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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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PATTERSON BELKNAP WEBB & TYLER LLP,

Plaintiff,

Index No.
158524/2012

Decision and
Order

- Against -

Mot. Seq. 002

BARBARA STEWART,

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Patterson Belknap Webb & Tyler, LLP ("Patterson Belknap" or "Plaintiff") filed this action against defendant, Barbara Stewart ("Stewart" or "Defendant"), on December 5, 2012, seeking to recover past due legal fees for services rendered by Patterson Belknap on Stewart's behalf in the years 2008 and 2009 in connection with a litigation surrounding various trusts established for the benefit of Stewart's children. Patterson Belknap and Stewart entered into a Stipulation, dated January 10, 2013, which extended Stewart's time to respond to Patterson Belknap's Complaint to February 1, 2013.[1]

On March 14, 2013, Patterson Belknap moved for a judgment of default against Stewart on the grounds that Stewart failed to appear in response to the Summons and Complaint. Stewart opposed the motion in which Stewart alleged defective service upon her doorman, that she was not in default based on continued communications with Patterson Belknap after she received the Complaint, and that she had a meritorious defense to Patterson Belknap's claims. Patterson Belknap submitted a reply, which responded that service of process had been properly effectuated on Stewart pursuant to CPLR 308(2), that Stewart had failed to demonstrate a justifiable excuse for her default, and that Stewart had failed to

[1] That Stipulation stated that Patterson Belknap "served the Complaint on Stewart" and "the deadline for Stewart to answer or otherwise respond to the Verified Complaint currently is January 22, 2013." The parties stipulated and agreed that the "time within which Stewart has to appear, answer or otherwise respond to PBWT's Verified Complaint is hereby extended to February 1, 2013."

demonstrate the existence of a potentially meritorious defense to the claims. On April 18, 2013, the Hon. Saliann Scarpulla scheduled oral argument on Patterson Belknap's motion for May 8, 2013. Patterson Belknap appeared. Stewart did not appear.

By Order dated May 8, 2013, Justice Scarpulla ordered, "[u]pon the foregoing papers," Patterson Belknap "motion for default judgment is granted on default based on Stewart Barbara Stewart's failure to appear for oral argument on May 8, 2013" and further directed the Clerk of the Court to enter judgment for Patterson Belknap and against Stewart in the amount of $1,535,546.70, plus interest from October 16, 2009. The Judgment for $2,056,160.14 was signed on July 22, 2013 ("the Judgment"). Patterson Belknap filed the notice of entry and served it on Stewart on August 6, 2013. Patterson Belknap served a Restraining Notice on Stewart on August 6, 2013.

Presently before the Court is Stewart's Order to Show Cause seeking an Order to vacate the Judgment and dismiss the action for lack of jurisdiction or, in the alternative, granting Stewart 30 days to answer or move in response to the Complaint. Stewart submits the attorney affirmation of Thomas J. Maimone and the affidavit of Stewart. Patterson Belknap opposes. Oral argument before this Court on June 24, 2014.

CPLR 5015(a)(1) provides that a party may be relived from an order for "excusable default." A party seeking to vacate a default must demonstrate both a reasonable excuse and the existence of a meritorious defense. (*Mutual Marine Office, Inc. v. Joy Const.*, 39 A.D.3d 417 [1st Dept. 2007]). It is an abuse of discretion to vacate a default judgment without a showing that defendant has a meritorious defense. (*Pedone v. Avco Financial Services of New York, Inc.*, 102 AD2d 885, 476 NYS2d 933 [2nd Dept 1984]). Mere conclusory allegations of a meritorious defense are insufficient for vacating a default. (*Loeb v. Tannenbaum*, 124 AD2d 941, 508 NYS2d 688 [3rd Dept 1986]).

As explained in *Hampton Val. Farms, Inc. v. Flower & Medalie*, 40 A.D. 3d 699, 701 [2d Dept 2014]:

> The doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding. (*Brownrigg v. New York City Hous. Auth.*, 29 A.D.3d 721, 722, 815 N.Y.S.2d 681). It applies to determinations which were necessarily resolved

on the merits in the prior order (see *D'Amato v. Access Mfg.*, 305 A.D.2d 447, 448, 762 N.Y.S.2d 393).

"At the core of the doctrine of res judicata is the concept that a valid final judgment bars further actions between the same parties on the same cause of action." *Jefferson Towers, Inc. v. Public Serv. Mut. Ins. Co.*, 195 A.D. 2d 311, 312 [1st Dept 1993] (citations omitted). "[T]he general doctrine of res judicata gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently relitigating any questions that were necessarily decided therein." *Landau, P.C. v. LaRossa, Mitchell & Ross*, 11 N.Y. 3d 8, 13 [2008] (citations omitted). Under New York's transactional approach to res judicata, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *O'Brien v. City of Syracuse*, 54 N.Y. 2d 353, 357 [4th Dept 1980]. "The doctrine of collateral estoppel, a narrower species of *res judicata*, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." *Ryan v. New York Tel. Co.*, 62 N.Y. 2d 494, 500 [1984].

First, Stewart argues that the Judgment should be vacated and the action dismissed on the grounds that the Court lacked personal jurisdiction over Stewart on the grounds that service of process was not properly accomplished when the Complaint was left with Stewart's doorman. Stewart argued improper service when opposing Patterson Belknap's motion for default judgment, and Patterson Belknap replied. In the decision dated May 8, 2013, Justice Scarpulla granted Patterson Belknap's motion "upon" the parties' submissions, which had included Stewart's opposition, and ordered that default be entered against Stewart. That decision was not appealed. Accordingly, Stewart is now precluded from relitigating that issue here. *See e.g., Penn Warranty Corp. v. DiGiovanni*, 10 Misc. 3d 998, 999 (Sup. Ct., Cnty. 2005) (previous decision denying motion to dismiss action for lack of personal jurisdiction was "law of the case and the issues decided therein may not be revisited by this court."). Moreover, the Court notes that after service was made by Patterson Belknap as per the Affidavit of Service, Stewart and Patterson Belknap entered into a January 10, 2013 stipulation signed by the parties and filed with the Court which stated, inter alia, that "on December 5, 2012, [Patterson] *served the Verified Complaint on Stewart*" and that the parties

had agreed "that the time within which Stewart has to appear, answer, or othereise respond ... is hereby extended to February 1, 2013."

Alternatively, Stewart argues that even if the Court should find that service was properly made, the Court should vacate the Judgment and allow Stewart to respond to the Complaint because there is a reasonable excuse for her failure to answer the Complaint and appear at the oral argument and to answer the Complaint, as well as meritorious defenses.

As for the reasonable excuse for her failure to file an answer, Stewart argues that after she received Patterson Belknap's Complaint, Stewart continued to have "collegial" "email exchanges" with Patterson Belknap and that these emails "reveal that she retained her trust in them" and that Patterson Belknap believed that "they were working the issue out" and failed to tell her that her appearance in Court on the return date was required with respect to their motion for a default judgment. Stewart further avers that she failed to appear at oral argument based inaccurate information that she received from the Clerk of the Court. Stewart avers, "At the time I delivered the affidavit, I spoke with the clerk of the Court, who advised me that the Court would review the papers and notify me of the decision. I understood that I did not need to make any further appearances or do anything further to defend myself against the motion."

Stewart has failed to provide a reasonable excuse for her delay in appearing and answering Patterson Belknap's Complaint, which is necessary to vacate the Judgment. *See e.g., Cohen Lans, LLP v Litow*, 2009 N.Y. Misc. LEXIS 4779, *3-4 (N.Y. Sup. Ct. Mar. 26, 2009) ("While [the defendant's] proffered excuses concern why defendant failed to timely respond to the underlying motion, they fail to provide any reasonable excuse for [defendant's] default in appearing or timely answering the instant action, which is necessary to vacate the default judgment."). Here, the documentary evidence demonstrates that even after having been granted an extension to file her answer, Stewart failed to timely interpose a response. In view of the lack of a reasonable excuse for Stewart's default in failing to timely answer, whether Stewart has demonstrated a meritorious defense need not be addressed.[2]

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[2] As for her alleged meritorious defenses, Stewart argues that Patterson Belknap expanded the scope of their engagement beyond the scope of the parties' written agreement, the parties relied upon the trusts ultimately paying Stewart's legal fees, Stewart did not receive "itemized statements to allow her to scrutinize the charges," and Patterson's work "was not efficacious" and "never succeeded."

Wherefore it is hereby,

ORDERED that Defendant Barbara Stewart's motion is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: OCTOBER 8, 2014

Eileen A. Rakower, J.S.C.

In opposition, Patterson Belknap contends that it is Stewart's responsibility to pay Patterson Belknap for the services rendered to her and that Stewart has not raised any legitimate issues regarding the quality of Patterson Belknap's representation.