115 Essex St. LLC v Tenth Ward LLC
2020 NY Slip Op 33025(U)
September 14, 2020
Supreme Court, Kings County
Docket Number: 502984/19
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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115 ESSEX STREET LLC,

Plaintiff, Decision and order

- against - Index No. 502984/19

TENTH WARD LLC, ET AL,

Defendants, September 14, 2020

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PRESENT: HON. LEON RUCHELSMAN

The defendant Edward Doyle has moved seeking to vacate an order dated July 18, 2019 granted on default. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The defendant Tenth Ward LLC was a commercial tenant at property located at 115 Essex Street in New York County. On July 13, 2004 the defendant accepted an earlier lease from another tenant and thus became bound by all the terms of the lease. The defendant Edward Doyle executed a guaranty on July 13, 2004 promising to pay any outstanding rent that was owed as of the date of any eviction. The defendant owed rent from July 2017 through January 2018 and obtained a judgement on default in the amount of $156,567.71. The defendant Doyle has now moved seeking to vacate the default on the grounds he has demonstrated a reasonable excuse for failing to answer and has a meritorious defense. The motion is opposed.

Conclusions of Law

It is well settled that to succeed upon a motion to vacate a default the party must demonstrate a reasonable excuse for the default and a meritorious defense (Golden Mountain Income v. Spencer Gifts, LLC, 167 AD3d 850, 88 NYS3d 889 [2d Dept., 2018]). In this case the reasonable excuse presented is that Doyle was not properly served with process. In Bossuk v. Steinberg, 58 NY2d 916, 460 NYS2d 509 [1983] the Court of Appeals held that where a person of suitable age and discretion refuses to accept service for a process server and "resists" service then service can be effectuated by leaving the summons and complaint outside the door and informing the individual the summons has been left there. Further, although pursuant to CPLR §3215(g)(3)(i) where a default is sought against someone for a contractual obligation then the party seeking default must submit an affidavit that an additional service of the summons was made upon the corporation at its last known address within twenty days before entry of judgement, the failure to do so does not render service ineffectual without a meritorious defense. In Crespo v. A.D.A. Management, 292 AD2d 5, 739 NYS2d 49 [1st Dept., 2002] the court held that, concerning CPLR §3215(g)(3)(i)'s notice requirements "even a total lack of compliance will not defeat a default motion where there is neither a meritorious defense nor other objection shown" (id). Thus, the failure to present such affidavit cannot

be a basis to vacate the default. Therefore, the defendant has failed to present any reasonable excuse.

Turning to the meritorious defense, a motion to vacate will prove unsuccessful if the party does not allege a defense at all (Halali v. Gabbay, 223 AD2d 623, 636 NYS2d 838 [2d Dept., 1996]). The defense need not entitle the party to judgement as a matter of law, rather it must simply raise the possibility that the case can be adequately defended (Bellcourt v. Bellcourt, 169 AD2d 855, 564 NYS2d 580 [3rd Dept., 1991]). Thus, where a defense cannot be asserted at all, for example where the defendant was already convicted of felony charges regarding the events which now comprise the civil action, then vacating the default would be improper (Boorman v. Deutsch, 152 AD2d 48, 547 NYS2d 18 [1st Dept., 1989]).

The defendant asserts that even if he signed the guaranty in 2004 he surely never intended for such guaranty to be extended in 2011 and 2016 and should not be responsible for debt that was incurred in 2017. However, the personal guaranty executed by Doyle provides that "this Guaranty shall be a continuing guaranty, and the liability of Guarantor hereunder shall in no way be affected, modified, impaired or diminished by reason of any event or circumstance which might otherwise constitute a legal or equitable discharge of Guarantor, including, without limitation: (i) any assignment, renewal or modification of the

Lease" (id). Thus, clearly the guarantee extended to any lease renewals or modifications and has not presented any defense to the guaranty. To the extent the defendant has any claims against others, the defendant in this case may initiate a contribution action against them (Leo v. Levi, 304 AD2d 621, 759 NYS2d 94 [2d Dept., 2003]). Those claims to not raise ay defense concerning the guaranty as it relates to the plaintiff.

Therefore, the defendant has failed to present any reasonable excuse or meritorious defense and the motion seeking to vacate the default is denied.

So ordered.

ENTER:

DATED: September 14, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC