

723 Third Realty LLC v Poke Empire LLC

2023 NY Slip Op 33698(U)

October 11, 2023

Supreme Court, Kings County

Docket Number: Index No. 525596/2019

Judge: Richard Velasquez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of OCTOBER, 2023

P R E S E N T:

HON. RICHARD VELASQUEZ

Justice.

-----X
723 THIRD REALTY LLC,

Plaintiff,

-against-

Index No.: 525596/2019
Decision and Order
Mot. Seq. No.'s 2 &3

POKE EMPIRE LLC, TOBIAS MILLER, and
RICHARD J. GOTTLIEB,

Defendants,

-----X

The following papers NYSCEF Doc #'s to read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed _____	38-47; 48-62
Opposing Affidavits (Affirmations) _____	67-71; 72-77

After having come before the Court on April 19, 2023 and the court having heard argument on said date as both applications were Orders to Show Cause the court finds as follows:

Defendant Miller and Gottlieb move by Order to Show Cause for an order pursuant to NY CPLR 5015(a)(1), vacating the default judgment as to Motion Sequence 1 herein as against MILLER and GOTTLIEB, and permitting the filing and service of the attached Amended Answer/Cross Claims (Exhibit A); and other relief. (MS#2). Plaintiff opposes the same.

Defendant POKE also moves by Order to Cause for an order Under CPLR 3215(c), dismissing the plaintiff's action (and its Amended Verified complaint) against defendant Poke Empire LLC on the grounds that the plaintiff failed to move for the entry of a default judgment against the Poke Empire LLC within one year after Poke Empire LLC's alleged default in failing to appear in the action or respond to the Amended Verified Complaint; or, in the alternative; (2.) In the event the Court determines not to dismiss the action (and the Verified Amended Complaint) as against Poke Empire LLC, under CPLR 2221(a)(t) and 5015(a)(l), vacating a prior Order of this Court, dated January 11, 2023, which, among other things, granted the plaintiff's motion for a default judgment against defendant Poke Empire, LLC, and directed that an inquest be conducted; (3). Permitting the defendant Poke Empire, LLC to appear in the action and to serve its proposed Verified Answer to the plaintiff's Amended Verified Complaint; and (4.) For such other and further relief as the Court deems proper. (MS#3). Plaintiff opposes the same.

DISCUSSION

This is an action for breach of contract and breach of a Limited Guaranty for failure to make monthly rental payments, pursuant to a commercial lease agreement, dated May 14, 2018, between the Plaintiff 723 THIRD REALTY LLC and Defendants POKE EMPIRE LLC ("POKE"), MILLER and GOTTLIEB, regarding the premises located at 723 Third Avenue, New York, New York 10017.

New York CPLR 5015(a)(1) provides that a defaulting party may, within one year of the default, obtain an order to vacate the default provided the party can demonstrate that the default was "excusable" and that there is a potentially meritorious defense to

the underlying action. See *Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co., Inc.*, 67 NY2d 138 (1986); *Sussman v. Jo-Sta Realty Corp.*, 99 AD3d 787 (2d Dept. 2012).

In support of their Order to Show cause Peititioners MILLER and GOTTLIEB contend Individual defendants' bases for challenging the default are that they have a valid excuse for their default and a bona fide defense to the underlying complaint, in that that the basis for plaintiff's motion for summary judgment is a "Limited Guarantee" which never contemplated the individual defendants' responsibility in a scenario based on a default judgment against the tenant and co-defendant POKE EMPIRE.

In support of their motion to vacate the default the defendants contend; "There are several Poke Empire matters with the firm and, through inadvertent law office failure, the firm did not respond to the amended complaint or the default motion herein because lines of responsibility were crossed." Defendants counsel also admits "While we admit that neither Mr. Gleason nor anyone else at the firm filed an Amended Verified Answer corresponding to plaintiff's amended complaint, it is clear from Mr. Gleason's initial filing that the individual defendants believe they have a strong valid defense to the underlying action and that plaintiff was aware of the basis thereof since the filing of the original Verified Answer with Cross Claims."

In the present case, contrary to the defendants' contentions they fail to state a reasonable excuse for the default, they admit they never responded to the amended complaint or the default judgment motion. Additionally, defendants' contention that they have a meritorious defense is unpersuasive as both individuals signed as individual guarantor's in the contract exposing each of them to individual liability in the event of a breach of the contract.

Accordingly, defendants Miller and Gottlieb Order to Show Cause for an order pursuant to NY CPLR 5015(a)(1), vacating the default judgment as to Motion Sequence 1 herein as against MILLER and GOTTLIEB, and permitting the filing and service of the attached Amended Answer/Cross Claims (Exhibit A); and other relief is hereby denied, for the reasons stated above. (MS#2)

Turning to MS#3 POKE EMPIRE LLC's (hereinafter referred to as "Poke") motion, which seeks to dismiss the Plaintiff's Complaint; or in the alternative, vacate the Decision and Order, dated January 11, 2023, granting Plaintiff a default judgment against Defendant Poke; and granting Defendant Poke leave to file an Amended Verified Answer to Plaintiff's Amended Complaint. In opposition, plaintiffs contend said motion should be denied in its entirety for failure to demonstrate a reasonable excuse for its default and a meritorious defense to the underlying action herein. Plaintiff also respectfully requests that the Court allow Plaintiff to proceed with an inquest for the assessment of damages owed by the Defendants, and for all other relief that may be just and proper under the circumstance. Plaintiffs contend they have a reasonable excuse for not moving for a default judgment earlier, which is an exception to the one-year rule.

The affidavits of Noel Shu and John Salmons, members of Defendant Poke Empire LLC, assert that they never received a copy of the Amended Summons and Verified Complaint, however, this is insufficient to rebut the proof of service upon the registered agent for Defendant Poke as demonstrated by the affidavit of service filed by Plaintiff. Pursuant to CPLR § 311-a, "service of process on any domestic or foreign limited liability company shall be made by delivering a copy personally to (i) any

member of the limited liability company in this state, if the management of the limited liability company is vested in its members, (ii) any manager of the limited liability company in this state, if the management of the limited liability company is vested in one or more managers, (iii) to any other agent authorized by appointment to receive process, or (iv) to any other person designated by the limited liability company to receive process, in the manner provided by law for service of a summons as if such person was a defendant. N.Y. CPLR § 311-a. On February 17, 2020, Angela Lee, a licensed process server, duly served Plaintiff's Amended Summons and Verified Complaint on Defendant Poke Empire LLC, pursuant to CPLR § 311-a(iii), by personally delivering a true copy to Francis White, a registered agent, at 160 Greentree Drive Suite 101, Dover, Delaware 19904. See Plaintiff's Exhibit "B." Accordingly, Defendant Poke's claim of not personally receiving the Amended Summons and Complaint has no merit, as the pleadings were not served upon Noel Shu. As such Defendant has failed to establish a reasonable excuse for its three-year default in filing an Amended Answer to Plaintiff's Amended Complaint and an opposition to Plaintiff's motion for default judgment.

Moreover, Plaintiffs have a reasonable excuse for the delay in filing for the default. One exception to CPLR 3215(c) is that the failure to timely seek a default on an unanswered complaint may be excused if sufficient cause is shown why the complaint should not be dismissed. Sufficient cause exists where (1) the failure to seek a default judgment within one year after the default is excusable, and (2) the cause of action is meritorious. The Appellate Division has held that "evidence of ongoing [settlement] negotiations demonstrate that the plaintiffs had not abandoned the action [and can

constitute a reasonable excuse for a delay in moving for a default judgment.]” *Iorizzo v. Mattikow*, 807 NYS2d 663, 664, 25 AD3d 762, 764, (2nd Dept. 2006). In the present case the plaintiff has demonstrated the parties were in good faith settlement negotiations and that is the reason they waited beyond the year to file for the default judgment.

Accordingly, Defendant POKE EMPIRE LLC’s motion, which seeks to dismiss the Plaintiff’s Complaint; or in the alternative, vacate the Decision and Order, dated January 11, 2023, granting Plaintiff a default judgment against Defendant Poke; and granting Defendant Poke leave to file an Amended Verified Answer to Plaintiff’s Amended Complaint is hereby denied, for the reasons stated above Plaintiff’s have a reasonable excuse for failing to move for the entry of a default judgment against the Poke Empire LLC within one year after the alleged default. (MS#3).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
October 11, 2023

ENTER FORTHWITH:



HON. RICHARD VELASQUEZ

Hon. Richard Velasquez, JSC

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