

**Prime Enters. LLC v Truck Repair of Brooklyn NY
Inc.**

2019 NY Slip Op 33412(U)

November 8, 2019

Supreme Court, Kings County

Docket Number: 506467/15

Judge: Wavny Toussaint

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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of November, 2019.

PRESENT:

HON. WAVNY TOUSSAINT

Justice.

-----X

Index No. 506467/15

PRIME ENTERPRISES LLC,

Plaintiff,

DECISION AND ORDER

mut seq. 008 + 009

- against -

TRUCK REPAIR OF BROOKLYN NY INC., & INTERNATIONAL TRUCK STOP & REPAIR CORP.,

Defendants.

-----X

The following papers numbered 1-7 read herein:

- Motion/Order to Show Cause/Petition/Cross Motion and Affidavits (Affirmations) Annexed
- Opposing Affidavits (Affirmations)
- Reply Affidavits (Affirmations)
- Other Papers

Papers Numbered

- 1-2, 3-4
- 4, 5
- 5

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Upon the foregoing papers, defendant Truck Repair of Brooklyn NY Inc. (Truck Repair or defendant) moves for an order vacating “the herein judgment in the amount of \$101,000.00” in its entirety; vacating any and all default judgments as against Truck Repair; vacating “the herein judgment that was procured as a result of former, [defense]¹ Counsel’s willful failure to comply with Order dated June 20, 2017 by which Order dated October 27, 2017 was

¹ While defendant’s order to show cause references former “plaintiff’s” counsel’s noncompliance, this reference was clearly a scrivener’s error, as defendant, represented by new counsel, references prior counsel’s defaults as the basis for this motion.

effectuated thus striking the Answer of Defendant”; vacating “former [defense] Counsel’s failure to attend the applicable proof hearing (assessment of damages) on December 11, 2017 by which the herein judgment was effectuated”; ordering that defendant be permitted to refile a responsive pleading as well as defend the matter through discovery and trial, if necessary; ordering that Marshal’s Notice of Levy and Sale, Docket No. “M 320886” as it pertains to defendant be vacated in its entirety; and ordering that any further Marshal’s notice of levy and sale be stayed pending the disposition of this application.

Plaintiff Prime Enterprises cross-moves for an order imposing sanctions on Truck Repair pursuant to 22 NYCRR 130.1 in the form of attorney’s fees in the amount of \$5,260.00; granting an injunction barring Truck Repair or its officers or any other associated persons from making any motion, filing any complaint or petition, or taking any other action to delay or hinder any levy, sale, restraining notice or any other procedure for the enforcement of the judgment without prior permission from the court; and for such further and different relief as the Court may deem just and proper.

Background

On February 18, 2015, plaintiff obtained a default judgment in the sum of \$54,590.79 against defendant International Truck Stop & Repair Corp. (International Truck) for negligence and breach of contract as a result of damage caused to plaintiff’s truck due to negligent repair of the truck’s engine in 2013 (*Prime Enterprises LLC v Truck Repair of Brooklyn NY Inc and International*

Truck Stop & Repair Corp., 4398/2014 [Sup Ct, Kings County]). After execution of judgment against International Truck was returned unsatisfied, on May 26, 2015, plaintiff brought this action to set aside what plaintiff purports to be a fraudulent conveyance of International Truck to Truck Repair in an effort to hinder its creditors and avoid payment of this judgment.

Truck Repair interposed an answer to the complaint; International Truck did not. After issue was joined, on June 25, 2015, plaintiff served Truck Repair with a notice to produce for discovery certain corporate documents relevant to the issue of whether there was a fraudulent conveyance, including, but not limited to, certificates of incorporation, by-laws, share certificates and stock transfer ledgers, tax returns and the identity of officers/directors/shareholders of both Truck Repair and International Truck. On July 6, 2015, Truck Repair, by its then attorney, John DeMaio, objected to the notice to produce on the basis that it was a nullity, as it was served on both defendants but only Truck Repair appeared. Truck Repair further objected to specific document requests on the ground that the documents are either public record and not discoverable, that the requests presumed a fact not previously established or are directed to non-appearing defendant International Truck.

Over the next two and half years, plaintiff filed five motions in an effort to obtain substantive responses to the notice to produce. Defendant did not respond to plaintiff's first motion, filed on February 12, 2016, seeking to compel defendant's compliance with the notice to produce, and at the preliminary

conference on May 24, 2016, the motion was resolved by order directing defendant to produce documents in response to the notice to produce within 30 days. After defendant failed to respond to the notice to produce, on September 29, 2016, plaintiff filed a motion to strike defendant's answer for failure to comply with the preliminary conference order. This was the only motion opposed by defendant. On October 4, 2016, defendant filed opposing papers, arguing that the demand was directed to a non-appearing party – International Truck – and was therefore a nullity. Defendant also submitted an affidavit from Nurelden Elvahvah in which Mr. Elvahvah stated that he was a corporate officer of “Brooklyn Truck Repair of New York Inc,” had examined the notice to produce, but possessed no responsive documents in connection therewith. After oral argument on October 5, 2016, the court issued a conditional order directing defendant to submit documents responsive to the notice to produce within 30 days or defendant's answer would be stricken, and adjourned the compliance conference to the following day, December 6, 2016.

On December 19, 2016, plaintiff filed a third motion – to restore the case to active status and setting a schedule for remaining discovery – after the case was marked disposed upon rejection of a proposed order submitted by plaintiff at the December 6, 2016 compliance conference. Defendant did not respond to this third motion. On January 11, 2017, the court granted plaintiff's motion on default and the case was restored to active status. The court again directed defendant to respond to the notice to produce, set a deadline for depositions, and directed that

a note of issue be filed by June 2, 2017. On May 23, 2017, plaintiff's counsel sent a letter to defense counsel seeking to schedule depositions expeditiously or to extend the note of issue date in light of prior communication from defense counsel that he may be terminated as counsel.

On June 2, 2017, plaintiff filed a fourth motion, to extend the note of issue date and to compel a deposition. Once again, defendant did not respond. On June 29, 2017, the court granted plaintiff's motion on default, extended the note of issue filing date to October 13, 2017, and directed that defendant's deposition be held on August 16, 2017. The order further stated that defendant's answer would be stricken if it failed to appear for a deposition. On August 16, 2017, defendant produced Amar Elvahvah, International Truck's former owner and now an employee of Truck Repair, for a deposition. Mr. Elvahvah's deposition was not completed due to defense counsel's schedule. Plaintiff's counsel subsequently reached out to defense counsel several times to schedule a continued deposition but failed to reach any agreement.

On October 10, 2017, plaintiff filed his fifth motion, seeking to strike defendant's answer for failure to comply with the June 29, 2017 discovery order or, in the alternative, compelling defendant's continued deposition, extending the note of issue date and awarding sanctions and/or attorney's fees. Again, defendant did not submit any opposition to the motion. On October 27, 2017, the court granted that branch of plaintiff's motion to strike defendant's answer on default, granted that portion of the motion for sanctions, and directed plaintiff to

file a note of issue for inquest. On November 20, 2017, plaintiff filed a note of issue and the issue of damages was referred to a special referee. On December 11, 2017, an inquest was held. After inquest, the Special Referee granted plaintiff's motion to enter judgment for damages in the amount of (1) \$54,590.79 for the first, second and third causes of action, and (2) \$14,902.10 for attorney's fees for the fourth cause of action. On January 19, 2018, plaintiff obtained a judgment on default against Truck Repair for \$85,364.54 (representing the previous judgment of \$54,590.79, interest in the amount of \$13,936.65 from February 18, 2015, attorney's fees in the amount of \$14,902.10, disbursements in the amount of \$435.00 and sanctions in the amount of \$1,500.00). The judgment also severed the action as against defendant International Truck.

On February 13, 2019, the Marshal served a notice of levy and sale on Truck Repair and International Truck, noticing the sale for February 20, 2019. On February 27, 2019, Truck Repair filed for bankruptcy. However, because the bankruptcy petition was filed *pro se*, the Bankruptcy Court issued a Notice of Hearing on Deficient Chapter 11 filing to consider why the case should not be dismissed or converted for debtor's failure to be represented by counsel. On March 12, 2019, defendant, by new counsel, submitted an order to show cause in this court to vacate the subject judgment, but subsequently withdrew the application without prejudice with the understanding that it could be refiled after the bankruptcy proceeding was dismissed. On March 28, 2019, the Bankruptcy Court held an initial case management conference, at which there was no

appearance on behalf of Truck Repair. On May 6, 2019, the Marshal's levy and notice for sale of Truck Repair and International Truck, noticing the sale for May 23, 2019, was served on defendant. On June 4, 2019, the bankruptcy action was dismissed. On June 11, 2019, defendant filed this motion by order to show cause.

Discussion

As relevant here, a court, in its discretion, may vacate a judgment on the ground of a party's "excusable default" (CPLR 5015[a][1]). To prevail on a motion to vacate a default judgment on this ground, a party must demonstrate a reasonable excuse for the default and a meritorious defense (see Jian Hua Tan v AB Capstone Development, LLC, 163 AD3d 937, 937-938 [2d Dept 2018]; Ashley v Ashley, 139 AD3d 650, 651 [2d Dept 2016]; Lambert v Schreiber, 69 AD3d 904, 905 [2d Dept 2010]; Pemberton v Fuchs, 57 AD3d 863, 864 [2d Dept 2008]). "The quantum of proof required to prevail [on a motion to vacate a default order or judgment] is not as great as is required to oppose summary judgment" (Clark v MGM Textiles Indus., 307 AD2d 520, 521 [3d Dept 2003]).

"The determination of what constitutes a reasonable excuse generally lies within the sound discretion of the trial court" (Jian Hua Tan, 163 AD3d at 938; Herrera v MTA Bus Co., 100 AD3d 962, 963 [2d Dept 2012]). A court has discretion to accept law office failure as a reasonable excuse for default where the claim is supported by a "detailed and credible explanation" of the default at issue (CPLR 2005. See also Herrera, 100 AD3d at 963; Swensen v MV Transp., Inc., 89 AD3d 924, 925 [2d Dept 2011]).

A court also has inherent discretionary power to vacate a default judgment in the interest of substantial justice (*see Nash v Port Auth. of N.Y. & N.J.*, 22 NY3d 220, 225-26 [2013]; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]), as there is a “strong policy of permitting the parties to determine matters on their merits” (*Matter of Kaufman v Board of Educ. of City School Dist. of City of N.Y.*, 210 AD2d 226, 227 [2d Dept 1994]). In exercising its discretion, a court should consider “the facts of the particular case, the equities affecting each party and others affected by the judgment or order, and the grounds for the requested relief” (*Nash*, 22 NY3d at 226, *quoting* Weinstein-Korn-Miller, NY Civ Prac ¶ 5015.03 at 50-284).

As to the first prong, defendant argues that its default was a result of former defense counsel’s negligent failure to oppose plaintiff’s motion to strike its answer and for failure to appear at the inquest or to oppose the entry of judgment. In support of this application, Nurelden Elvahvah, president of Truck Repair, submitted an affidavit stating that he only “recently” learned of former defense counsel’s failure to submit any opposition to the motion to strike defendant’s answer and to attend the inquest. Mr. Elvahvah alleges that he contacted prior counsel upon learning of the default, and counsel “continually” assured Mr. Elvahvah that he would “take care of it.” It was only after receiving the Marshal’s notice of levy and sale dated February 13, 2019 “that the reality of [former defense counsel’s] failure to defend same became apparent.” As to the second prong, defendant argues that it has a meritorious defense because there

was no privity of contract between plaintiff and defendant since the work on plaintiff's vehicle was performed by International Truck before Truck Repair was incorporated. Plaintiff argues, however, that the work was performed in July, 2013, *after* Truck Repair was incorporated in May, 2013.

While the Second Department has upheld a trial court's exercise of discretion in vacating a default resulting from law office failure of a party's prior counsel (*see Sarcona v J & J Air Container Sta., Inc.*, 111 AD3d 914, 915 [2d Dept 2013]; *Muir v Coleman*, 98 AD3d 569 [2d Dept 2012]; *Gironda v Katzen*, 19 AD3d 644, 645 [2005]), it has also held that courts improvidently exercise their discretion to vacate a default judgment where the allegations of law office failure are vague and unsubstantiated or where the conduct of a party's attorney constitutes repeated neglect such that the party's continued belief that the attorney was handling the case was not reasonable (*see Roussodimou v Zafiriadis*, 238 AD2d 568, 569 [2d Dept 1997]; *Eretz Funding, Ltd. v Shalosh Assoc.*, 266 AD2d 184 [2d Dept 1999]; *Rosado v Economy El. Co.*, 236 AD2d 598, 599 [2d Dept 1997]; *Chery v Anthony*, 156 AD2d 414, 417 [2d Dept 1989]).

The court finds that given the history of this litigation, the explanation of law office failure proffered by defendant and its president is vague, unsubstantiated and incredible, and does not constitute a reasonable excuse for its default (*see Herrera*, 100 AD3d at 963]; *Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789 [2d Dept 2011]; *Swensen*, 89 AD3d at 925 [2d Dept 2011]. *See also Youni Gems Corp. v Bassco Creations Inc.*, 70 AD3d 454, 455 [1st Dept 2010]

[“bare allegations of incompetence on the part of prior counsel cannot serve as the basis to set aside a [default] pursuant to CPLR 5015”], quoting *Spatz v Bajramoski*, 214 AD2d 436 [1st Dept 1995]). In *Swensen*, the Second Department held that the court providently exercised its discretion in granting a motion to vacate a default where plaintiff’s counsel “provided a credible and detailed explanation for his default in this matter, which included various acts of misconduct and deception by his former associate attorney who worked on plaintiff’s matter” (*Swensen*, 89 AD3d at 925).

By contrast, here, Nurelden Elvahvah merely states that he only recently learned of defense counsel’s negligence without providing an affirmation from prior counsel or detailing the nature and dates of his communication with counsel. Mr. Elvahvah does not state when prior counsel was terminated or when new counsel was retained, does not state when the conversations between him and prior counsel took place, and only vaguely details the nature of those conversations. Moreover, Mr. Elvahvah’s allegation that he only learned of prior counsel’s failure to oppose plaintiff’s motion to strike and failure to appear at the inquest after receiving the Marshal’s notice in February, 2019 is belied by correspondence suggesting that defendant contemplated terminating defense counsel as early as May, 2017. Indeed, correspondence dated May 23, 2017 suggests that defense counsel communicated his belief that he would be terminated as counsel of record to plaintiff’s counsel prior to that date. In addition, prior defense counsel’s failure to appear or oppose four of the five

motions filed by plaintiff constitutes repeated neglect, and therefore, defendant's continued belief that prior counsel was handling the case was not reasonable (see Roussodimou, 238 AD2d at 569). Finally, defendant took no steps to vacate the default judgment until the judgment was entered and the Marshal served notice that it was about to levy and sell defendant's business (see Roussodimou, 238 AD2d at 569; Eretz Funding, 266 AD2d at 185). Under these circumstances, defendant's default was intentional and inexcusable (*id.*).

Defendant also argues that had prior counsel not defaulted, defendant would have shown a meritorious defense, namely lack of privity of contract between plaintiff and Truck Repair. Defendant argues that the prior money judgment was obtained against International Truck and that International Truck and Truck Repair are separate entities.

Here, the record shows International Truck was owned by Amar Elvahvah, Nurelden Elvahvah's brother. International Truck performed work on plaintiff's vehicles in 2013. On May 10, 2013, Nurelden Elvahvah incorporated Truck Repair, located at 111 58th Street in Brooklyn. Invoices between plaintiff and International Truck dated in July, 2013 show that International Truck was located at 111 58th Street in Brooklyn, the same location as Truck Repair. Tellingly, plaintiff's check to International Truck for work performed by International Truck was marked as deposited to a bank account by "Truck Repair." Defendant concedes that International Truck and Truck Repair also shared the same address previously, located at 92 20th Street in Brooklyn. When

International Truck closed in 2014, Amar Elvahvah started working at Truck Repair, bringing International Truck's tools and equipment with him. Amar Elvahvah also testified that while his brother, Nurelden Elvahvah, owned Truck Repair, Nurelden did not play an active role in its operation. On May 30, 2017, a third corporation, "International Truck Repair Corp.," which plaintiff alleges was formed by the defendants, was incorporated at 111 58th Street in Brooklyn. Amar Elvahvah also testified that Nurelden Elvahvah subsequently sold Truck Repair to Abraham Elvahvah.²

The Court finds that the record demonstrates classic "badges of fraud" accompanying the above-described transactions to which defendant has failed to show a meritorious defense. "Badges of fraud" include "(1) the close relationship among the parties to the transaction, (2) the inadequacy of the consideration, (3) the transferor's knowledge of the creditor's claims, or claims so likely to arise as to be certain, and the transferor's inability to pay them, and (4) the retention of control of property by the transferor after the conveyance" (*Dempster v Overview Equities*, 4 AD3d 495, 498 [2d Dept 2004]; *Pen Pak Corp. v La Salle Natl. Bank of Chicago*, 240 AD2d 384, 386 [2d Dept 1997]). The corporations here were owned by brothers, apparently operated out of the same locations, and engaged in the same business. Amar Elvahvah, International Truck's owner, went to work for his brother's company, Truck Repair, when his company filed for bankruptcy. A

² While Amar Elvahvah testified that Abraham Elvahvah is not a brother or relative, he does share the same last name as Amar and Nurelden, and given the history of transactions here, the Court is not convinced that there is no relation.

third truck repair business was formed at the same location in 2017. Plaintiff's judgment in the prior action obtained against International Truck, which incidentally was also obtained on default, remains unpaid because execution of judgment against International Truck was returned unsatisfied. Conveniently, Amar Elvahvah testified that he had no documents pertaining to International Truck and that he did not know what happened to them. He could not provide any concrete dates for when he worked at Truck Repair or when his brother owned the company. The court has reviewed Mr. Elvahvah's deposition testimony in its entirety and finds the testimony concerning his lack of knowledge of important aspects of his former corporation and the whereabouts of corporate documents to be highly evasive, if not incredible.

Defendant argues that privity of contract exists only between plaintiff and International Truck and urges the court not to pierce the corporate veil. The court is not persuaded. Defendant has not demonstrated that International Truck and Truck Repair are parent and subsidiary corporations such that a piercing the corporate veil analysis should be applied, and in any event, it is apparent that the primaries behind both corporations are related such that they act as the true movers behind both corporations' actions (*see Matter of Sbarro Holding (Shiaw Tien Yuan)*, 91 AD2d 613, 614 [2d Dept 1982]).

Finally, the Court notes that defendant's answer was stricken and judgment entered after an over two-year history of noncompliance with orders to produce discovery essential to this litigation. In *Gibbs v St. Barnabas Hosp.* (16 NY3d 74

[2010]), the Court of Appeals, in considering a similar pattern of noncompliance with court orders, emphasized the need for all parties to abide by rules of proper practice and the necessity to enforce court orders, holding:

“there is . . . a compelling need for courts to require compliance with enforcement orders if the authority of the courts is to be respected by the bar, litigants and the public . . . As this Court has repeatedly emphasized, our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice (see e.g. Brill v City of New York, 2 NY3d 648 [2004]; Kihl v Pfeiffer, 94 NY2d 118 [1999]). The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well. For these reasons, it is important to adhere to the position we declared a decade ago that ‘[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity’ (Kihl, 94 NY2d at 123)” (Gibbs, 16 NY3d at 81).

Given the Court of Appeals’ guidance in Gibbs, as well as Second Department caselaw cited above, the Court finds that it would be an improvident use of its discretion to vacate the default judgment in light of defendant’s history of default and noncompliance.

In its cross-motion, plaintiff moves for imposition of sanctions on defendant pursuant to 22 NYCRR 130-1.1 in the form of an award for attorney's fees in the amount of \$5,260. Plaintiff's counsel, James Klatsky, affirms that he has expended 18.2 hours of attorney time on the court appearance when defendant submitted its Order to Show Cause and in the review of defendant's motion and preparation of the opposition papers. Plaintiff's counsel billed plaintiff at a rate of \$300.00 per hour, for a total of \$5,260 after a \$200.00 courtesy discount credit. Plaintiff's counsel affirms that he graduated from Columbia Law School in 1984, was admitted to the bar in 1985 and has since been a practicing attorney specializing in both litigation and transactional work.

The Court, in its discretion, may award reasonable attorney's fees resulting from frivolous conduct, and in lieu of or in addition to attorney's fees, may also award financial sanctions upon an attorney, a party to the litigation or both, limited to \$10,000, as a result of frivolous conduct (22 NYCRR 130-1.1, 22 NYCRR 130-1.2). Conduct is frivolous if it (1) is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;" (2) is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another;" or (3) "asserts material factual statements that are false" (22 NYCRR 130-1.1[c]). "In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the

conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party” (*id.*). An award of costs or sanctions may be made upon motion pursuant to CPLR 2214 or 2215 or upon the court’s own initiative, after a reasonable opportunity to be heard (22 NYCRR 130-1.1[d]). “The court may award costs or impose sanctions or both only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate” (22 NYCRR 130.1-2). However, the procedural dictates of 22 NCYRR 130.1-2 need not be followed “in any rigid fashion” so long as the court sets forth the reason for the fee or sanction award and the conduct upon which it was based (*see Duncan v Popoli*, 105 AD3d 803, 805 [2d Dept 2013]).

Here, the Court declines to exercise its discretion to award attorney’s fees to plaintiff’s counsel, as the court does not find that defendant’s motion was completely without merit, undertaken primarily to delay or harass, or asserts false factual material statements (22 NYCRR 130-1.1[c]).

Plaintiff’s motion for an injunction barring defendant and its agents and officers from essentially making any further motions without permission of the court is denied. Plaintiff may, of course, challenge any future motion or application as its sees fit, at which time the Court will pass on any such motion and rule accordingly.

Conclusion

Accordingly, it is

ORDERED, that branch of defendant Truck Repair's motion for an order vacating the judgment as well as the Court's prior order upon which the judgment is based is denied; and it is further

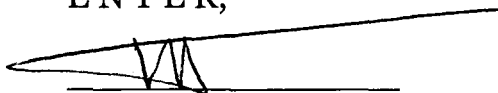
ORDERED, that those portions of defendant's motion seeking leave to file a responsive pleading and to vacate the Marshal's notice of levy and sale are also denied; and it is further

ORDERED, that pursuant to agreement enumerated in the Order to Show Cause dated on June 11, 2019, because defendant's motion to vacate the judgment and Marshal's levy and sale was denied, Truck Repair shall pay the expenses of the Marshal for the levy and sale; and it is further

ORDERED, that Plaintiff's cross-motion for attorney's fees and for an injunction barring defendant from making further motions without leave of the court is denied.

This constitutes the decision and order of the Court.

ENTER,



J. S. C.

Hon. Wavny Toussaint
J.S.C.

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