

Deboer v Friedman
2019 NY Slip Op 32654(U)
September 4, 2019
Supreme Court, New York County
Docket Number: 654329/2018
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON

PART

IAS MOTION 37EFM

Justice

INDEX NO.

654329/2018

DERRICK DEBOER, NICOLE DEBOER,

Plaintiffs,

MOTION DATE

06/26/2019,
07/24/2019

- v -

MOTION SEQ. NO.

003 004KEN FRIEDMAN, 375 AMSTERDAM AVENUE
RESTAURANT LLC, BIERGARTEN LLC, AMSTERDAM
OWL LLC,

Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 26, 27, 28, 29, 30, 31, 34, 35, 36

were read on this motion for

DEFAULT JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 004) 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion for

REARGUMENT

Upon the foregoing documents, it is hereby ordered that plaintiffs' motion for a default judgment as against defendant Ken Friedman is denied; defendants' motion for reargument is granted, and upon reargument, the Court adheres to its original determination; and defendants 375 Amsterdam Avenue Restaurant LLC and Biergarten LLC's motion to vacate is denied.

Background

Plaintiffs, Derrick and Nicole Deboer, commenced this action on August 30, 2018 to recover damages for goods allegedly sold and delivered to defendants for which payment remains outstanding. It is uncontested that all defendants, except Amsterdam Owl LLC were served; Amsterdam Owl LLC does not appear to be a valid entity operating in the State of New York and it was not served. On January 5, 2019, several months after their time to answer had expired, plaintiffs moved for a default judgment against defendants 375 Amsterdam Avenue Restaurant LLC and Biergarten LLC (hereinafter, "the Restaurant defendants"). On said date, the time for defendant Ken Friedman ("Friedman") to respond to the complaint had not yet run, so plaintiffs made their motion for a default as to the Restaurant defendants only. On February 5, 2019, the Restaurant defendants and Friedman appeared in this action by filing a motion to dismiss the complaint.

On June 21, 2019, this Court granted plaintiffs' motion. In so doing, this Court disregarded defendants' submission entitled "memorandum of law in opposition" as it had been untimely

filed by the Restaurant defendants and was not accompanied by an affidavit of anyone with personal knowledge of the facts underlying this action. Moreover, as this Court noted in its decision and order, the Restaurant defendants had not filed a motion, pursuant to CPLR 5015, to vacate their default, nor had they filed a motion, pursuant to CPLR 3012(d), asking this Court to extend their time to answer or otherwise appear in the action.

Plaintiffs now move, pursuant to CPLR 3215, for a default judgment against Friedman.

Friedman now moves, pursuant to CPLR 2221, for leave to reargue his motion to dismiss the verified complaint. The Restaurant defendants also move, pursuant to CPLR 5015, to vacate the default on liability entered against them.

Discussion

Friedman's Motion to Reargue his Motion to Dismiss

Friedman's motion to reargue is granted. This Court erred in not considering defendants' motion to dismiss on behalf of Friedman. Although the Restaurant defendants were untimely in making a motion to dismiss, Friedman was not. The affidavit of service on Friedman was filed on January 3, 2019, and states that Friedman was served pursuant to CPLR 308(4). Accordingly, Friedman's request to dismiss was timely on February 5, 2019. However, upon reconsideration, the Court adheres to its initial determination in denying the motion to dismiss.

Friedman moves to dismiss the complaint as against him in his individual capacity, asserting that the Court should not pierce the corporate veil.

The law dismissing a complaint pursuant to CPLR 3211 is clear and well-settled. Dismissal pursuant to CPLR 3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes as a matter of law a defense to the asserted claims. Leon v Martinez, 84 NY2d 83, 88 (1994); accord; Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 82-83 (1st Dep't 2013) ("[d]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law"). Dismissal pursuant to CPLR 3211(a)(7) is warranted where, after accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. Leon v Martinez, *supra*, 84 NY2d at 87-88; see also EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) ("[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus" in determining a motion to dismiss for failure to state a cause of action). A complaint survives a motion to dismiss for failure to state a cause of action if it gives the court and the parties "notice" of what is intended to be proved and the material elements of a cause of action. CPLR 3013.

"While '[t]he law permits the incorporation of a business for the very purpose of escaping personal liability,' equity will intervene to pierce the corporate veil and permit the imposition of personal liability in order to avoid fraud or injustice." Ventresca Realty Corp. v Houlihan, 28 AD3d 537, 538 (2nd Dep't 2006).

Contrary to the arguments advanced by Friedman, plaintiffs have adequately alleged that Friedman exercised complete dominion and control over the corporation, and that he used such control to perpetrate a wrong against plaintiffs. Accordingly, plaintiffs have pleaded facts sufficient to survive a motion to dismiss pursuant to CPLR 3211(a)(7), and Friedman's motion to dismiss is denied.

The Restaurant Defendants Motion to Vacate

The Restaurant defendants' motion to vacate their default as to liability is denied.

"It is well settled that in order to vacate [a] default pursuant to CPLR 5015 a defendant must demonstrate both a reasonable excuse for the failure to appear and a meritorious defense." Youni Gems Corp. v Bassco Creations Inc., 70 AD3d 454, 455 (1st Dep't 2010).

Here, the reasonable excuse offered by the Restaurant defendants is nebulous. Friedman, as a member of the Restaurant defendants, asserts that during the Fall of 2018 he was in the middle of separating from his longtime business partner, and that "[d]uring that difficult period, [the Restaurant defendants] apparently allowed the Summons and Complaint in this matter to go unanswered." (NYSCEF Doc. No. 38.) Such a vague assertion is insufficient to establish a reasonable excuse for his default. Manhattan Telecommunications Corp. v H&A Locksmith, Inc., 109 AD3d 699, 701 (1st Dep't 2013) (holding "[defendant's] explanation that he failed to focus on the action because he was attending to business matters and had suffered stress" was not a reasonable excuse); Hannie v Smith, 246 AD2d 803 (3rd Dep't 1998) (holding defendant's excuse that he failed to appreciate that new action had been commenced was insufficient).

Even more clearly that the lack of a reasonable excuse, the Restaurant defendants have failed to evidence a meritorious defense. The affidavit of Friedman is silent as to the existence of a meritorious defense. Moreover, the conclusory assertions made by the Restaurant defendants' attorney in his affirmation are insufficient to establish a meritorious defense. Lopez v Trucking & Stratford, Inc., 299 AD3d 187 (1st Dep't 2002) (holding attorney's affirmation insufficient to establish meritorious defense); Paez v 1610 Saint Nicholas Ave. L.P., 103 AD3d 553, 554 (1st Dep't 2013) (holding trial court erred in finding meritorious defense based on attorney verification where attorney did not have personal knowledge of facts).

Plaintiffs' Motion for a Default Judgment as to Friedman

Plaintiffs' motion for a default judgment against Friedman is denied. As discussed *supra*, Friedman timely filed a motion to dismiss in lieu of an answer.

As this Court believes a settlement would be in the interest of all parties, the Court invites counsel to contact it to schedule a settlement conference. A call to (646) 386-4374 with both sides on the line can get the ball rolling.

Conclusion

For the reasons set forth herein, plaintiffs' motion for a default judgment as against defendant Friedman is denied; defendants' motion for reargument is granted, and upon reargument, the Court adheres to its original determination; and the Restaurant defendants' motion to vacate is denied. Moreover, Friedman has 20 days from the date of this order to interpose an answer to the complaint, and the parties are further directed to appear for a preliminary conference on October 8, 2019, at 10:00 a.m., 60 Centre Street, Courtroom 418, New York, New York.



9/4/2019

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☒

OTHER

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: