Ingvarsdottir v Bedi
2016 NY Slip Op 32359(U)
December 1, 2016
Supreme Court, New York County
Docket Number: 155571/2016
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. CAROL R. EDMEAD J.S.C.

Index Number : 155571/2016
INGVARSDOTTIR, HELGA
vs
BEDI, VICKRAM A
Sequence Number : 001
SUMMARY JUDGMENT

PART 35

INDEX NO. _____
MOTION DATE 9/22/16
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

In this action arising out of a wage and hour complaint filed by plaintiff with the United States Department of Labor, plaintiff Helga Ingvarsdottir ("plaintiff") moves pursuant to CPLR 3213 against defendants Vickram A. Bedi ("Mr. Bedi") and Datalink Computer Products, Inc. ("defendants") for summary judgment *in lieu* of complaint based on a final determination by the U.S. Department of Labor on plaintiff's claim for back payment of wages. Plaintiff filed a complaint with the U.S. Department of Labor Wage and Hour Division against Datalink seeking, *inter alia*, unpaid wages owed to her during her employment in H-1B immigration status. On August 4, 2014, U.S. Department of Labor Administrative Law Judge Lystra Harris ("ALJ Harris") issued a Decision and Order ("ALJ Decision") holding that defendants were liable to plaintiff for back wages, plus pre-judgment interest. The plaintiff's appeal to the Administrative Review Board (the "Board") of the ALJ Decision was affirmed on February 29, 2016 (the "Board Decision"), except for decreasing the wages to be paid to plaintiff by three days. Plaintiff contends that defendants have not sought review of the Board Decision within time periods set forth in 28 USC §2107, and the time to seek review of such Decision expired on April 29, 2016. No motion for reconsideration is pending with the Board. Thus, the Board Decision is final and defendants are collaterally estopped from opposing the Decision. Plaintiff is therefore entitled to judgment and statutory interest on the Judgment pursuant to CPLR 5004.

In response, defendants oppose the motion, arguing that their time to seek judicial review of the Order by the United States District Court is not exhausted. Defendants' time to seek such review of the Order is subject to a six-year statute of limitations pursuant to 28 USC §2401 from

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

Dated: _____ _____, **J.S.C.**

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

February 29, 2016 when the Board issued its determination. Thus, collateral estoppel is inapplicable. Further, defendants cross move pursuant to CPLR 5015, 317 and 2221 to vacate this Court's August 9, 2016 restraining and disclosure order. By this order, the Court granted plaintiff's order to show cause "without opposition," to restrain defendants from, *inter alia*, transferring any property in which they had an interest, and compelling defendants to disclose to plaintiff all of its assets in order to satisfy the judgment sought in this action. Mr. Bedi's reasonable excuse for his default is based on the fact that he has been incarcerated at a New York State correctional facility since the inception of this action, and did not receive notice of plaintiff's order to show cause until after his papers were due. And, Mr. Bedi's meritorious defense is based on the fact that restraining relief under CPLR §§5222, 5223, and 5229 is only available where there is a judgment, and the Decision and Order is not a final judgment subject to these provisions.

In reply, plaintiff argues that defendants' interpretation of the statute of limitations is incorrect. In any event, defendants are obligated to immediately pay the moneys owed ordered by the US Department of Labor. Otherwise, defendants were required to seek a stay of the Decision from the Board or the US District Court, which they have failed to do. Once the ALJ's order is affirmed, it is enforceable and there is no automatic stay if the losing party seeks judicial review of the Board's Decision. And, defendants are unlikely to demonstrate they will suffer irreparable injury in the absence of a stay, given that their harm is solely the mere payment of money and the public interest favors the recovery of wages for workers. Further, under CPLR 5302, a judgment may be final when rendered even though an appeal of the judgment is pending. And under CPLR 5303, a foreign country judgment is enforceable, thereby entitling plaintiff to the entry of judgment.

In further support of defendants' cross-motion and response to plaintiff's reply papers, defendants argue that the Board Decision is still subject to review and thus, cannot be used as an instrument in support of CPLR 3213 relief or in support of the disclosure and restraining motion previously submitted by plaintiff. Plaintiff does not rebut these arguments, and raises a new argument to domesticate a "foreign" judgment, which does not apply to the Board Decision.

Discussion

CPLR §3213 provides the following: "When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." "A plaintiff moving under CPLR §3213 must demonstrate that the claim is based on a judgment or an instrument itself and proof of non-payment according to its terms (*Imbriano v Seaman*, 189 Misc 2d 357, 358-359 [NY Dist Ct 2001], *citing Seaman-Andwall Corp. v Wright Machine Corp.*, 31 AD2d 136 [1st Dept 1968]). It has been held that "an 'instrument' has been generally defined as "... [a]nything reduced to writing, a document of a formal or solemn character, a writing given as a means of affording evidence. A document or writing which gives formal expression to a legal act ... for the purpose of creating [and] securing ... a right ..." (*Maldonado v. Man-Dell Food Stores*, 178 Misc. 2d 541, 679 N.Y.S.2d 787 [Civil Court, New York County 1998] *citing* Black's Law Dictionary 801 (6th ed. 1990)).

As relevant herein, the Immigration and Nationality Act ("INA"), 8 U.S.C.A. § 1182(n), sets forth the requirements of the H–1B visa program to admit aliens into the United States to

perform services in a specialty occupation that meet specific requirements of the Act (*Gupta v. Headstrong, Inc.*, 2013 WL 4710388 [SDNY 2013]; *Gupta v. Perez*, 101 F.Supp.3d 437 [DC NJ 2015]). Section 1182(n) "contains a comprehensive regulatory enforcement scheme that provides for the investigation of claims and for remedies" tailored to the specific relief sought (*Shah v. Wilco Sys., Inc.*, 126 F. Supp. 2d 641, 647 [SDNY 2000]). The Secretary of Labor (the "Secretary"), under the authority of Section 1182(n) of the INA, has established extensive administrative regulations that govern the enforcement of this Section (see 20 C.F.R. §§ 655.800-655.855).

Pursuant to Section 1182(n)(2), an aggrieved party, such as plaintiff, "must file a complaint with the Wage and Hour Division of the DOL, which then makes a determination regarding the validity of the complaint (*Gupta v. Headstrong, Inc., supra citing* 8 U.S.C.A. §1182(n)(2); 20 C.F.R. §§ 665.805, 655.815). "If the party is dissatisfied with this determination, [the party] may request a hearing before an administrative law judge. Thereafter, any party may petition for review by the DOL's Administrative Review Board, *whose decision in turn may be appealed to the appropriate Untied States District Court*" (*Gupta v. Headstrong, Inc., supra citing* 20 C.F.R. §§ 655.840, 655.845, 655.850); *Biran v. JP Morgan Chase & Co.*, 2002 WL 31040345 [SDNY 2002] (emphasis added)). Notably, the Code of Federal Regulations, 20 C.F.R. § 655.850, also provides that, upon "receipt of a complaint seeking review of the final agency action *in a United States District Court*, the Chief Administrative Law Judge shall certify the official record and shall transmit such record to the clerk of the court" (*see also, Venkatraman v. REI Systems, Inc.*, 417 F. 3d 418 [4th Cir 2005] (noting that the C.F.R. "contemplate review of the final agency action *in the district courts* § 655.850") (emphasis added)).

Under the Administrative Procedure Act ("APA"), "[a] person suffering legal wrong because of agency action, [as defined in 5 U.S.C. § 551(13)], or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof" (5 U.S.C. § 702; *see also Hsing v. Usery*, 419 F. Supp. 1066, 1070 [W.D. Pa. 1976] (finding that the APA provided jurisdictional basis for the plaintiff to bring the suit in district court based on an allegation that defendant violated 8 U.S.C. § 1182(a)(14)). An agency action is subject to judicial review only when it is a "final agency action" (5 U.S.C. § 704). Specifically, an aggrieved party may seek judicial review of an agency action "when 'the agency has completed its decisionmaking process, and [when] the result of that process is one that will directly affect the parties'" (*Franklin v. Massachusetts*, 505 U.S. 788, 797 [1992] (internal citations omitted)). Under 28 U.S.C. § 2401, a party challenging the final decision of an agency must do so "within six years after the right of action first accrues" (28 U.S.C.A. § 2401). The action first accrues "on the date of the final agency action." (*Harris v. FAA*, 353 F.3d 1006, 1009-10 [D.C. Cir. 2004]; *see also Felter v. Kempthorne*, 473 F.3d 1255, 1259 [D.C. Cir. 2007]; *Friends of Tims Ford v. Tennessee Valley Auth.*, 585 F.3d 955, 964 [6th Cir. 2009]; *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 186 [4th Cir.1999]).

Here, the ALJ issued a decision under the INA in favor of the plaintiff, which the Board affirmed. The affirmance of the ALJ's decision by the Board is a final agency action because there are no further administrative remedies available to the parties. Under the APA, the final decision of the Board is subject to judicial review in the appropriate United States District Court. A judicial review of an agency action is a "civil action" under 28 U.S.C. § 2401. Therefore, as

urged by defendant, the six-year statute of limitations under 28 U.S.C. § 2401 applies, and runs from the date of the agency's final decision (*i.e.*, the date the Board issued its order affirming the ALJ Decision).

It has been held, in the context of a motion under CPLR 3213, that a decision and order by an agency such as the Department of Consumer Affairs which implicitly directed "'forthwith' payments of $800.00 in fines" were "incontestable admittedly because of [owner's] failure to exhaust its administrative remedies challenging such administrative orders" (*Maldonado v. Man-Dell Food Stores*, 178 Misc. 2d 541, 679 N.Y.S.2d 787 [Civil Court, New York County 1998]). And, plaintiff asserts that under, 27 USCA § 2107, *Venkatraman v. REI Systems, Inc.* (417 F. 3d 418 [4th Cir 2005]) and *Gupta v. Perez* (101 F.Supp.3d 437 [NJ Dist Court 2015] ("Judicial review of an agency's final determination is governed by the"APA, 5 U.S.C. § 701 *et seq.*)), the adjudication of plaintiff's matter is complete and the time to appeal is exhausted.

27 USCA § 2107 governs the time for appeals to the court of appeals of a "judgment, order or decree in an action, suit or proceeding of a civil nature." 28 U.S.C. § 2107 is inapplicable, however, as it requires parties to appeal to the court of appeals, which is in contravention with the INA, which designates the federal district court for judicial review of a Board's order. As 27 USCA § 2107, and caselaw cited by plaintiff, do not overcome the showing that the six-year statute of limitations under 28 U.S.C. § 2401 applies to the Board's determination herein, defendants' time to challenge the Board's determination has not yet exhausted.

Given that plaintiff failed to establish that the time to further challenge the Board's order is exhausted, it cannot be said that the Board's order is incontestible under *Maldonado v. Man-Dell* Food Stores, for purposes of CPLR 3213 relief. Plaintiff's remaining policy arguments are insufficient to warrant the relief requested.[1]

And, plaintiff's request for relief under CPLR 5302, raised for the first time in reply, is denied, as arguments raised for the first time in reply are not to be considered (*Wal-Mart Stores, Inc. v. U.S. Fidelity and Guar. Co.*, 11 A.D.3d 300, 784 N.Y.S.2d 25 [1st Dept 2004]; *Alrobaia ex rel. Severs v. Park Lane Mosholu Corp.*, 74 A.D.3d 403, 902 N.Y.S.2d 63 [1st Dept 2010] ("The argument on which the court relied, however, was raised for the first time in defendants' reply papers, and should not have been considered by the court in formulating its decision")).

Therefore, plaintiff's motion pursuant to CPLR 3213 is denied.

As to defendants' cross-motion to vacate the default, a party may move to vacate a default judgment against it under CPLR 317 or CPLR 5015. Under CPLR 317, a defendant must show that service was made in a manner other than personal delivery, he or she did not receive actual notice of the process in time to defend the action, and a meritorious defense, and that the motion

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[1] The Court notes that ALJ Harris' Decision ordered that defendants "pay [plaintiff] $341,693.02 in back wages"; "pay prejudgment compound interest"' and that the "Administrator, Wage and Hour Division, Employment Standards Division, U.S. Department of Labor, *shall forthwith make such calculations* as may be necessary and appropriate with respect to back pay, . . . *which calculations, however, shall not delay Respondents' obligation to make immediate payment of back wages*. . . ." The letter accompanying the Board's Decision indicates that if "Defendants do not make full payment as indicated above by June 15, 2016, *the Administrator may seek appropriate collection remedies*. . . ." (Emphasis added).

to vacate was made within one-year from receipt of knowledge of entry of the default judgment and no more than five years from such entry.[2] It is well settled that in order to vacate a judgment default pursuant to CPLR 5015 the defaulting party must demonstrate both a reasonable excuse for the default and a meritorious defense (*see AWL Indus., Inc. v. QBE Ins. Corp.*, 65 A.D.3d 904, 905, 885 N.Y.S.2d 71 [2009]; *Goldman v. Cotter*, 10 A.D.3d 289, 291, 781 N.Y.S.2d 28 [2004]). What constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court (*see Grutman v. Southgate At Bar Harbor Home Owners' Assn.*, 207 A.D.2d 526, 527, 616 N.Y.S.2d 68 [1994]). The determination whether a reasonable excuse has been offered is *sui generis* and should be based on all relevant factors, among which are the length of the delay chargeable to the movant, whether the opposing party has been prejudiced, whether the default was willful, and the strong public policy favoring the resolution of cases on the merits (*Chevalier v. 368 E. 148th Street Associates, LLC*, 80 A.D.3d 411, 914 N.Y.S.2d 130 [1st Dept 2011] *citing Harcztark v. Drive Variety, Inc.*, 21 A.D.3d 876, 876-877, 800 N.Y.S.2d 613 [2005]).

Defendants sufficiently established a reasonable excuse for failing to answer or appear in this Action and has asserted a meritorious claim (see CPLR 5015[a][1]; *Miller v. Ateres Shlomo, LLC*, 49 A.D.3d 612, 853 N.Y.S.2d 602; *Giovanelli v. Rivera*, 23 A.D.3d 616, 804 N.Y.S.2d 817; Mjahdi v. Maguire, 21 A.D.3d 1067, 802 N.Y.S.2d 700; *Thompson v. Steuben Realty Corp.*, 18 A.D.3d 864, 865, 795 N.Y.S.2d 470). It is uncontested that Bedi was incarcerated at the time the order to show cause was served, and that defendants did not receive the order of the show cause until after defendants' response to same was due.

Further, the court finds that defendants alleged a meritorious defense to plaintiff's application for enforcement of the Board Decision, in that, as defendants' point out, a decision by the administrative law judge is not a "judgment" to which the enforcement devices of CPLR 5222 and 5223 apply.

CPLR 5222 provides, in relevant part, that:

> A restraining notice may be issued by the clerk of the court or the attorney for the *judgment* creditor as officer of the court, or by the support collection unit designated by the appropriate social services district. . . .It shall specify . . . the date that the *judgment or order* was entered, *the court* in which it was entered, the amount of the *judgment or order* and the amount then due thereon, the names of all parties in whose favor and against whom the judgment or order was entered . . . .
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> * * * * *
>
> (f) For the purposes of this section "order" shall mean an order issued by a court of competent jurisdiction directing the payment of support, alimony or maintenance

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[2] CPLR 317 provides:
A person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense.

CPLR 5223 regarding disclosure provides:
At any time before *a judgment* is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the *judgment*, by serving upon any person a subpoena, which shall specify . . . the date of the *judgment*, *the court* in which it was entered, the amount of the judgment and the amount then due thereon, and shall state that false swearing or failure to comply with the subpoena is punishable as a contempt of court.

Plaintiff has not submitted any caselaw holding to the contrary. Therefore, defendants' cross-motion to vacate this Court's August 9, 2016 restraining and disclosure order is warranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment *in lieu* of complaint is denied; and it is further

ORDERED defendants' cross-motion to vacate this Court's August 9, 2016 restraining and disclosure order is granted, and this Court's August 9, 2016 order is hereby vacated; and it is further

ORDERED that the moving and answering papers shall be deemed the complaint and answer, respectively; and it is further

ORDERED that the parties shall appear for a preliminary conference on February 21, 2017, 2:15 p.m.; and it is further

ORDERED that plaintiff shall a copy of this order with notice of entry upon all parties within 20 days.

This constitutes the decision and order of the Court.

DATED: 12/1/16

J.S.C.

HON. CAROL R. EDMEAD
J.S.C.

1. CHECK ONE : ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE : MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE : ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE