5665 Sunrise Hwy. Corp. v Holbrook Dev. Corp.
2024 NY Slip Op 35168(U)
August 13, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 605907/2020
Judge: James Hudson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Supreme Court of the State of New York
County of Suffolk
Commercial Division Part XLVI
Memorandum Decision

***PRESENT*:**
HON. JAMES HUDSON
Acting Justice of the Supreme Court

----------X

5665 SUNRISE HIGHWAY CORP.,

Plaintiff,

-against-

HOLBROOK DEVELOPMENT CORP.; MARKETING, INC. OF ISLANDIA and STEVEN KESHTGAR,

Defendants.

----------X

INDEX NO.: 605907/2020
MOT. SEQ. NO.: 001 – MotD
002 – MD

THE LAW OFFICES OF RICHARD J. DAVOLIO, P.C.
Attorneys for the Plaintiff
15 Main Street, Suite 10
Sayville, NY 11782

ERLICH, PETRIELLO, GUDIN, PLAZA & REED, P.C.
Attorneys for Defendants Holbrook Development Corp., Marketing, Inc. of Islandia, Steven Keshtgar
555 5th Avenue, 14th Floor
New York, NY 10017

Defendants, Holbrook Development Corp., Marketing, Inc. of Islandia, and Steven Keshtgar in their motion (Mot. Seq. 001) request an Order pursuant to **CPLR 3215**: 1) granting a default judgment on all counterclaims contained within the answer with counterclaims; 2) setting the matter down for a damages inquest; 3) dismissing the complaint; 4) awarding a money judgment to the defendants in an amount to be determined at trial; 5) awarding the defendants treble damages on the money judgment as a result of the plaintiff's fraud; 6) granting a declaratory judgment to defendant Steven Keshtgar that his personal guarantee is a nullity; 7) a judgment dismissing all causes of action against defendant Marketing, Inc. of Islandia as a matter of law.

Plaintiff, 5665 Sunrise Highway Corp. ("5665 Sunrise") by cross-motion (Mot. Seq. 002) requests an order pursuant to **CPLR 317** compelling the defendants to accept the answer to the counter claims.

This action concerns a March 9th, 2012 Agreement ("Contract") to purchase a gas station/convenience store business ("Business"). That Business was owned and operated by the plaintiff in leased premises pursuant to a twenty (20) year commercial lease ("Lease") from a non-party landlord (NYSCEF Doc No. 33, Purchase Agreement and Lease). 5665 Sunrise the contract vendor/seller, by Tom DiCicco and Tom Campbell, sold the Business to Holbrook Development Corp. ("Holbrook"), whose signatory was its president, Steven Keshtgar. The sale consideration was the Business' goodwill and equipment. The Contract was executed by each party solely in their corporate capacity. Defendant Marketing, Inc. is not a party to the Contract. Defendant Steven Keshtgar is not a party to the Contract. The sale price was $500,000; of which $200,000 was paid at the closing, and $300,000 was financed by the plaintiff. Holbrook accepted an assignment of the Lease and took immediate possession upon the Business purchase. The plaintiff alleges that Mr. Keshtgar signed a Ten (10) year promissory note to finance the $300,000 due on the Business purchase, which payment he personally guaranteed ("Note"). No copy of a promissory note has been filed. The complaint alleges that Holbrook defaulted at an unspecified date and has refused to pay the balance despite due demand. Holbrook, in its answer alleges that 5665 Sunrise breached the Contract by misrepresenting its ability to operate the Business. Holbrook alleges that 5665 Sunrise concealed that it was in violation of Town of Islip Building Code and unable to legally operate the subject gas

station/convenience store or sell the Business for that use. Holbrook alleges that the multiple violations were never resolved or rectified by 5665 Sunrise. Holbrook alleges that it paid over $240,000 to 5665 Sunrise on the Note and ceased paying because the cost of rectifying the violations, according to Mr. Keshtgar, exceeds $350,000 (NYSCEF Doc No. 32, Affidavit, para. 16).

On December 24th, 2014, Holbrook filed for chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Eastern District of New York, which bankruptcy was assigned case no. 14-75671. The bankruptcy court has exclusive jurisdiction to adjudicate dischargeability of debts and claims and the scope of discharge (***Woodson v. Robintech, Inc.***, 69 BR 77 [ED La 1986]).

The plaintiff was noticed in the bankruptcy case as a secured creditor (NYSCEF Doc No. 60). The plaintiff did not object to the March 28th, 2016 Second Amended Plan of Reorganization ("Plan") or file a notice of claim. The plaintiff, as a secured creditor, was barred from asserting non-dischargeability of its prepetition debt upon confirmation of the chapter 11 plan and failing to timely seek plan revocation (***Matter of Pavlovich***, 952 F2d 114 [CA5 La 1992]). Upon confirmation of a chapter 11 plan, all prior obligations and rights of the parties are extinguished and replaced by the plan (***In re Friedberg***, 192 BR 338 [SDNY 1996]). A confirmed chapter 11 plan has the effect of a final judgment (***In re Berryman Products, Inc.***, 183 BR 463, *affd* 91 F3d 140 [ND Tex 1995]).

Pursuant to Judge Trust's June 30th, 2016 Final Decree, which closed the Holbrook bankruptcy case:

> Except as otherwise provided for in the Plan, the Debtor will be discharged from any debt that arose before confirmation of the Plan, subject to the occurrence of the Effective Date to the extent specified in Bankruptcy Code §1141(d)(1)(A), except that the Debtor will not be discharged of any debt: (i) imposed by Plan; (ii) specified under Bankruptcy Code §1141(d)(6)(A) if a timely complaint is filed in accordance with Bankruptcy Rule 4007(c); or (iii) specified under Bankruptcy Code §1141(d)(6)(B) (NYSCEF Doc No. 59, Final Decree para. 4).

The effect of a confirmation of a chapter 11 plan is to place the debtor back in business on his own feet subject to the plan (***In re Lieb Bros., Inc.***, 198 F Supp 229 [D NJ 1961]). All property of the bankruptcy estate vests in the debtor free and clear of all claims in interest of creditors and discharges the non-liquidating corporate debtor free and clear of all claims in interest of creditors (***In re American Properties, Inc.***, 30 BR 239 [Bkrtcy D Kan 1983]).

No copy of the Plan has been filed. No copy of an adversary proceeding by 5665 Sunrise against Holbrook has been filed. The confirmation of the chapter 11 plan caused all listed creditors to be bound by its provisions, whether or not a creditor was impaired and whether or not the creditor had previously filed a claim. However, it is unclear as to whether the debt complained of by the plaintiff against Holbrook has been discharged in bankruptcy. The defendants fail to attach a copy of the Plan with their motions. Absent the Plan, the Court is unable to ascertain which debt has been discharged or remained.

Under the circumstances, the branch of the defendants' motion to dismiss the complaint is denied. The Court notes that defendants failed to specify the grounds upon which the request was based pursuant to CPLR 2214 (a). In any event, the defendants failed to make a prima facie showing of entitlement to judgment as a matter of law and failed to

tender sufficient admissible evidence to eliminate any material issues of fact (*see* ***Winegrad v N.Y. Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

The Court will next consider defendants Marketing, Inc. of Islandia and Steven Keshtgar. There is no allegation that Marketing, Inc. of Islandia is a party to the Contract. The record reveals that entity is not a signatory. Generally, privity between a plaintiff and a defendant is required to support a breach of contract claim (*see* ***Tutor Perini Bldg. Corp. v. Port Auth. of N.Y. & N.J.***, 191 AD3d 569, 143 NYS3d 12 [1st Dept 2021]; ***Seaver v. Ransom***, 224 NY 233, 224 NYS 233 [1918]). The complaint will be dismissed as to Marketing, Inc. of Islandia.

The complaint alleges that Steven Keshtgar signed a personal guarantee on a promissory note. As stated hereinabove, no promissory note has been filed despite this being an action on the note. Defendant Steven Keshtgar, through the responsive pleadings has admitted to having signed the personal guarantee complained of in the action. The complaint will not be dismissed as to Steven Keshtgar.

Defendants' motion will be examined and considered solely as pertains to the remaining defendants Holbrook and Steven Keshtgar. The motion requests default judgment pursuant to **CPLR 3215 (a)**, on the ten (10) counterclaims asserted in the answer (NYSCEF Doc No. 9).

The answer with counterclaims was served on February 1st, 2021 (NYSCEF Doc No. 11, Affidavit of Service). On April 24th, 2023, the plaintiff untimely filed a reply to the counterclaims as exhibit "A" to its cross-motion (NYSCEF Doc No. 57). The plaintiff,

by cross-motion (seq. no. 002) requests that the defendants be compelled to accept its late answer to the counterclaims.

It has been established that the plaintiff defaulted in answering the counterclaim (*see* **CPLR 3215 [f]**; ***Atlantic Cas. Ins. Co. v. RJNJ Servs, Inc.***, 89 AD3d 649, 651, 932 NYS2d 109 [2d Dept 2011]). The question is whether the default is excusable and the late response thereby accepted.

Pursuant to **CPLR 3012 (d)**, the plaintiff's cross-motion to compel acceptance of its late response must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense (***HSBC Bank USA v. Pantel***, 208 AD3d 643, 644, 173 NYS3d 608 [2d Dept 2022]; ***Sadowski v. Windsor Vil. Apts. Co., LLC***, 200 AD3d 816, 817, 155 NYS3d 120 [2d Dept 2021]; ***Wilmington Trust, N.A. v. Pape***, 192 AD3d 947, 949, 140 NYS3d 712 [2d Dept 2021]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (***Cumanet, LLC v. Murad***, 188 AD3d 1149, 1153, 137 NYS3d 412 [2d Dept 2020]).

Plaintiff's counsel argues that the automatic stay in defendant Holbrook's bankruptcy proceeding prohibited 5665 Sunrise from answering the counterclaims. It is a matter of public record that the Holbrook bankruptcy was closed on June 30th, 2016. That date is five (5) years prior to the defendant filing the contested counterclaim. The Plaintiff has cited to ***Junior v. City of New York***, 85 AD2d 683, 445 NYD2d 503 (2d Dept 1981) in support of its contention that it had a reasonable excuse for its untimely answer. That case may be distinguished. In ***Junior***, the court found that the delay was "a relatively short

time" of thirty three (33) days (***Id.*** at 684). In the case at bar, the delay was more than two (2) years after service of the defendant's answer.

The Court, in its discretion, finds that the plaintiff's reliance upon a belief that an automatic stay in bankruptcy precluded it from timely answering the counterclaim does not constitute a reasonable excuse. The Court finds that the automatic stay was lifted when the Bankruptcy Court issued the order confirming the Chapter 11 plan (*see* 11 USC § 362 [c]; § 1141 [b]; ***In re Turning Point Lounge***, 111 BR 44 [WD NY 1990]; ***In re Fortner Oilfield Servs.***, 49 BR 9 [ND Tax 1984]; ***Mercury Capital Corp. v. Shepherds Beach***, 281 AD2d 604, 605, 723 NYS2d 48 [2d Dept 2001]). Additionally, the late service of plaintiff's response to the counterclaims is not *de minimus*.

The court in ***Junior*** found that the defaulting party had demonstrated a meritorious defense. In the case at bar, plaintiff's counsel states, without elaboration, "The Plaintiff has a viable defense to the counterclaims as stated in the complaint" (NYSCEF Doc No. 56, Affirmation para. 10). Counsel further states: "The Plaintiff herein has demonstrated a meritorious defense and its desire to defend the counterclaims both by appearing at numerous court conferences and also by serving its answer" (para. 17). The Court does not find that the plaintiff has stated a meritorious defense.

The relief requested by the defendants' ninth (9^{th}) counterclaim is repeated as his tenth (10^{th}) affirmative defense and final request for relief pursuant to their motion: for a declaratory judgment that Keshtgar's personal guarantee on the Note constitutes a nullity. The chief relief sought by the defendants is a default judgment on that counterclaim. Upon being granted, that request will have the effect of a final judgment (**CPLR 3001**).

The Court has carefully considered each remaining argument, and each is denied.

Accordingly, it is

ORDERED, that the motion (Mot. Seq. 001) by the defendants, Holbrook Development Corp., Marketing, Inc. of Islandia, and Steven Keshtgar which requests, pursuant to **CPLR 3215**, default judgment against Plaintiff 5665 Sunrise Highway Corp. is granted as to defendants Holbrook Development Corp. and Steven Keshtgar; and it is further

ORDERED, that the request for dismissal of all causes of action against defendant Holbrook Development Corp. is denied; and it is further

ORDERED, that the request for dismissal of all causes of action against defendant Marketing, Inc. of Islandia is granted; and it is further

ORDERED, that the balance of the requested relief is denied; and it is further

ORDERED, that the cross-motion (Mot. Seq. 002) by the plaintiff, 5665 Sunrise Highway Corp. is denied; and it is further

This memorandum also constitutes the Order of the Court.

Dated: August 13th, 2024
Riverhead, NY

HON. JAMES HUDSON
Acting Justice of the Supreme Court