above, defendant GMM Baking was certainly aware of the entry of such judgment when co-defendant Kaff filed its first motion to vacate the 2006 default judgment, in February 2014, and, thus, intentionally chose to forgo taking action in this matter.

Based upon the above, it is

ORDERED that defendants' motion (Motion Sequence Number 10) is denied in its entirety; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants, with notice of entry.

Dated: March 29, 2019

DORIS LING-COHAN, J.S.C.

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