

Global Revolution TV v A.J. Muste Mem. Inst., Inc.
2022 NY Slip Op 32747(U)
August 12, 2022
Supreme Court, New York County
Docket Number: Index No. 651050/2017
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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GLOBAL REVOLUTION TV, an unincorporated
association, VLADIMIR TEICHBERG, ALEX
GERSHKOVICH, and JOSEPH FIONDA,

Plaintiffs

Index No. 651050/2017

-against-

DECISION AND ORDER

A.J. MUSTE MEMORIAL INSTITUTE, INC.,
and 214 ON STAR LLC,

Defendants
-----x

LUCY BILLINGS, J.S.C.:

Plaintiffs sue for breach of a lease executed by the remaining defendant A.J. Muste Memorial Institute, Inc., demising commercial premises to house plaintiff Global Revolution TV's operations at 165 Canal Street, New York County, or for promissory estoppel, after defendant accepted plaintiffs' security deposit for the premises. Defendant counterclaims for rent owed.

I. PLAINTIFFS' MOTION

Plaintiffs move, citing C.P.L.R. § 2219, to vacate the court's orders dated January 4, 2022, and February 9, 2022, and, pursuant to C.P.L.R. § 2004, to extend plaintiffs' time to depose defendant's witness Heidi Boghosian. NYSCEF Doc. Nos. 200-201. In the January 2022 order, a referee in the submission part,

pursuant to Part 41's instructions, denied plaintiffs' request to extend their deadline to oppose defendant's motion for penalties due to plaintiffs' nondisclosure, returnable January 4, 2022. In the February 2022 order, the court granted defendant's motion to the extent of precluding plaintiff Teichberg's testimony or affidavit at trial or in relation to a motion for summary judgment due to his repeated nonappearance for his deposition.

Regarding the January 2022 order, plaintiffs point out that their request for an extension of time complied with the submission part's requirements and contend that the submission part violated its procedures that required placing the motion on the "All Papers By" (APB) calendar, adjourning the motion three days, even if the referee denied the requested extension. Once the court denied plaintiffs' requested extension without placing defendants' motion on the APB calendar, however, plaintiffs' attorney then made the admitted strategic decision not to take any further action, to request a shorter extension, or to request placement on the APB calendar, waiting to ascertain how the court would decide defendant's motion. Now, after the February 2022 order granting defendant's motion in part, plaintiffs maintain that they have been denied an opportunity to be heard consistent with due process. For the reasons explained below, the court denies plaintiffs' motion.

II. PROCEDURAL BACKDROP

Plaintiffs' opposition to defendant's prior motion was already delinquent by the return date, when plaintiffs sought to extend their deadline to respond. C.P.L.R. § 2214(b).

Plaintiffs first sought an extension from the court, despite defendant's offer to stipulate to a more modest extension that plaintiffs' attorney considered insufficient time to file their opposition. Upon hearing that the court likely would deny plaintiffs' untimely request for the longer extension, plaintiffs' attorney announced his intention to redirect his request and instead seek the extension from the submission part, rather than accept the extension to which defendant stipulated.

The APB calendar, from which plaintiffs contend defendant's motion erroneously was omitted, and which effectively would have granted plaintiff a brief extension, is used when the submitted documents do not comply with the submission part's required procedures. Since plaintiffs insist that their submitted request for an extension complied with all requirements, no reason dictated placing defendant's motion on the APB calendar.

Having strategically decided to take no action upon the submission part's denial of plaintiffs' requested extension, plaintiffs still, to date, have failed to present any opposition to defendant's motion on its merits. Plaintiffs have presented no evidence to substantiate the claims by plaintiffs' attorney

that Teichberg's prolonged illness has prevented Teichberg from appearing for his deposition, which has been delayed repeatedly since August 2019, well before the pandemic, or that Teichberg finally is able and willing to appear.

III. STANDARDS TO BE APPLIED TO PLAINTIFFS' MOTION

While plaintiffs claim to move pursuant to C.P.L.R. § 2219, that rule provides the time and form in which the court is to determine a motion, neither of which are at issue. Plaintiffs' motion is a motion pursuant to C.P.L.R. § 5015(a)(1), for relief from an order upon an excusable default. To vacate plaintiffs' default in responding to defendant's motion, plaintiffs must demonstrate both a reasonable excuse for their default and a meritorious defense to preclusion of Teichberg's testimony.

Luciano v. Felix, 185 A.D.3d 469, 470 (1st Dep't 2020); Besler v. Uzieri, 179 A.D.3d 628, 628 (1st Dep't 2020); Higgs v. Williams, 178 A.D.3d 530, 530 (1st Dep't 2019); Wade v. Giacobbe, 176 A.D.3d 641, 642 (1st Dep't 2019). Plaintiffs have satisfied neither of these requirements. Liparulo v. New York City Health & Hosps. Corp., 193 A.D.3d 593, 594 (1st Dep't 2021); Wiltz v. City of New York, 191 A.D.3d 452, 452 (1st Dep't 2021); Cruz-Guzman v. 2380-2386 Grand Ave., LLC, 190 A.D.3d 409, 409 (1st Dep't 2021); Fernandez v. Santos, 161 A.D.3d 473, 474 (1st Dep't 2018). Unlike the authority on which plaintiffs rely, albeit only in reply, Marine v. Montefiore Health Sys., Inc., 129

A.D.3d 428, 428-29 (1st Dep't 2015), they have not offered a reasonable excuse for their failure to oppose defendant's motion, nor shown that that failure was non-willful, nor offered a meritorious opposition to defendant's motion.

A defaulting party's vague and conclusory excuses without evidentiary support such as plaintiffs, at best, offer here, justify denial of a motion to vacate an order entered on default. Urban D.C. Inc. v. 29 Green St. LLC, 205 A.D.3d 634, 634 (1st Dep't 2022). While plaintiffs' attorney claims he was unable to oppose defendant's underlying motion because he could not obtain an affidavit from Teichberg, plaintiffs fail to explain why Teichberg's affidavit was unobtainable or provide any evidentiary support, such as Teichberg's affidavit now attesting to why he did not submit an affidavit previously. Nor do plaintiffs explain why they filed no opposition whatsoever, even if incomplete, before the deadline. Thus, plaintiffs have failed to demonstrate a reasonable excuse for not opposing defendant's motion to preclude Teichberg's testimony. When the defaulting party fails to provide a reasonable excuse, the court need not consider whether that party has a meritorious defense to the underlying relief. Id.; Rudd Mech. Assoc., Inc. v. ZDG, LLC, 192 A.D.3d 440, 441 (2021); Landusco v. Open Loop NYC, 188 A.D.3d 464, 464 (2020); Luciano v. Felix, 185 A.D.3d at 470.

Plaintiffs have not demonstrated a meritorious defense to

defendant's motion in any event. As set forth above, plaintiffs have not, to date, presented evidence why preclusion of Teichberg's testimony is unwarranted after his repeated nonappearance for his deposition. Plaintiffs made a strategic decision not to do so before the February 2022 order and present no reason to compel the court to grant them yet another bite at this apple. Therefore the court denies plaintiffs' motion to vacate the referee's order dated January 4, 2022, and the court's order dated February 9, 2022.

IV. BOGHOSIAN'S DEPOSITION

Plaintiffs also seek relief from the consequences of their strategic litigation decisions and dilatory tactics in requesting an extension of time to depose defendant's witness Heidi Boghosian. The February 2022 order required defendant to produce Boghosian for a deposition within 20 days after service of the order. That time has expired, not because defendant failed to comply, but because, according to plaintiffs, they decided not to schedule the deposition. Plaintiffs claim they were concerned that defendant would use Boghosian's deposition to oppose plaintiffs' request in this motion to allow Teichberg's deposition, because his deposition then would be out of the order of priority. Plaintiffs do not indicate, however, that they conferred with defendants regarding this assumption. 22 N.Y.C.R.R. § 202.7(a) and (c); Government Empls. Ins. Co. v.

Pellot, 187 A.D.3d 620, 620-21 (1st Dep't 2020); Cashbamba v. 1056 Bedford LLC, 172 A.D.3d 415, 415-16 (1st Dep't 2019); Pirralglia v. Jofsen, 171 A.D.3d 521, 523 (1st Dep't 2019); Kelly v. New York City Tr. Auth., 162 A.D.3d 424, 424 (1st Dep't 2018). Nor did plaintiffs promptly move to extend the time for Boghosian's deposition before the deadline for her deposition had passed. Therefore the court also denies plaintiffs' motion to vacate the February 2022 order's deadline for Boghosian's deposition and to extend that deadline. C.P.L.R. § 2004.

V. CONCLUSION

In sum, the court denies plaintiff's motion to vacate or modify both the referee's order dated January 4, 2022, and the court's order dated February 9, 2022, in all respects. C.P.L.R. §§ 2004, 5015(a)(1). The court grants defendant's unopposed request, due to the pendency of this motion, to extend the parties' time to file motions for summary judgment. C.P.L.R. § 3212(a). The parties may file summary judgment motions by October 11, 2022.

DATED: August 12, 2022


LUCY BILLINGS, J.S.C.

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