

Gulf Coast Bank & Trust Co. v LM Rest. Group LLC

2023 NY Slip Op 33711(U)

October 13, 2023

Supreme Court, New York County

Docket Number: Index No. 650885/2022

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

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INDEX NO. 650885/2022

GULF COAST BANK AND TRUST COMPANY,
Plaintiff,

MOTION SEQ. NO. 003; 004

- v -

**DECISION + ORDER ON
MOTION**

LM RESTAURANT GROUP LLC and MICHAEL SINENSKY,
Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 71, 73, 74, 75, 78, 79

were read on this motion to/for CONTEMPT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 76, 77, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95

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

This court granted plaintiff’s unopposed motion for summary judgment in lieu of complaint by the Decision and Order dated July 5, 2022, and entered on July 14, 2022. After plaintiff served Notice of Entry of the Decision and Order via FedEx overnight mail on both defendants, Rich Pawelczyk (“Pawelczyk”), counsel for defendants allegedly contacted plaintiff to settle the matter. However, the attempted settlement did not materialize. According to plaintiff, defendants failed to make payments on the amount owed and consequently, plaintiff served defendants and Michael Sinensky’s (“M. Sinensky”) wife, non-party Irina Sinensky (“I. Sinensky”), with information subpoenas on or about October 24, 2022. Plaintiff asserts that defendants and the non-party have not complied with the information subpoenas. On November 10, 2022, Elena Sinensky, Esq, informed plaintiff that she was representing defendants and I. Sinensky in the action.

Plaintiff now moves by Order to Show Cause, pursuant to CPLR 2308(a), (b) and Judiciary Law §§ 753 and 756, for an Order holding defendants and I. Sinensky in contempt for failing to comply with the information subpoenas and directing them to pay a fine equal to all of the attorneys’ fees, costs, and expenses incurred by plaintiff as a result of their failure to comply with discovery obligations (Mot. Seq. 003). In opposition, M. Sinensky contends that he was never personally served with the underlying action and that his failure to appear was unintentional. He further argues that he did not sign the personal guaranty that forms the basis for the entire action against him, and that he should first be given the opportunity to file an Answer to plaintiff’s motion for summary judgment in lieu of a complaint. Defendants and I. Sinensky set forth that there is no basis here for contempt, sanctions, and fees because over a ten-month period during which time the subpoenas in question were served, their counsel communicated with plaintiff’s counsel about resolving the matter. Lastly, they articulate that plaintiff is a foreign corporation, not authorized to

do business in New York, and has no standing to bring an action in this Court pursuant to BCL § 1312, and that this action must be dismissed.

In Mot. Seq. 004, M. Sinensky moves by an Order to Show Cause, pursuant to CPLR 2221 and/or 5015, for a stay of these proceedings seeking a judgment, allowing M. Sinensky to submit opposition to plaintiff's summary judgment motion in lieu of a complaint to vacate the Decision and Order dated July 5, 2022. He argues that public policy favors settling disputes on the merits, and that he has a reasonable excuse in that he was never personally served with the underlying action. Service of process was instead made upon the doorman in the building in which he sometimes resided. According to M. Sinensky, he was neither given the legal papers by the doorman or any building personnel, nor did he receive the mailing. In addition to the alleged lack of service, M. Sinensky asserts that he has a meritorious defense in that he relied on his counsel to negotiate a settlement during the relevant time. M. Sinensky furnishes an affirmation from Elena Sinensky, Esq, wherein she lists dates on which attempted settlement discussions were held (NYSCEF Doc. No. 59, *Elena Sinensky affirmation*). M. Sinensky further claims that he did not sign the personal guaranty that forms the basis for the entire action against him, but that a loan broker affixed his electronic signature to the personal guaranty without authorization.

In opposition, plaintiff disputes M. Sinensky's claim of improper service, arguing that the affidavit of plaintiff's process server accompanied by a photograph of the postage-stamped mailing to defendant at his residence, and Pawelczyk acknowledged receipt of the motion for summary judgment confirm that service of process was proper. Plaintiff rejects M. Sinensky contention that the alleged protracted settlement negotiations support his argument that his default was not willful, arguing that rather, the only two communications that occurred between the parties prior to the motion for summary judgment being marked fully submitted with no opposition on March 15, 2022: an e-mail sent on March 4, 2022 and a follow-up e-mail sent on March 8, 2022, cannot support the position that the default was not willful. Likewise, plaintiff argues that M. Sinensky's assertion that his signature was affixed to the guaranty without consent is meritless insofar as he is a sophisticated party presumed to have read the contents of the loan agreement and assented to the terms with his signature, or authorized his signature to be affixed thereunto; M. Sinensky is responsible for the actions of his agent performed within the scope of the agent's apparent authority; and that M. Sinensky ratified the loan agreement including the personal guaranty (NYSCEF Doc. No. 95, *plaintiff's opposition*). Lastly, although the issue of standing is not raised in Mot. Seq. 004, plaintiff asserts that while it is not authorized to conduct business in the State of New York, New York Banking Law § 200(4) entitles it to sue in New York courts.

Both motions are hereby consolidated for disposition.

“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).” (*Caba v Rai*, 63 AD3d 578, 581 n 1 [1st Dept 2009].) “Pursuant to CPLR 5015(a)(4), a default must be vacated once a movant demonstrates lack of jurisdiction.” (*Mortgage Electronics Registration Systems, Inc. v Mercado*, 194 AD3d 420, 421 [1st Dept 2021].)

Under CPLR 5015(a)(1), a court may vacate an Order of Judgment upon the showing by the defaulting party of a reasonable excuse for the default and a meritorious defense to the action. (See *Di Lorenzo Inc. v Dutton Lbr*, 67 NY2d 138, 141 [1986].) “What constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court.” (*Rodgers v 66 E. Tremont Hgts. Hous. Dev. Fund Corp.*, 69 AD3d 510, 510 [1st Dept 2010].) “Absent a reasonable excuse, vacatur is not appropriate regardless of whether defendant has a meritorious defense” (*Citibank, N.A. v K.L.P. Sportswear, Inc.*, 144 AD3d 475, 476-477 [1st Dept 2016].)

The court shall first address the issue of plaintiff’s alleged lack of standing to commence this action (Mot. Seq. 003). Defendants and I. Sinensky’s claim that plaintiff lacks standing to sue under BCL §1312 because it is a duly organized banking corporation under the laws of the State of Louisiana and maintains no office in New York lacks merit. It has been held that “Banking Law § 200 expressly authorizes a ‘foreign banking corporation[] which [does] not maintain an office in this state for the transaction of business . . . [to] enforce[e] in this state obligations . . . acquired by it” (*Flat Rock Mtge. Inv. Trust v Lott*, 214 AD3d 1221, 1223 [3rd Dept 2023], citing *Commonwealth Bank & Trust Co. v Tioga Mills*, 78 AD2d 953, 953 [3d Dept 1980]; *Banque Arabe Et Int’l D’Investissement v One Times Square Assocs. Ltd. Partnership*, 193 AD2d 387, 387 [1st Dept 1993]). Hence, plaintiff has standing to commence this action.

Turning next to the issue of service, defendant’s unsubstantiated claim of non-receipt of service is belied by the proof and does not constitute a reasonable excuse for default. “An affidavit of service constitutes prima facie evidence of proper service and the ‘mere denial of receipt of service is insufficient to rebut the presumption of proper service created by a properly-executed affidavit of service” (*Jones v Grooms*, 209 AD3d 584, 584 [1st Dept 2022], quoting *Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]). According to affidavit of service, after four unsuccessful attempts (on February 28, 2022, March 1, 2022, March 4, 2022, and March 9, 2022) to serve M. Sinensky personally at his residence, process was served upon the doorman at M. Sinensky’s residence pursuant to CPLR 308(2). The process server averred that following the service on the doorman, he mailed a copy of the summons and complaint to M. Sinensky at his last known address (NYSCEF Doc. No. 13, *affidavit of service on M. Sinensky*). Service of process on the doorman was reasonably calculated to afford M. Sinensky with notice of commencement of the action, since the doorman “could reasonably be expected to convey the message or papers to [him], as the intended party” (*Edan v Johnson*, 117 AD3d 528, 529 [1st Dept 2014]). M. Sinensky has not provided any evidence establishing that the doorman described in the affidavit of service was not a person of suitable age and discretion, or that he is not the doorman at his residence. Therefore, the Order to Show Cause (Mot. Seq. 004) seeking to vacate the Decision and Order dated July 5, 2022, is denied insofar as the denial-of-service claim is unavailing, and M. Sinensky does not offer a reasonable excuse (see *U.S. Bank Trust N.A. v Rivera*, 187 AD3d 624, 625 [1st Dept 2020]). Therefore, this court need not address whether M. Sinensky has established a meritorious defense.

Concerning that branch of Mot. Seq. 003 seeking compliance of the *Duces Tecum and Ad Testificandum* plaintiff served upon defendants on October 24, 2022, and October 26, 2022, CPLR 2308(b)(1) permits a party to move to compel compliance with a subpoena. (See *Citibank, N.A. v Angst, Inc.*, 61 AD3d 484, 485 [1st Dept 2009].) At the time of the filing of Mot. Seq. 003, compliance with the subpoenas remained outstanding. As the judgment creditor, plaintiff is entitled to disclosure of “all matter relevant to the satisfaction of the judgment” through service of

subpoenas upon “any person” “[a]t any time before a judgment is satisfied or vacated” (CPLR 5223). This discovery includes relevant information “from either the judgment debtor or a third party in order to determine whether the judgment debtor[] . . . transferred any assets so as to defraud the judgment creditor” (*Berisha v Tosca Caff *, 202 AD3d 531, 532 [1st Dept 2022]). M. Sinensky’s lone contention in opposition, namely, that he was never personally served with the underlying action and hence, his failure to oppose plaintiff’s summary judgment motion has been found to be unavailing. Therefore, that branch of Mot. Seq. 003 seeking compliance with the subpoenas is granted.

Nevertheless, that branch of Mot. Seq. 003 seeking to hold defendants and I. Sinensky in contempt and fine them for failure to comply with the subpoenas is denied, without prejudice. It has been concluded that CPLR 2308(a) embraces subpoenas issued by an officer of the court (such as an attorney) at any stage of a judicial proceeding, regardless of whether the subpoena was specifically returnable in court, and that disobedience of a judicial subpoena is punishable by contempt. (See *Cadlerock Joint Venture, L.P. v Patterson*, 199 AD3d 557, 557 [1st Dept 2021].) Contrary to plaintiff’s claim that defendants and I. Sinensky’s have demonstrated unwillingness to comply with their respective discovery obligations, the available evidence evinces that the parties were in communication during the relevant times and in fact, defendants’ counsel proposed dates for M. and I. Sinensky to answer questions and submit documents in response to the information subpoenas, as well as, dates for them to appear for depositions (NYSCEF Doc. No. 45, *exhibit 16*). Based on the foregoing, the court declines to impose fines at this time. All other arguments have been considered and are either without merit or need not be addressed. Accordingly, it is hereby

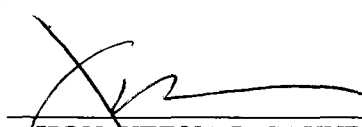
ORDERED that plaintiff’s motion for contempt (Mot. Seq. 003) is granted solely to the extent that Michael Sinensky, Irina Sinensky, and LM Restaurant Group LLC are hereby directed to comply with the subpoenas *Duces Tecum And Ad Testificandum* served upon them on October 24, 2022, and October 26, 2022 (NYSCEF Doc. Nos. 41, 42, 43), no later than 45 days after service of this decision and order, with notice of entry, and the motion is otherwise denied; and it is further

ORDERED that the Mot. Seq. 004 seeking to vacate Decision and Order dated July 5, 2022, and entered on July 14, 2022, is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon LM Restaurant Group LLC, Michael Sinensky, and Irina Sinensky.

This constitutes the decision and order of this court.

October 13, 2023


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER