

Stuart v Star Jets Intl., Inc.

2020 NY Slip Op 33709(U)

November 3, 2020

Supreme Court, New York County

Docket Number: 656737/2019

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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BRETT STUART,
Plaintiff,

- v -

STAR JETS INTERNATIONAL, INC.
and RICKY SITOMER
Defendants.

INDEX NO. 656737/2019
MOTION DATE 9/2/2020
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this action to recover \$109,000.00, that the plaintiff, Brett Stuart, claims to have paid to the defendants for air charter-related brokerage services, this court, by order dated April 27, 2020, granted the plaintiff's motion for leave to enter a default judgment and awarded judgment in that amount against the defendants.. The defendants now move to vacate the court's order pursuant to CPLR 5015(a)(1) and CPLR 317, and for leave to serve the late answer pursuant to CPLR 3012(d). The plaintiff opposes the motion. The motion is granted.

CPLR 5015(a)(1) provides that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person... on the ground of... excusable default if such motion is made within one year after the service of a copy of the judgment or order with written notice of its entry upon the moving party." To vacate a judgment entered on default under CPLR 5015(a)(1) the moving party must demonstrate both a reasonable excuse for the failure to appear and a potentially meritorious defense to the proceeding. See CPLR 5015(a); Matter of Bendeck v Zablah, 105 AD3d 457 (1st Dept. 2013); Youni Gems Corp. v Bassco Creations Inc., 70 AD3d 454 (1st Dept. 2010). In order to establish

a reasonable excuse, the movant must submit facts explaining the reason for its default, and it is "within the court's sound discretion to determine whether the excuse for the default is sufficient." Chevalier v 368 E.148th St. Assoc., LLC, 80 AD3d 411, 413 (1st Dept. 2011); see also Tandy Computer Leasing v Video X Home Library, 124 AD2d 530, 531 (1st Dept. 1986).

First, the motion is timely made. Although the motion papers do not demonstrate when the defendants were served with either a copy of the judgment or the order with written notice of its entry, the defendants moved for relief within a month of this court's April 27, 2020 order, well within the time limits prescribed by CPLR 5015(a)(1).

As to reasonable excuse, the defendants contend that neither of them received service of the summons and complaint, and that they only became aware of this action upon receipt of the plaintiff's notice of motion for a default judgment in January 2020. With regard to defendant Star Jets International, Inc. the defendants contend that the plaintiff served the summons and complaint on the incorrect entity. Specifically, according to the plaintiff's affidavits of service, Star Jets International, Inc. was served by an agent for service of process, United States Corporation Agents, Inc., at 7014 13 Avenue, Brooklyn, New York 11228. However, according to the affidavit of defendant Ricky Sitomer and corporate records submitted in support of this motion, the agent served was for a now-defunct company previously run by Sitomer, Star Jets International, LLC, not the defendant in this action Star Jets International, Inc., which is a Florida corporation with a registered agent for service of process located in Tallahassee, Florida.

As to Sitomer, the defendants claim that he was displaced from his office in a shared workspace due to flooding in the building, which resulted in him not receiving service. The plaintiff's affidavit of service for Sitomer avers that service was effectuated on a "John Doe (WeWork Receptionist)" at 135 East 57th Street, New York, New York. Sitomer, in his affidavit, does not dispute that he has an office in that building, rather he claims that a sprinkler valve in the building was severed in November 2019, and due to the subsequent flooding he was forced to relocate offices in the building from the 11th floor to the 6th floor, which may have prevented

the person served from providing him with the summons and complaint. In further support of their contention, the defendants submit a series of emails between Sitomer and a WeWork employee starting in November 2019, when the summons and complaint were served, reflecting that Sitomer was in a different office due to flooding through at least January 2020. As such, the defendants sufficiently demonstrate a reasonable excuse for their delay in answering the complaint or appearing in this action.

The defendants' papers are silent as to the delay from their receipt of notice of the instant action in January 2020 through their first appearance in this action on March 10, 2020. The defendants submit an affirmation by their counsel averring that shortly before filing his appearance in this action he contacted counsel for the plaintiff seeking to have the motion for default judgment adjourned and that counsel for the plaintiff refused. He further avers that he planned to raise the issue at a preliminary conference scheduled in this action for March 26, 2020, but that, due to the COVID-19 health emergency and subsequent temporary court closures and e-filing limitations, the conference was adjourned indefinitely and the plaintiff's motion for default judgment was decided in the interim. He claims that he was unable to file opposition during the temporary e-filing limitations. The plaintiff contends that such excuse is not reasonable, particularly in light of the fact that the return date for the motion was March 2, 2020 and the defendants failed to appear or oppose the motion prior to that date despite being on notice. Nonetheless, counsel's unfortunate decision to forego the timely filing of opposition does not appear to be willful or in bad faith. Thus, such a law office failure is nonetheless a reasonable excuse under CPLR 5015(a)(1). See Imperato v Mount Sinai Med. Ctr., 82 AD3d 414 (1st Dept. 2011); Chelli v Kelly Group, P.C., 63 AD3d 632 (1st Dept. 2009) CPLR 2005.

The defendants' submissions also establish a potentially meritorious defense, inasmuch as Sitomer's affidavit avers that Blue Star Jets, the company that the plaintiff previously had the \$109,000 deposited with, was sold to non-party Apollo Jets LLC and that pursuant to the sales agreement, also submitted in support of this motion, Apollo Jets LLC was responsible for

honoring the outstanding accounts held by Blue Star Jets, not the defendants. While the defendants' ultimate success on this claim is far from clear, these submissions sufficiently demonstrate a potentially meritorious defense for purposes of the motion. See Peacock v Kalikow, 239 AD2d 188 (1st Dept. 1997).

Therefore, under the circumstances presented in this case, and in light of the strong public policy in this State of resolving disputes on the merits, granting of the defendant's motion under CPLR 5015(a)(1) is warranted. See Newyear v Beth Abraham Nursing Home, 157 AD3d 651 (1st Dept. 2018); Wimbledon Financing Master Fund, Ltd. v Weston capital Mgmt. LLC, 150 AD3d 427 (1st Dept. 2017); Artcorp Inc. v Citirich Realty Corp., 140 AD3d 417 (1st Dept. 2016).

As relief is granted pursuant to CPLR 5015(a)(1), the portion of the defendants' motion seeking relief under CPLR 317 is denied as academic.

The portion of the defendants' motion seeking to compel the plaintiff to accept their late answer is also granted. In determining a motion pursuant to CPLR 3012(d), the court takes into account the excuse offered for the defendant's delay in answering, any possible prejudice to the plaintiff, the absence or presence of willfulness and the potential merits of its defense. See Jones v 414 Equities LLC, 57 AD3d 65 (1st Dept. 2008); Sippin v Gallardo, 287 AD2d 703 (2nd Dept. 2001). As already discussed herein, the plaintiff has offered reasonable excuse for its delay in answering and shown the absence of willfulness in their delay and the potential merits to their defenses. CPLR 2004 authorizes the court to "extend the time fixed by any statute rule or order from doing any act, upon such terms as may be just and upon good cause shown." Good cause had been shown by the defendants. Moreover, the plaintiff fails to explain how, under the present circumstances, it would be prejudiced by the service of a late answer. See id.

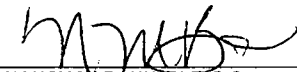
Accordingly, it is hereby,

ORDERED that the defendants' motion is granted, this court's order dated April 27, 2020, is vacated pursuant to CPLR 5015 and the defendants' answer attached to the motion papers is deemed to have been timely served *nunc pro tunc* and the plaintiff shall accept the same, pursuant to CPLR 3012(d); and it is further,

ORDERED that the Clerk shall mark the file accordingly; and it is further,

ORDERED that the parties shall jointly contact chambers on or before November 30, 2020 to schedule a preliminary/settlement conference.

This constitutes the Decision and Order of this Court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

11/3/2020
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE