

Alghafly v Ewiess

2023 NY Slip Op 32102(U)

June 25, 2023

Supreme Court, New York County

Docket Number: Index No. 650335/2019

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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KHALID ALGHAFLY, AHMAD ALKHAMEES,
 MOHAMMED ALHULEIMI, FAHAD ALSHAIKH, and
 HAMZA ALALI,

Plaintiffs,

- v -

FADI EWIESS,

Defendant.

INDEX NO. 650335/2019

MOTION DATE N/A

MOTION SEQ. NO. 003

**DECISION + ORDER ON
 MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157

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

Defendant Fadi Eweiss moves pursuant to CPLR 5015¹ to vacate the default judgment against him.

“ In April 2017, Eweiss pled guilty in the United States District Court for the Southern District of New York for conspiracy to commit wire fraud in violation of 18 U.S.C. § 1343 and § 1349. The court entered judgment in September 2017 against Eweiss, who was incarcerated at Moshannon Valley Correctional Center in Philipsburg, Pennsylvania” (MV Correctional Center). (NYSCEF 135, Jeff Ifrah, Esq.,² aff ¶12.)

On January 17, 2019, plaintiffs commenced this action arising from a currency trading scheme with promised high rates of return and bank guarantees against losses.

¹ In the Notice of Motion, defendant fails to state the authority pursuant to which he files this motion.

² Defendant’s attorney.

(NYSCEF 1, Summons and Complaint, ¶¶7-8.) On January 23, 2019, while incarcerated at the MV Correctional Center, defendant was admittedly personally served with the summons and complaint. (NYSCEF 135, lfrac Aff ¶ 3; *see also* NYSCEF 4, Aff of Service [Summons and Complaint].) On November 20, 2019, this court granted plaintiffs' motion for default judgment on the cause of action for fraud. (NYSCEF 151, Decision and Order [mot. seq. no. 002].) On January 30, 2020, this court signed a judgment, which was entered by the County Clerk on February 4, 2020 in favor of plaintiffs for a total amount of \$730,356.42 (Judgment). (NYSCEF 127, Judgment Signed by Court; NYSCEF 128, Judgment.) On October 19, 2020, plaintiffs filed a Notice of Entry of the Judgment. (NYSCEF 129, Notice of Entry.) Plaintiffs' counsel affirms in the Affirmation of Service attached to the Notice of Entry that the Judgment, bill of costs, and an attorney affirmation were served on defendant by first class mail at his last known residence, the MV Correctional Center, on October 19, 2020. (*Id.*; *see also* NYSCEF 130, Aff of Service [Judgment].) However, plaintiffs' counsel admits she was informed on June 19, 2019 that defendant no longer resided at the MV Correctional Center. (NYSCEF 68, Return Mail; NYSCEF 67, Miller Aff ¶ 5.) Defendant asserts that he was served with the Judgment in August 2021 as part of an action in Israel seeking to enforce the Judgment. On July 15, 2022, defendant filed this motion to vacate the default judgment on the grounds that the court did not have personal jurisdiction over him, there is a forum selection clause in an agreement between the parties designating the United Kingdom as the forum to file suit, and his application is timely, his default is excusable, and he has a meritorious defense to this action. (See NYSCEF 133, Notice of Motion [mot. seq. no. 003].)

CPLR 5015 (a) (4)

CPLR 5015 (a) (4) provides, “[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 with such notice as the court may direct, upon the ground of lack of jurisdiction to render the judgment or order.” “When a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015 (a) (4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015 (a) (1).” (*Roberts v Anka*, 45 AD3d 752, 753 [2d Dept 2007] [citation omitted], *lv dismissed* 10 NY3d 851 [2008].) Unlike CPLR 5015 (a) (1), there is no prescribed time limit to seek vacatur pursuant to subdivision (a) (5). (*See generally* CPLR 5015; *see also* Hon. Mark C. Dillon, Practice Commentaries, McKinney's Cons Laws, CPLR C5015:3.) “Pursuant to CPLR 5015(a)(4), a default must be vacated once a movant demonstrates lack of jurisdiction.” (*Mortgage Elecs. Registration Sys. v Mercado*, 194 AD3d 420, 421 [1st Dept 2021].)

Here, defendant has not met his burden. Although defendant’s counsel argues that defendant never engaged in business in New York and all the bank accounts defendant used were in Florida, no proof is submitted to support these arguments. There is no affidavit from defendant himself, no evidence of the locations of bank accounts, etc. In fact, defense counsel admits that his understanding that all of the banks that defendant used were located in Florida was “based upon Defendant’s Israeli’s counsel.” (NYSCEF 156, Reply Memo at n. 1.) These conclusory assertions by defense counsel are insufficient.

CPLR 5015 (a) (1)

Under CPLR 5015 (a) (1), a party seeking to vacate a judgment or order must demonstrate both a reasonable excuse for the default and a meritorious defense to the action. (*Eugene Di Lorenzo, Inc. v AC Dutton Lumber Co., Inc.*, 67 NY2d 138, 141 [1986].) Further, a motion to vacate pursuant to this subsection must be filed within a year of service of a copy of the order or judgment.³

Even assuming that this motion is timely, defendant fails to offer a reasonable excuse or meritorious defense. Again, defendant failed to submit an affidavit setting forth a reasonable excuse for failing to appear and a meritorious defense, and the motion pursuant to CPLR 5015 (a) (1) is denied on that ground alone. (*Matter of Orchid C. (Tiffany C.)*, 171 AD3d 666, 666 [1st Dept 2019] [affirming Family Court's denial of a motion to vacate a default based on movant's failure to submit an affidavit setting forth a reasonable excuse for failing to appear and a meritorious defense].) Nevertheless, even if the court considered defense counsel's argument that defendant's incarceration is a reasonable excuse, the court disagrees. Defendant admittedly was aware of this action as he was personally served while incarcerated, and yet never made any attempt

³ Although defendant cites CPLR 317, he does not get the benefit of that statute which allows "a person served with a summons other than by personal delivery" one year from the time that person learns of a judgment to seek vacatur. As stated above, defendant was admittedly personally served with the summons and complaint on January 23, 2019. Rather, the applicable statute is CPLR 5015 (a) (1), which permits a party to file a motion to vacate 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." Thus, defendant's motion to vacate must be filed within one year of service of the Judgment.

to make the court aware of his imprisonment or seek an extension of time to answer or otherwise appear. (See *Matter of Fa'Shon S.*, 40 AD3d 863, 863 [2d Dept 2007].)⁴

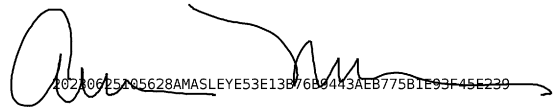
The court rejects defendant's argument based on the forum selection clause in the contract between the parties here. Since the court granted a default judgment on plaintiff's cause of action for fraud, the forum selection clause in the contract moot.

(NYSCEF 122, November 20, 2019 Decision and Order.) In any case, given defendant's admitted fraud, the contract would be void.

Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that as to the remaining claims, the parties shall submit a discovery schedule by July 10, 2023. Otherwise, the remaining claims in this 2019 action could be dismissed for neglect to prosecute.



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<u>6/25/2023</u> DATE			<u>ANDREA MASLEY, J.S.C.</u> ANDREA MASLEY, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE

⁴ A failure to set forth a reasonable excuse renders it unnecessary to consider whether there was a meritorious defense, including whether the parties are bound by a forum selection clause. (See *Time Warner City Cable v Tri State Auto, Inc.*, 5 AD3d 153, 153 [1st Dept 2004] [citation omitted].)