

Calderon v Sharp

2021 NY Slip Op 31857(U)

May 28, 2021

Supreme Court, Kings County

Docket Number: 502415/19

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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DAVID CALDERON & CALDERBROOK VENTURES LLC,
Plaintiffs,

Decision and order

- against -

Index No. 502415/19

TOM SHARP & TOM SHARP DESIGNS LLC,
Defendants,

May 28, 2021

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PRESENT: HON. LEON RUCHELSMAN

The plaintiffs have moved pursuant to CPLR §3217 seeking an order discontinuing the breach of contract cause of action from the remaining causes of action. The defendant opposes the motion and has cross-moved essentially seeking to vacate the default granted. The plaintiffs oppose that motion. Papers were submitted by all parties and arguments held. After reviewing all the arguments this court now makes the following determination.

This lawsuit concerns unpaid loans and sums of money the defendants owe the plaintiffs. Thus, during March 2016 and November 2017 the defendant Tom Sharp executed a promissory note in the amount of approximately \$71,000. The complaint alleges the defendant only paid back approximately \$6,350 and the remaining balance remains outstanding. A lawsuit was commenced and On October 8, 2020 the court granted the plaintiffs motion seeking summary judgment on the breach of contract cause of action. That motion was granted on default. The plaintiffs now seek to sever that cause of action so they can enter judgment. The defendant has moved seeking to vacate the default entered.

He argues that he was never served with the original motion and has thus presented a reasonable excuse for failing to respond to the motion.

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 the defendant was not properly served with process. Specifically, he alleges technical infirmities regarding service, such as improper markings on the envelope that contained the summons, failure to indicate the summons was 'private and confidential' and that there was no postage found on the envelope.

Even if those issues raise questions of fact whether service was proper the defendant must still present a meritorious defense.

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]).

In this case the defendant has not raised any meritorious defense at all concerning the amounts owed pursuant to the promissory note. Therefore, the motion seeking to vacate the default is denied.

Turning to the motion seeking a discontinuance, it is well settled that the court maintains discretion whether to grant a voluntary discontinuance of a litigation pursuant to CPLR §3217(b) (Tucker v. Tucker, 55 NY2d 378, 449 NYS2d 683 [1982]). That discretion includes the determination whether such discontinuance is granted 'without prejudice' (Valladares v. Valladares, 80 AD2d 244, 438 NYS2d 810 [2d Dept., 1981]). Generally, such discontinuance should be granted unless valid reasons, such as prejudice to the defendant, warrant denial (*id.*). Prejudice means the discontinuance would prejudice a substantial right of a party, circumvent an order of the court, avoid the consequences of a potentially adverse determination or produce some other improper result (Marinelli v. Wimmer, 139 AD3d 914, 30 NYS3d 571 [2d Dept., 2016]). Thus, in Catherine Commons LLC v. Town of Orangetown, 157 AD3d 785, 69 NYS3d 662 [2d Dept., 2018]

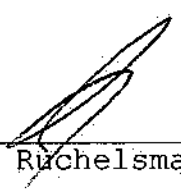
the court denied the request for voluntary discontinuance since such discontinuance would prejudice a party's ability to challenge an assessment. Again in Baez v. Parkway Mobile Homes Inc., 125 AD3d 905, 5 NYS3d 154 [2d Dept., 2015] the court held discontinuance was improper where it was only pursued to avoid the consequences of failing to respond to a 90 notice and an adverse determination of a summary judgement motion filed.

The basis for the discontinuance is so that the breach of contract action can be severed so final judgement can be entered. As noted, the defendant maintains no defense to that claim. Therefore, no prejudice can possibly accrue. Consequently, the motion seeking to discontinue the remaining claims is hereby granted.

So ordered.

ENTER:

DATED: May 28, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC