Great Am. Ins. Co. v Morshed
2021 NY Slip Op 30295(U)
February 1, 2021
Supreme Court, New York County
Docket Number: 160464/2019
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** ***Justice***

PART **IAS MOTION 42EFM**

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GREAT AMERICAN INSURANCE COMPANY, AS SUBROGEE OF FOOD FOR JUNIORS, INC.,

Plaintiff,

- v -

MOHAMMAD MORSHED,

Defendant.

---X

INDEX NO. 160464/2019

MOTION DATE 1/7/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24

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

I. BACKGROUND

In this subrogation action, the plaintiff, Great American Insurance Company, seeks to recover $200,000 from the defendant, Mohammad Morshed, a former employee of the subrogor, Food For Junior's, Inc., which operates Junior's, a Brooklyn restaurant known for its cheesecakes. Over the course of a year, the defendant, who worked as a cashier, embezzled $566,503 from the restaurant by taking cash from customers and then canceling those transactions and keeping the cash for himself. After his scheme was discovered by fellow employees, he was arrested and indicted for grand larceny. He pleaded guilty to Grand Larceny in the Second Degree, a class C felony, in the Supreme Court, Kings County – Criminal Term and, on September 20, 2018, he was sentenced to three years of probation and ordered to pay $55,000 in restitution.

On or about December 6, 2017, the restaurant reported the loss to the plaintiff, its insurance carrier. The plaintiff paid the restaurant's loss claim, $200,000, which was the policy

limit for acts of employee dishonesty. This action ensued in October 2019. The defendant failed to answer or appear. On September 11, 2020, the plaintiff moved pursuant to CPLR 3215 for leave to enter a default judgment. On September 15, 2020, counsel for the defendant informed the plaintiff that the defendant had filed a Chapter 7 voluntary bankruptcy petition in the Bankruptcy Court for the Eastern District of New York on March 2020, and that the subject debt had been discharged. The plaintiff denies receiving any notification of the bankruptcy proceeding prior to September 15, 2020. The bankruptcy petition lists a $200,000 debt to the plaintiff, with an address of 233 Broadway, Suite 1800, NY NY 10007, and indicates that it concerned a lawsuit for damages. The address is not that of the plaintiff, an Ohio company, but of the plaintiff's attorney, albeit with an incorrect zip code. Counsel affirms that no notice was received at the law office. The Order of Discharge and Final Decree of the Bankruptcy Court, dated June 17, 2020, does not state which of the debts listed by the defendant were discharged but does contain a notice that debts not properly listed by the debtor are not discharged.

By an amended order dated October 9, 2020, the court granted the plaintiff's motion, directed judgment be entered against the defendant in the principal sum of $200,000.00, and noted that the defendant's late opposition to the motion was procedurally improper as he was first required to seek leave to file a late answer. The defendant now moves to vacate his default pursuant to CPLR 5015(a)(1), for leave to file a late answer pursuant to CPLR 3012(d) and to dismiss the complaint pursuant to CPLR 3211. The plaintiff opposes the motion. The defendant did not reply. The motion is denied.

II. DISCUSSION

A. Legal Standard

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 an order 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).

B. Reasonable Excuse

The defendant fails to establish the first prong of CPLR 5015 in that he fails to assert any reason excuse for not responding to the complaint. One communication made by counsel to the plaintiff's counsel in September 2020, after the default motion was filed, is wholly insufficient, particularly when that communication was to incorrectly inform the plaintiff that the subject debt had been discharged in bankruptcy, as discussed below. Further, the communication indicates that the defendant had notice of this action and chose not to answer and assert the purported bankruptcy discharge as a defense. Since the purported bankruptcy discharge also appears to be the defendant's only "potentially meritorious defense", he also fails to establish the second prong for vacatur under CPLR 5015.

C. Potentially Meritorious Defense

Initially, the court notes that there is no dispute that this court has concurrent jurisdiction with the bankruptcy court to determine dischargeability. 28 U.S.C.A. 1471(b). See In re Candidus, 327 B.R. 112, 118 (EDNY 2005); Watertown Carriage Co. v Hall, 176 N.Y. 313 (1903); Hilton Credit Corp. v Jaggli, 366 F.2d 793 (9th Cir 1966). The defendant's purported

defense is without merit since the proof submitted shows that the plaintiff was not properly notified of the commencement of the bankruptcy proceeding and the does not dispute that the debt occasioned by his acts of embezzlement is not dischargeable.

Since the plaintiff was not properly listed on the bankruptcy petition with a correct address, and was thus not formally notified, or notified at all, of the proceeding, the subject debt was not discharged in the defendant's bankruptcy proceeding. See 11 U.S.C.A. §§ 342; 521(a)(1); Salmon v Arno, 265 App Div 114 (1st Dept. 1942); In Re Walker, 543 B.R. 560 (Bkrtcy N.D. Ohio, 2015). "The burden is on the debtor to cause formal notice to be given." In Re Maya Contr. Co., 28 F.3d 1395, 1399 (9th Cir 1996); see 11 U.S.C.A. §§ 342; 523(a)(3).

Even if the correct address had been provided in the petition and the plaintiff properly notified, the debt is nonetheless not a dischargeable one as it arises from the defendant's embezzlement from the restaurant. As expressly provide in 11 U.S.C.A. §523(a)(4), "Exceptions to Discharge", a discharge under chapter 7 or 11 does not discharge an individual debtor from any debt ... for fraud or defalcation while acting in a fiduciary capacity, *embezzlement,* or larceny [emphasis added]." See Poswick v Cutten, 258 A.D. 218 (1st Dept. 1939); In Re Salmon, 2014 WL 291316 (Bkrtcy WD Michigan, June 24, 2014); In Re Ghaemi, 492 B.R. 321 (Bkrptcy D. Colorado 2013). Moreover, this rule applies, where, as here, a subrogee seeks to recover on claims paid to an insured for the embezzlement or larceny of an employee. See In Re Hutcherson, 50 B.R. 845 (Bkrtcy E.D. Virginia 1985); In Re Covino, 12 B.R. 876 (Bkrtcy M.D. Florida 1981).

Additionally, the defendant's plea of guilty to a count of grand larceny in connection with the embezzlement of the restaurant's cash receipts collaterally estops him from arguing that 11 U.S.C.A. § 523(a)(4), which excepts debts arising from embezzlement from discharge, does not apply. See In re Goux, 72 B.R. 355 (Bkrtcy NDNY 1987). A defendant's criminal conviction is given collateral estoppel effect in a civil action where the identical issue was decided in the criminal action and is decisive in the civil action. See D'Arata v New York Central Mutual Fire

Ins. Co., 76 NY2d 659 (1990); Maielo v Kircher, 98 AD3d 481 (2nd Dept. 2012); Grayes v DiStasio, 166 AD2d 261 (1st Dept. 1990); National Bank of Pakistan v Basham, 148 AD2d 399 (1st Dept. 1989). "A criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts in a subsequent civil action and collaterally estops a party from re-litigating the issue." Grayes v DiStasio, supra at 263.

D. Other Relief

Since the branch of the defendant's motion seeking to vacate the judgment entered on default is denied, the branches seeking leave to file a late answer pursuant to CPLR 3012(d) and to dismiss the complaint pursuant to CPLR 3211 are denied as moot.

III. CONLCUSION

Accordingly, and upon the foregoing papers, it is

ORDERED that the defendant's motion to vacate a judgment entered on default and other relief, is denied in its entirety, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

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

2/1/2021
DATE

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**