

Valley Natl. Bank v Shamuely Cab Corp.

2023 NY Slip Op 33754(U)

October 17, 2023

Supreme Court, New York County

Docket Number: Index No. 655246/2020

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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VALLEY NATIONAL BANK,

Plaintiff,

- v -

SHAMUELY CAB CORP., SAMI ITSHAIK, 412 EXPRESS
MANAGEMENT CORP.

Defendants.

INDEX NO. 655246/2020

MOTION DATE 07/07/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to VACATE JUDGMENT AND DISMISS.

Defendants Shamuely Cab Corp. (“Shamuely”) and Sami Itshaik (“Itshaik” and with Shamuely “Answering Defendants”) move to vacate the April 13, 2022 judgment (“Judgment” [NYSCEF 45]) in favor of Plaintiff Valley National Bank (“Plaintiff” or “VNB”) pursuant to CPLR 5015(a)(4) and to dismiss the case as abandoned pursuant to CPLR 3215(c). Answering Defendants argue that summary judgment was improperly granted because they only answered the original complaint, not the amended complaint, and that issue was therefore not joined as required by CPLR 3212(a). For the reasons that follow, Defendants’ motion is **denied**.

BACKGROUND

This is an action to enforce a loan agreement. Plaintiff’s Verified Complaint was filed on October 13, 2020 against Shamuely, the Borrower, and Itshaik, a Guarantor (NYSCEF 1). Answering Defendants’ Answer was filed on November 20, 2020 (NYSCEF 3). The Answer did not raise lack of jurisdiction as a defense.

Plaintiff filed a Supplemental Summons and Amended Verified Complaint on December 8, 2020, adding Defendant 412 Express Management Corp. (“412 Express”) (NYSCEF 5-6). The allegations against Answering Defendants were not changed. Answering Defendants did not file an answer to the Amended Verified Complaint.

Plaintiff moved for summary judgment against Answering Defendants and default judgment against 412 Express on March 19, 2021 (NYSCEF 11). The motion attached the Complaint, Answer and Amended Complaint (NYSCEF 21-23). The affirmation in support of Plaintiff’s counsel provides that “[f]ollowing service of the Amended Verified Complaint, Answering Defendants did not amend their Answer” (NYSCEF 14 ¶5). Plaintiff did not seek a default judgment against Answering Defendants.

On April 21, 2021, Answering Defendants filed opposition papers limited to an argument that payments on the loan should be suspended due to the COVID-19 pandemic (NYSCEF 30). Answering Defendants did not argue that summary judgment was premature because they had not answered the Amended Complaint (or otherwise) or that the Court lacked jurisdiction. 412 Express did not file any opposition.

On November 30, 2021, the Court issued a Decision and Order granting summary judgment on the merits against Answering Defendants and a Default Judgment solely against 412 Express (NYSCEF 34). The Judgment was entered on April 13, 2022 with notice of entry served on April 14, 2022 (NYSCEF 45-46). No appeal was taken.

The docket was silent for more than a year until Moving Defendants filed this motion (NYSCEF 48). The motion is supported by, among other things, an affidavit of Mr. Itshaik who states that the “merits and defenses initially raised remain true and accurate” (NYSCEF 51 ¶9).

DISCUSSION

CPLR 5015(a)(4) provides that the “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.” Answering Defendants argue that, because they did not answer the Amended Complaint, summary judgment was improperly granted because issue was not joined as required by CPLR 3212(a). Answering Defendants do not argue that the Court lacks personal or subject matter jurisdiction.

The Answering Defendants’ reliance on *JBBNY, LLC v Begum*, 156 AD3d 769, 771 [2d Dept 2017], is misplaced. In that case, the defendant did not answer or move against the complaint but did file a notice of appearance. The Second Department held that summary judgment was properly denied where no responsive pleading was filed. Here, by contrast, the Answering Defendants did join issue by filing an Answer to the Complaint and opposed summary judgment on the merits. CPLR 3025(d) provides: “[e]xcept where otherwise prescribed by law or order of the court, there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented.” Thus, “a trial court has discretion to vary or dispense with the answer requirement. . . without a formal request from the parties” (*Bahar v Sanieoff*, 210 AD3d 459, 460 [1st Dept 2022]). The answer requirement may be properly dispensed with where “no new factual allegations were asserted in the amended complaint. . .” (*id. citing Stephanie R. Cooper, P.C. v. Robert*, 78 A.D.3d 572, 573, 911 N.Y.S.2d 63 [1st Dept. 2010] [other citations omitted]).

A similar conclusion was reached by the Second Department in *Triolo v Greenwood*, 216 AD3d 1035 [2d Dept 2023][citations omitted]. In *Triolo*, the Second Department held that the

answering requirement should be dispensed where “unusual circumstances” are present and “in the interest of judicial economy” where the merits of the dispute are before the Court (*id.* at 1036-1037).

Contrary to Answering Defendants’ contention in reply, a different result is not required by *Valentine Tr., Inc. v Kernizan*, 191 AD2d 159, 160 [1st Dept 1993]. In *Valentine*, “defendant answered the original amended complaint but was afforded no opportunity to respond to the second amended complaint prior to the court granting Valentine’s motion for summary judgment.” Here, the Amended Complaint only adds 412 Express as an additional defendant. Answering Defendants filed opposition to Plaintiff’s summary judgment, and did not argue that the motion was premature or that the Court lacked jurisdiction. Moreover, Mr. Itshaik has confirmed that Answering Defendants would not have asserted any new defenses in an amended answer.

In sum, the Court finds that Answering Defendants have not established legitimate grounds to vacate the judgment entered against them. Moreover, because the Court did not (and does not) find that the Answering Defendants were in default, the time period referenced in CPLR 3215(c) is not implicated and the second prong of Answering Defendants’ motion seeking dismissal on that ground is denied.

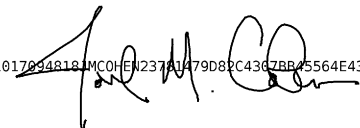
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Accordingly, it is

ORDERED that Answering Defendants’ motion to vacate and dismiss is **DENIED**.

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

10/17/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: