Schwartzberg v Pro-Active Holdings, LLC
2020 NY Slip Op 32980(U)
September 11, 2020
Supreme Court, New York County
Docket Number: 150219/2018
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

----------X

GIL SCHWARTZBERG,

Plaintiff,

- v -

PRO-ACTIVE HOLDINGS, LLC,

Defendant.

----------X

INDEX NO. 150219/2018

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 46

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this action by plaintiff Gil N. Schwartzberg to recover on a promissory note, defendant Pro-Active Holdings, LLC moves, inter alia, pursuant to CPLR 5015(a)(1), to vacate a money judgment entered against it on August 9, 2018. Plaintiff opposes the motion. After consideration of the parties' positions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

By decision and order entered June 15, 2018, this Court granted plaintiff's motion for summary judgment in lieu of complaint against defendant in the amount of $100,000, with interest at the note rate of 9% per annum from July 29, 2008, less $45,000 in payments already made after the interest was calculated, and plaintiff was further awarded legal fees in the amount of $1,000.00, which this Court deemed reasonable, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs. Doc. 12. A judgment was thereafter entered against defendant on August 9, 2018. Doc. 16.

Defendant now moves, by order to show cause, pursuant to CPLR 5015(a)(1), to vacate the judgment. Alternatively, defendant moves, pursuant to CPLR 5015(a)(5) and 5021(a)(2), to modify the judgment or enter a partial or complete satisfaction of the same. In an affidavit in support of the motion, Jeffrey Ramson, the former President and CEO of defendant, represents, inter alia, that defendant, a limited liability company, had a principal place of business at 50 Broad Street, Suite 1402 in Manhattan, that it "never received and was completely unaware of [p]laintiff's [n]otice of [m]otion for [s]ummary [j]udgment in [l]ieu of [c]omplaint", and that this led defendant to default on plaintiff's underlying motion. Doc. 18 at pars. 3, 5.

In opposition to the motion, plaintiff argues that defendant has failed to set forth a reasonable excuse for its default or a meritorious defense, as required by CPLR 5015.

In a reply affidavit, Ramson argues that defendant's motion should be granted because its debt to plaintiff has been repaid in full.

It is well settled that a defendant seeking to vacate a default judgment pursuant to CPLR 5015(a) "must demonstrate a reasonable excuse for the delay, as well as a meritorious defense to the action." *Rodgers v 66 E. Tremont Hgts. Hous. Dev. Fund Corp.*, 69 AD3d 510 (1st Dept 2010); *see also Matter of Messiah G. (Giselle F.),* 168 AD3d 420 (1st Dept 2019). This Court has the discretion to determine whether the proffered excuse is sufficient. *Rodgers v 66 E. Tremont Hgts. Hous. Dev. Fund Corp.*, 69 AD3d at 510.

In his affidavit in support of the motion, Ramson states, inter alia, that:

> [a]s for a reasonable excuse for [defendant's] default, all I can say is that by the time [p]laintiff commenced [the captioned action], [defendant] had all but ceased its operations and had vacated its [office] located at 50 Broad Street in Manhattan. This was the address [defendant] had designated for service upon it by New York's Secretary of State. For this reason, [p]laintiff's [motion for summary judgment in lieu of complaint] and the resulting [j]udgment were not received by me until the end of 2018, well after the fact."

Doc. 18 at par. 20.

Ramson admits, "[u]pon information and belief", that defendant was served with the motion via the Secretary of State pursuant to Business Corporation Law § 306 and that the Secretary of State presumably mailed the summons and moving papers to defendant's former address on Broad Street.[1] Doc. 23. Thus, Ramson does not dispute that the defendant was properly served at the Broad Street address on file with the Secretary of State. A presumption of receipt arises once service is completed on the Secretary of State, defendant's designated agent, regardless of whether it is actually received by the company's representative. *See 26 Warren Corp. v Aetna Cas. & Sur. Co.*, 253 AD2d 375, 376 (1st Dept 1998). Although Ramson maintains that defendant no longer occupied the Broad Street address, he does not specify when it vacated the premises or whether it ever had a subsequent address. If defendant was no longer at the Broad Street address, it had an obligation to "keep the Secretary of State advised of [its] current and correct address" and its failure "to receive process due to [its] breach of the obligation to keep a current address on file with the Secretary of State . . . does not constitute a reasonable excuse" for its default. *Crespo v A.D.A. Mgmt.*, 292 AD2d 5, 10-11.

Despite his claim that defendant had "all but ceased its operations" by the time this action was commenced, this representation is extremely vague. Does it mean that the company was winding down? That it went bankrupt ? That it was dissolved ? Even assuming, arguendo, that defendant was no longer in business, "a dissolved corporation may sue or be sued." *See Ford v. Pulmosan Safety Equipment Corp.*, 52 AD3d 710, 711 (2d Dept 2008) (citation omitted). Therefore, this, too, does not constitute a reasonable excuse.

[1] This Court notes, however, that the affidavit of service reflects that defendant was served in accordance with Limited Liability Corporation Law § 303. Doc. 10.

Ramson further proffers as an excuse that, since he and plaintiff were friends, the latter knew how to communicate with him but "never bothered to email [him] any notification that he had filed a motion for [summary judgment]." Doc. 18 at par. 21. However, this contention, based solely on Ramson's personal expectations and devoid of any legal support, does not establish a reasonable excuse.

Given that defendant clearly failed to establish a reasonable excuse for its default, there is no need to address whether it has a meritorious defense, and, thus, the branch of the motion seeking relief pursuant to CPLR 5015(a)(1) is denied.

The branch of the motion seeking relief pursuant to CPLR 5015(a)(5) is also denied since there has been no "reversal, modification or vacatur of a prior judgment or order upon which [the judgment against defendant] is based."

Finally, the branch of the motion seeking relief pursuant to CPLR 5021(a)(2) is denied since defendant has failed to establish on the papers that plaintiff has satisfied more than $45,000 of the judgment which, as noted above, is reflected in the amount awarded against it.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendant's motion is denied in all respects; and it is further

ORDERED that this constitutes the decision and order of the court.

9/11/2020
DATE

KATHRYN E. FREED, 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