SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3

NASSAU COUNTY

AUTO-CHLOR OF NYC, INC., d/b/a AUTO-CHLOR SYSTEM OF NEW YORK,

Plaintiff,

-against-

MOTION DATE: 1/13/12

MOTION SEQ. NO.: 001

INDEX NO.: 10592/10

MARIO'S ITALIAN KITCHEN, INC. d/b/a MARIO'S RESTAURANT and MARIO BRANCHINELLI

Defendant.

The following papers read on this motion (numbered 1-3):

Order to Show Cause 1

Affirmation in Opposition.....2

Reply Affidavit.....3

Defendants' move pursuant to **CPLR §5015(a)(1)** to vacate the default judgment, in the total sum of $21,833.42, entered in favor of plaintiff and against the defendants by the Nassau County Clerk on April 27, 2011 (the "Judgment").

This action arose out of a five-year dishwashing equipment lease agreement entered into on November 14, 2006 (the "Lease"), between plaintiff, as lessor, defendant MARIO'S ITALIAN KITCHEN INC. d/b/a MARIO'S RESTAURANT (the "Restaurant"), as lessee, and MARIO BRANCHINELLI ("Branchinelli"), as guarantor. Plaintiff claims that defendants breached the Lease by failing to pay the monthly rental due on May 4, 2009 and thereafter. The action was commenced on or about June 1, 2010, and the Summons and Complaint were served on June 15, 2010. Plaintiffs assert that they never received an answer from either defendant, and proceeded to Judgment on the basis of defendants' default. An income execution was issued on August 22, 2011 (the "Execution"). On or about December 27, 2011, defendants brought this motion to vacate the Judgment.

In support of the motion, defendants' attorney, Justin M. Block, Esq. ("Block") claims that he did, in fact, serve an answer on behalf of defendants. He attaches a copy of the "Verified Answer" dated June 29, 2010 (the "Answer"), with a verification purportedly signed by Branchinelli (the "Verification"). [Order to Show Cause ("OTSC"),

Exh. B]. Attorney Block also attaches an Affirmation of Service (the "Affirmation of Service"), stating that he served the Answer on June 29, 2010 by regular mail to plaintiff's attorneys. [OTSC Exh. B] Attorney Block cannot explain why plaintiff never received the Answer, but states that the envelope in which the Answer was served was not returned to him. Block asserts that, to the extent that he failed to confirm the receipt of the Answer, or failed to monitor the progress of the litigation, such conduct is tantamount to "law office failure," which may constitute a reasonable excuse for the default.

Branchinelli states that he had no notice of any legal proceedings subsequent to his receipt of the Summons and Complaint (which was served upon him pursuant to **CPLR §308(2)** at the Restaurant). He claims that he never received the additional copy of the Summons and Complaint, mailed to 6 Andrew Street, Port Jefferson Station, New York, 11776, because he does not reside there. On the merits, Branchinelli asserts that the equipment installed by plaintiff was defective. He also claims that he never signed the document purporting to be the Lease.

The Court notes, at the outset, that defendants do not challenge plaintiff's service of process nor deny receipt of the Summons and Complaint. Accordingly, defendants cannot avail themselves of the relief afforded by **CPLR §317**, which does not require an explanation for the default. Defendants rely, as they must, upon **CPLR §5015(a)(1)**, which requires them to establish both a reasonable excuse for the default and a meritorious defense to the action.

The determination of what constitutes a reasonable excuse lies within the Court's discretion. The Court has the discretion to accept law office failure as a reasonable excuse where that claim is supported by a detailed and credible explanation of the default at issue. **Swensen v. MV Transp., Inc.**, 89 A.D.3d 924. *See* **CPLR §2005.**

In the case at bar, defendants' explanation seems plausible on its face. Upon close examination, however, the Court finds that the proof is riddled with defects and inconsistences which render it suspect. First, the Affirmation of Service does not include the date on which it was signed by Attorney Block. Second, the purported Verification does not include the date on which it was sworn to by Branchinelli and notarized by Attorney Block, and Brock's notary stamp does not include the date on which his commission was due to expire. Finally, Branchinelli's Affidavit in Support appears to have been notarized by Attorney Block after his commission expired.

None of these defects, in itself, is significant. Taken together and in context, however, they raise concern about the reliability of the documents in which they appear. At minimum, the number of defects suggest a pattern of carelessness, which may erode

any semblance of a reasonable excuse. In harsher light, the omission of critical dates may be capable of a more cynical interpretation regarding the genuineness of such excuse. The Court notes that there is no independent evidence confirming the authenticity of the documents, or their existence at the time that the Answer was purportedly served by Attorney Block. There is no certification by an unaffiliated or disinterested notary. The County Clerk's file contains no date-stamped copy of the Answer (inasmuch as the Answer was never filed). There is no post-office receipt or copy of the post-marked envelope confirming the date on which the Answer was purportedly mailed.

Amplifying the Court's concern is the untrustworthy nature of Branchinelli's sworn statements -- incomplete or inconsistent at best, evasive or untruthful at worst. In his Affidavit in Support, Branchinelli states that "I have only recently become aware of the fact that the Plaintiff has somehow obtained a judgment against me and a corporation in which I am an owner, specifically MARIO's ITALIAN KITCHEN, INC." [Aff. In Support, ¶2.] In his Reply Affidavit, however, Branchinelli states that MARIO'S ITALIAN KITCHEN is a corporation in which he "has no interest." [Reply Aff. ¶ 4]. He also states, apparently for the first time, that "the corporation which operates the restaurant is not the named Defendant MARIO'S ITALIAN KITCHEN, INC." [Reply Aff. ¶6.] No further explanation is given. Branchinelli does not provide the name of the non-party corporation that does actually operate the restaurant. He does not elaborate on the nature of his relationship, if any, to MARIO'S ITALIAN KITCHEN, INC., or explain the inconsistency in his statements regarding that corporation.

In his Affidavit in Support, Branchinelli admits that he, on behalf of the Restaurant, entered into an agreement with the plaintiff, and that equipment supplied by plaintiff was installed at the Restaurant. [Aff. In Support ¶¶ 7, 10] In his Reply Affidavit, however, Branchinelli states that the agreement attached as Exhibit 1 to the Affirmation in Opposition is not the agreement he entered into, and that the signatures thereon are not his signatures. [Reply Aff. ¶¶ 3, 4] Again, no further explanation is offered. Was there a a different agreement? Was it reduced to writing? Did Branchinelli, or anyone on his behalf, retain a copy? What were the terms of the "true" agreement between the parties, and what were the circumstances of its formation?

In his Reply Affidavit, Brachinelli states: "I do not reside at 6 Andrew Street, Port Jefferson Station, New York, and I did not either write that as my residence, nor did I provide that information to anyone so that they could write it on a contract I did not sign." [Reply Aff. ¶ 7]. In the Answer, however, Branchinelli "[a]dmits the allegations contained in the paragraph of the Verified Complaint denoted '5'". [OTSC Exh. B] Said paragraph "5" states that Branchinelli resides at 6 Andrew Road, Port Jefferson, New York. [Aff. In Opp. Exh. 2]

For edification, the Court searched the on-line records of the New York State Department of State, Division of Corporations. The Court found an entity named MARIO'S ITALIAN KITCHEN, INC., located at 315 Jericho Turnpike in Commack, NY, which is listed as "Inactive," based upon its dissolution in 1992. An entity named "Branchinelli Foods Inc." is an active corporation, located at 30 Canal Road, Pt Jefferson Station, NY 11776. Its Chairman or Chief Executive Officer is: "Mario Branchinelli, 6 Andrew Street, Pt Jefferson Station, New York 11776". The Principal Executive Office is: "Mario Branchinelli, 6 Andrew Street, Pt Jefferson Station, New York 11776". The Court also searched the on-line White Pages and found a residential listing for Branchinelli at 6 Andrew Street, Port Jefferson Station, New York, NY 11776. Although not probative, the on-line records highlight the contradictions in Branchinelli's sworn statements.

The Court finds that the defects and inconsistences cited above taint the entire application, both with respect to the reasonableness of the excuse and the existence of a meritorious defense. Defendants' submissions are not sufficiently forthcoming or trustworthy to establish a credible basis upon which to vacate their default.

Notwithstanding the foregoing, however, the Court finds that the Judgment, rendered by the Clerk, is invalid, insofar as the plaintiff has failed to establish its right to recover a "sum certain." *See* **CPLR §3215(a); Fidelity Natl. Title Ins. Co. v. Valtech Research, Inc.,** 73 AD3d 686. "The term 'sum certain' in this context contemplates a situation in which, once liability has been established, there can be no dispute as to the amount due, as in actions on money judgments and negotiable instruments. Obviously, the clerk then functions in a purely ministerial capacity." **Reynolds Sec. v Underwriters Bank & Trust Co.,** 44 N.Y.2d 568. A Clerk's judgment is inappropriate where the damages sought cannot be determined without extrinsic proof. **Id.**

In this case, the only proof of the claim included in plaintiff's application for a Clerk's judgment was the unsubstantiated affidavit of plaintiff's "Regional Manager," attesting to the breach of an equipment lease contract, the alleged arrears, and the alleged basis for calculating liquidated damages. The affiant does not claim to have first-hand knowledge of the facts, nor provide any basis for inferring such knowledge. The affidavit is unsupported by documentary proof. *Cf.* **Collins Financial Services v. Vigilante,** 30 Misc.3d 908 (credit card debt).

Notably, plaintiff did not attach a copy of the contract to its application. On examination of the purported contract [Aff. In Opp, Exh. 1], the reason for its omission becomes apparent. In Paragraph (1), the amount of fixed monthly rental is crossed out and left blank. In Paragraph (2), plaintiff reserves the right to adjust prices if necessary.

Paragraph (2) provides for liquidated damages in the fixed amount set forth in Paragraph (1) (which is blank), and requires the plaintiff to give seven days notice of an election to terminate the agreement. Paragraph (3) obligates plaintiff to perform services throughout the term of the Lease; namely, "thoroughly service the machine at regular intervals and supply all parts necessary for proper maintenance." In the event that the equipment is not returned on the Lessee's default, the Guaranty includes "the fair market value of said equipment at the commencement of the lease which is $11,270, to be decreased .05% for each month of the lease." The only thing certain here is the uncertain nature of the damages due.

The Court finds that plaintiff's damages cannot be ascertained without extrinsic proof, and that plaintiff should not have proceeded to judgment without an inquest. *See* **Pikulin v Mikshakov**, 258 A.D.2d 450. The Court vacates the judgment and remits the matter for an inquest on damages only. *See* **Fidelity Natl. Title Ins. Co. v. Valtech Research, Inc.,** 73 AD3d 686. This does not vacate the defendants' default, nor permit them to defend the inquest. Based upon the foregoing, it is

ORDERED, that the motion to vacate the Judgment pursuant to **CPLR §5015** is **denied in part**, to the extent that defendants' default in appearing and answering is not vacated, and defendants' liability remains determined; and it is further

ORDERED, that the motion is **granted in part**, to the extent that the Judgment is **vacated** and the matter is remitted for an inquest on damages. Within sixty (60) days of entry of this Order, plaintiff shall file, and serve upon defendants, a Note of Inquest together with a copy of this Order. In lieu of an inquest, plaintiff may submit to the Court on notice to defendants, and within sixty (60) days of entry of this Order, a detailed affidavit pursuant to **NYCRR §202.46**, demonstrating the derivation of the amount sought, together with documentary substantiation. The failure to comply with this paragraph shall constitute an abandonment of the claim, and the matter shall be dismissed without further order of the Court.

This constitutes the Order of the Court.

Dated: March 21, 2012

J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE