Global Export Mktg. Co., Ltd. v Raymond AAB
2020 NY Slip Op 33319(U)
October 8, 2020
Supreme Court, New York County
Docket Number: 157695/2017
Judge: W. Franc Perry

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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GLOBAL EXPORT MARKETING CO., LTD.,

Plaintiff,

- v -

RAYMOND AAB, KOEHLER & ISAACS, LLP, OMAR LOPERA, ABC LAW FIRM, DEF ATTORNEY

Defendant.

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INDEX NO. 157695/2017

MOTION DATE 01/16/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153

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

Plaintiff Global Export Marketing Co., Ltd. ("Plaintiff") brings this motion to vacate this court's July 26, 2018 decisions granting the motions to dismiss of Defendant Raymond Aab and Defendant Omar Lopera. Defendants Aab, Lopera, and Koehler & Isaacs ("K&I", collectively, "Defendants") oppose the motion. K&I has also filed a cross motion for sanctions. The motion has been fully submitted.

BACKGROUND

Plaintiff, a food exporter, filed its Amended Complaint on August 30, 2017, alleging that the Defendants' negligence in representing it in an underlying dispute against non-party food importer Al Maya Trading Establishment ("Al Maya") resulted in an adverse arbitration award of $6,353,997.41.

Plaintiff alleges that from 1988 to September 2013, it exported its food products to Al Maya, a corporation located in the United Arab Emirates. In January 2014, Al Maya filed a petition

in the United States District Court for the Southern District of New York (the "District Court") to compel arbitration pursuant to a provision in a 1999 agency agreement (the "Agreement") between the parties. Plaintiff states that it was unaware of the Agreement and denied its authenticity, allegedly retaining Defendants Aab, Lopera, and K&I to represent it in the dispute.[1] During pre-trial conferences, the District Court ordered that the sole issue at trial would be the determination of whether the Agreement was legitimate. Further, the District Court ordered that any party moving for summary judgment must submit a letter setting forth the basis for the motion by June 19, 2014.

Plaintiff alleges that on June 27, 2014, the Defendants expressed their intent to move for summary judgment on the grounds that the Agreement should be governed by UAE law, and that if it were, certain requirements were not met by the Agreement, therefore rendering it invalid. After the District Court ordered briefing on this issue, it determined that New York law applied, with the Hon. Paul A. Engelmayer finding all of Al Maya's arguments meritorious: "(1) that Global's request to apply foreign law is untimely under Federal Rule of Civil Procedure 44.1; (2) there is no conflict between UAE and New York law, because the Agreement is valid under both; and (3) if there is a conflict between UAE and New York law, this Court must apply New York law." (NYSCEF Doc No. 17 at 5.) Following this ruling, the parties signed a stipulation, agreeing to submit all claims at issue to arbitration and that New York law would apply. (NYSCEF Doc

[1] Aab submits a January 13, 2014 retainer agreement printed on what appears to be his own professional stationary demonstrating that he was retained by Plaintiff. (NYSCEF Doc No. 6.) In his opposition, Aab states that although he "occasionally serves as 'counsel' to Koehler & Isaacs," Plaintiff never retained K&I and thus Aab represented Plaintiff in his individual capacity.

Lopera states that he also was retained by Plaintiff in his individual capacity (NYSCEF Doc No. 24 at ¶ 3), although he fails to submit that retainer agreement, and that he has not worked at K&I since 2010, whereas his Notice of Appearance in the underlying action was filed on June 30, 2014. (*Id*. at ¶ 2; NYSCEF Doc No. 28)

Throughout this action, K&I has consistently alleged that it was never retained by Plaintiff and that Plaintiff engaged Aab and Lopera in their individual capacities. (NYSCEF Doc No. 31 at ¶ 3.)

No. 52.) At arbitration before the International Centre for Dispute Resolution, Plaintiff was ordered to pay Al Maya $6,353,997.41. This amount was subsequently confirmed by the SDNY in a March 21, 2017 Judgment that also added on post-judgment interest to be calculated in accordance with 28 USC § 1961. (NYSCEF Doc No. 97.)

In its Amended Complaint herein, Plaintiff set forth three causes of action. First, Plaintiff argued that Defendants committed legal malpractice by: failing to timely raise the issue of the applicability of UAE law, failing to retain a UAE legal expert, advising Plaintiff that it could challenge the authenticity of the Agreement at arbitration, entering into the stipulation to apply New York law when UAE law should apply, and failing to counsel Plaintiff as to the differences between UAE and New York law. (NYSCEF Doc No. 2 at ¶ 99.) Plaintiff's second and third causes of action were for breach of fiduciary duty and breach of contract, respectively.

Motion sequence 001 was Aab's motion to dismiss, on the grounds that documentary evidence contradicted all claims of alleged wrongdoing, Aab was never served and therefore the court lacked personal jurisdiction, Plaintiff failed to state a claim for legal malpractice, and the statute of limitations had run. (NYSCEF Doc No. 4.) Defendant K&I filed a cross-motion to dismiss the Amended Complaint against it, on the grounds that it never provided legal representation to Plaintiff and was not properly served as a partnership, pursuant to CPLR 310. K&I also moved for sanctions against Plaintiff in the sum of $10,000.00. (NYSCEF Doc No. 31.)

By decision dated July 26, 2018, this court granted motion sequence 001, stating that the motion is "granted as unopposed, as there is no personal jurisdiction upon defendant. The complaint also fails to state a cause of action, as the allegations therein are belied by the documentary evidence. The cross motion to dismiss is also granted as unopposed, as stated on the

record. No sanctions are awarded. This is the decision and order of the Court." (NYSCEF Doc No. 57.)

Motion sequence 002 was Lopera's motion to dismiss, incorporated by reference all facts and legal arguments made by Aab. (NYSCEF Doc No. 24.) By decision also dated July 26, 2018, this court granted motion sequence 002, stating that the motion "is granted as unopposed. There is no personal jurisdiction upon defendant and the complaint fails to state a cause of action. This is the order of the Court." (NYSCEF Doc No. 58.)

Although Plaintiff failed to oppose either motion and likewise failed to appear for oral argument, it filed notices of appeal of both decisions on August 27, 2018. (NYSCEF Doc Nos. 61, 66.) Additionally, on February 28, 2019, Plaintiff commenced a related action before this court by filing a virtually identical complaint against the same Defendants herein under index number 152181/2019.

Plaintiff now moves to vacate both decisions, arguing that "in fact, the motions were granted on default," and alleging that it only defaulted due to law office failure. (NYSCEF Doc No. 73 at 7.)

Defendants all oppose the motion on the grounds that the July 26, 2018 decisions granted the underlying motions on the merits. (NYSCEF Doc Nos. 138, 141.) Additionally, K&I again cross-moves for sanctions. (NYSCEF Doc No. 132.)

DISCUSSION

CPLR 5015[a][1] ("Relief from judgment or order") provides that a court may relieve a party from a judgment on the ground of "excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry[.]"

"It is well-settled law that a party's default should not be vacated absent a showing of a justifiable excuse for the default and a meritorious cause of action or defense." (*Cipriano by Cipriano v Hank*, 197 AD2d 295, 297 [1st Dept 1994].) "The determination whether to vacate a default is generally left to the sound discretion of the motion court and will not be disturbed if the record supports such determination." (*White v Incorporated Village of Hempstead*, 41 AD3d 709, 710 [2d Dept 2007].)

And, pursuant to CPLR 2005, a court may excuse a default resulting from law office failure. "Although the Supreme Court has the discretion to accept law office failure as a reasonable excuse, the excuse must be supported by detailed allegations of fact explaining the law office failure . . . [and the excuse cannot be] vague, conclusory, unsubstantiated [or] unreasonable under the circumstances." (*CEO Business Brokers, Inc. v Alqabili*, 105 AD3d 989, 990 [2d Dept 2013] [internal citations omitted].)

Plaintiff, who has been represented by counsel since the inception of this case, argues that the court should grant its motion to vacate the July 26, 2018 decisions because Plaintiff's failure to appear was due to excusable law office failure. Specifically, Plaintiff's counsel submits an affirmation stating that the Complaint and Amended Complaint were prepared and filed by a different attorney of the firm. (NYSCEF Doc No. 74 at ¶ 4.) However, due to "technical reasons," that different attorney was forced to use the NYSCEF login of a third attorney, and thus only the third attorney received notifications that other documents (such as the papers for motion sequences 1 and 2) had been filed. The third attorney did not communicate that those documents had been filed, incorrectly assuming that "others" were receiving the notifications as well. (*Id*. at ¶¶ 4-5.)

Plaintiff has not demonstrated a justifiable excuse for defaulting in appearance. Counsel was responsible to check on the status of the case he was handling, even if electronic notifications

were only communicated to another member of the same firm. (*See Kee Yip Realty Corp. v Win Tax Services, Inc*., 2016 WL 4094718, *3 [Sup Ct, NY County 2016] [denying Plaintiff's motion to vacate where plaintiff alleged law office failure of failing to see email notification from Court regarding defendants' motion to dismiss].)

In addition, as the court previously noted in its July 26, 2018 decisions, Plaintiff fails to set forth a meritorious cause of action as Plaintiff's allegations are belied by the documentary evidence. (NYSCEF Doc No. 57.) To state a cause of action for legal malpractice, a plaintiff must allege "the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages." (*O'Callaghan v Brunelle*, 84 AD3d 581, 582 [1st Dept 2011].)

Here, as stated in the affirmation in support of the motion, the crux of Plaintiff's legal malpractice argument is that the Defendants negligently failed to advise Plaintiff on the differences between UAE and New York law, resulting in damages to Plaintiff after it entered into the Stipulation and agreed to arbitrate under New York law. (NYSCEF Doc No. 74 at ¶¶ 42-43.) In support, Plaintiff submits an affidavit from Mahmoud Mostafa Ahmed Mostafa, an attorney allegedly admitted to practice law in Dubai, who states that, in his opinion, if "the disputed claims and the arbitration been controlled by the laws of the [UAE] rather than the laws of the State of New York, [Plaintiff] would have been exposed to far more limited damages" and that Plaintiff's claim against the Defendants "is meritorious." (NYSCEF Doc No. 95 at ¶¶ 11, 15.)

However, the documentary evidence in the record utterly refutes Plaintiff's malpractice claim. Specifically, the Hon. Paul A. Engelmayer's July 15, 2014 opinion and order held that if there were any conflict between UAE and New York law, "the Court would apply New York law." (NYSCEF Doc No. 118 at 17; *Optical Comm. Groups, Inc. v Rubin, Fiorella & Friedman, LLP*, 145 AD3d 469, 470 [1st Dept 2016] [finding a federal court opinion in a related case to be

documentary evidence that flatly contradicted the factual allegations in the state court complaint].) This conclusion, which was supported by a lengthy analysis, precludes the possibility of damages being calculated under UAE law, because, even if Plaintiff had argued in the SDNY action that UAE law should apply for the purpose of calculating damages only, the argument would have been rejected, as New York was the place that the Agreement was accepted, and therefore any conflict of law would be resolved in New York's favor. (*Id*.) Accordingly, Plaintiff's argument that Judge Engelmayer's opinion left open the question of what law would apply to calculate damages at arbitration is unavailing. (NYSCEF Doc No. 73 at 15-18.) Additionally, the Mostafa affirmation in support of the motion sets forth only self-serving, vague, and conclusory assertions by an attorney who has no personal knowledge of the facts underlying Plaintiff's claim. (*Carroll v Nostra Realty Corp*., 54 AD3d 623, 625 [1st Dept 2008]; *James v Hoffman*, 158 AD2d 398, 398 [1st Dept 1990].)

Defendant K&I's motion insofar as it seeks sanctions against Plaintiff is denied. A court has the discretion to "award ... costs in the form of reimbursement for actual expenses" and/or impose financial sanctions for frivolous conduct. (*Ortega v Rockefeller Ctr. N. Inc.*, 2014 WL 10698475, at *2 [Sup Ct, NY County 2014].) Conduct is frivolous if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." (*Id*.) This determination is discretionary and the court denies Defendant's motion seeking to impose sanctions against Plaintiff. Accordingly, it is hereby

ORDERED, that the motion to vacate this court's July 26, 2018 decisions which granted the Defendants' motion sequences to dismiss is hereby denied; and it is further

ORDERED, that Defendant Koehler & Isaac's cross-motion for sanctions is denied.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

10/08/20
DATE

W. FRANC PERRY, 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