

Karian v Physician's Choice, Inc.

2013 NY Slip Op 33219(U)

December 4, 2013

Sup Ct, NY County

Docket Number: 653235/2012

Judge: Melvin L. Schweitzer

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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: MELVIN L. SCHWEITZER
Justice

PART 45

STEPHAN KARIAN

INDEX NO. 653235/12

- v -

MOTION DATE _____

PHYSICIANS CHOICE, INC.

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by Ida Teplinsky to intervene as a defendant, to vacate the defence judgment and to remove venue to Nassau County is GRANTED

The Clerk is directed to reissue this caption to read:
STEPHAN KARIAN

v.
PHYSICIANS CHOICE, INC. and
IDA TEPLINSKY

It is ordered that the Movant is directed to serve a copy of this order with Notice of Entry on County Clerks Office (Room 1418) who is hereby directed to transfer this case to Nassau County.

Dated: December 4, 2013

Melvin L. Schweitzer
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

-----X		
STEPHAN KARIAN,	:	Index No. 653235/12
Plaintiff,	:	
-against-	:	DECISION
	:	AND ORDER
PHYSICIAN'S CHOICE, INC.,	:	(Motion Sequence 003)
Defendant.	:	
-----X		

MELVIN L. SCHWEITZER, J.:

In June 2013, the court granted Plaintiff Stephan Karian’s motion for a default judgment. Subsequently, the court’s law secretary determined that the signing of the judgment was in error. The court instructed defense counsel to submit a motion, on order to show cause, addressing vacatur of the default order, intervention of Ida Teplitsky, and change of venue. The court now considers that motion, which defendant Physician’s Choice, Inc. opposes.

Background

Sometime in 1996, Stephan Karian (Karian) and Dr. Michael Teplitsky (Dr. Teplitsky) incorporated Physician’s Choice Inc. (“PCI”) in the County of New York. Karian owns 50% of the stock, is one of two directors, and is the chief executive officer of the company. Ida Teplitsky, Dr. Teplitsky’s wife, is the other stockholder, director, and secretary and treasurer.

In 2010, three separate actions were filed in Nassau County Supreme Court: Karian and Ida Teplitsky filed competing derivative actions (14840/10 and 16539/10), and Ida Teplitsky filed an action for the dissolution of the corporation (14841/10), which is uncontested. Teplitsky has also pled claims against Karian based, *inter alia*, on his improperly taking salary. In this

action, Karian pleads breach of contract and other claims, alleging that PCI owes him deferred salary.

Discussion

A. Relief from Judgment

CPLR Rule 5015 provides the grounds upon which a court may grant relief from judgment. CPLR 5015(a)(1) allows relief from judgment because of excusable default. To vacate a default, a party must show that an excusable default and a meritorious claim or defense. *Gray v. B.R. Trucking Co*, 59 NY2d 649, 650 (1983). Mr. Karian is the president and sole employee of PCI and, as such, only he can mount a defense for the corporation. Mr. Karian had the power to prevent the default, but chose to take no action in the corporation's defense. Therefore, the court finds that the default is excusable because the failure of the corporation to proceed is wholly the fault of the Plaintiff himself.

B. Intervention of Ida Teplitsky

Sections 1012 and 1013 of the CPLR govern the intervention of a non-party into an action. The right to intervene derives from the notion that, if a judgment may affect the interests of non-parties, they shall be afforded the opportunity to be heard. Section 1012 permits intervention as of right upon a dual showing that the parties do not sufficiently represent the person's interests in the matter, and the judgment will bind the intervenor. Section 1013 grants intervention by permission when the interested person's claim or defense and the main action contain common questions of law and fact. However, "whether intervention is sought as a matter of right ... or as a matter of discretion is of little practical significance since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real

and substantial interest in the outcome.” *Well Fargo Bank, N.A. v McLean*, 70 AD3d 676, 677 (2nd Dept 2010).

Ida Teplitsky is a director, treasurer, secretary and shareholder of the corporation. As such, her interests run wide and deep. Furthermore, the defense she raises is entangled with that of the corporation, and the prospect of a multi-million dollar judgment against the company will assuredly affect her investment. Therefore, she must be afforded the opportunity to be heard.

C. Venue

In his complaint, Plaintiff cites BCL 1112 as the basis for venue in New York County.

BCL 1112 addresses proper venue in corporate dissolution proceedings and states that:

An action or special proceeding under this article shall be brought in the supreme court in the judicial district in which the office of the corporation is located at the time of the service on the corporation of a summons in such action or of the presentation to the court of the petition in such special proceeding.

In her reply, Mrs. Teplitsky cites CPLR 503(a) as the basis for venue in Nassau County. CPLR 503(a) consigns venue to “the county in which one of the parties resided when [the action] was commenced.” She relies on *Casavecchia v. Mizrahi*, 2010 NY Slip Op 32234(U) in which defendants sought an order to remove venue to Richmond County in reliance on BCL 1112. The court determined that CPLR 503(a) was the proper basis for venue because the proceeding was not an action for dissolution and thus BCL 1112 did not apply.

In the instant action, no party resides in New York County. Mrs. Teplitsky resides in Nassau County while Mr. Karian resides in Destin, Florida. PCI’s principal place of business is Destin, Florida. Moreover, Plaintiff clearly identifies this action as one, *inter alia*, for unpaid salary, not dissolution. Therefore, BCL 1112 does not apply, and CPLR 503(a) is the proper

basis for the determination of the appropriate venue. Since Mrs. Teplitsky resides in Nassau County, venue is appropriate in that county. Accordingly, it is hereby

ORDERED that Ida Teplinsky's motion to intervene, vacate the default judgment, and remove venue to Nassau County is granted; and it is further

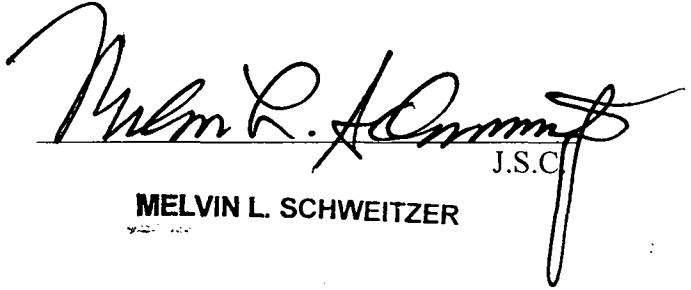
ORDERED that the Clerk is directed to ~~return this matter to the calendar~~, amend the caption to read as follows:

-----X		
STEPHAN KARIAN,	:	
	:	Index No. 653235/12
Plaintiff,	:	
	:	
-against-	:	
	:	
PHYSICIAN'S CHOICE, INC. and	:	
IDA TEPLINSKY,	:	
Defendants.	:	
-----X		

and then transfer this matter to Nassau County Supreme Court.

DATED: December 4, 2013

ENTER:



J.S.C.

MELVIN L. SCHWEITZER