Gozlan v Sefer Israel, Inc.
2017 NY Slip Op 30567(U)
March 22, 2017
Supreme Court, New York County
Docket Number: 651204/16
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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MARC GOZLAN,

Plaintiff,

-against-

SEFER ISRAEL, INC. and ORLY FARHI-HALEY,

Defendants.

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Index No. 651204/16

Motion seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, J.:

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By notice of motion, plaintiff moves pursuant to CPLR 3215 for an order granting him a default judgment. Defendant Orly Farhi-Haley opposes.

I. PERTINENT BACKGROUND

On or about May 11, 2011, the parties entered into a redemption agreement whereby defendant Sefer Israel, Inc. (Sefer) would redeem plaintiff's 95 percent interest in it for $550,000, plus annual interest of four percent, with a down payment of $50,000, the balance to be paid in equal annual installments over ten years, with an acceleration clause in the event of a default. It was also agreed that upon each payment, a share would be transferred to Sefer, and that in exchange for an additional $50,000 to be paid by Sefer in $5,000 installments over ten years, plaintiff would not compete with Sefer. The agreement is memorialized in a promissory note executed by defendants in favor of plaintiff. By separate agreement, Orly, then five percent

shareholder and Sefer employee, personally guaranteed the note, agreeing therein that "there are no defenses to any of the obligations of [Sefer] under the Promissory Note, . . . nor are there any defenses to any of [Sefer's and Orly's] obligations under the Redemption Agreement." (NYSCEF 2, 5).

On March 8, 2016, plaintiff commenced this action against defendants based on their alleged defaults on the agreements. In an unverified complaint, causes of action for breach of the agreements and note, and for unjust enrichment are advanced. (NYSCEF 2).

On March 15 and 16, 2016, respectively, plaintiff's process server served Sefer through the Secretary of State, and served Orly personally at her place of business. (NYSCEF 6-7). Plaintiff twice extended defendants' time to answer the complaint pending settlement discussions. The last adjournment was May 6, 2016. (NYSCEF 15). Sometime thereafter, defense counsel stopped representing defendants. (NYSCEF 9).

On June 29, 2016, plaintiff filed this motion, returnable July 20, 2016. (NYSCEF 8). On July 19, Orly filed her opposition, which plaintiff rejects as untimely. (NYSCEF 18).

II. CONTENTIONS

Plaintiff's attorney alleges that he granted counsel then representing defendants an extension to serve an answer pending settlement negotiations. When defense counsel's offer was unsatisfactory, he claims, he allowed a final extension, and thereafter, defendants failed to answer. He asserts that both defendants were properly served, and that he sent them a follow-up mailing pursuant to CPLR 3215(g), with a confirmation of Orly's nonmilitary status. (NYSCEF 9).

In opposition, Orly explains the defaults as resulting from Sefer's insolvency and inability to retain counsel. She argues that the redemption agreement is unenforceable as Sefer has no surplus and thus must pay plaintiff from its operating funds, which resulted in its insolvency. She also maintains that given her "long relationship" with and the "misplaced trust" she had in plaintiff, her alleged "mentor," she did not negotiate the price as set forth in the agreement as she assumed that his terms would be fair. She claims that Sefer "struggled to stay in business" as her payments to plaintiff greatly reduced the corporation's "cash on hand," and that threats of a copyright lawsuit against Sefer, which she alleges resulted from plaintiff's conduct while still a shareholder, required the additional expense of attorney fees. (NYSCEF 18).

In reply, plaintiff alleges that Orly "shared equal responsibility with [him], or even had greater responsibility" in managing Sefer, belying her unawareness of or inability to investigate Sefer's financial condition. He also alleges that Orly received a dividend before the closing, and that Sefer had no outstanding debts at the time of closing. He denies that he would have agreed to terms that would have made Sefer's performance impossible by rendering it insolvent, and contends that Orly may not escape her obligation to assume the risk that the financial condition of the corporation might change over time. (NYSCEF 25).

The attorney retained by plaintiff to negotiate and prepare the redemption agreement affirms that Orly retained counsel to devise the "legal structure" of the agreement once the parties had agreed to its terms, and that Orly's apparent representation by counsel at the time the pleadings were served and throughout settlement negotiations belies her contention that she cannot now afford a lawyer. He also contends that Orly may not assume the personal defenses of the principal obligor, Sefer, and that in any event, her personal guarantee provides that she shall

"assume and become bound by all the obligations" of Sefer should its obligations "under the Redemption Agreement be unenforceable or barred from enforcement." (NYSCEF 21).

III. ANALYSIS

Pursuant to CPLR 3215, a default judgment may be entered upon a party's failure to answer or appear timely. The moving party must file proof of service of the summons and complaint along with proof of the facts constituting the claim and the default. (CPLR 3215[f]). To demonstrate the facts constituting a claim, "the movant need only submit sufficient proof to enable a court to determine if the claim is viable" (*Global Liberty Ins. Co. v W. Joseph Gorum, P.C.*, 143 AD3d 768, 769 [2d Dept 2016]), and such proof may include an affidavit or verified complaint (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]; *Al Fayed v Barak*, 39 AD3d 371, 372 [1st Dept 2007]).

Here, plaintiff demonstrates that he properly served Sefer and Orly, that they failed to answer or appear in the action, and that he sent them an additional mailing pursuant to CPLR 3215(g). Although he references and provides the pertinent agreements, he provides no proof of breach beyond counsel's affirmation and reference to the allegations set forth in the unverified complaint. (*See Ritzer v 6 E. 43rd St. Corp.*, 47 AD3d 464, 464 [1st Dept 2008] [plaintiff's complaint, verified only by attorney, not proof of facts constituting plaintiff's claims]). To the extent that plaintiff provides proof of defendants' breach, he does so only in reply to their opposition. (*See eg Migdol v City of New York*, 291 AD2d 201, 201 [1st Dept 2002] ["belated attempt to cure deficiencies in (movant's) prima facie showing by raising new facts and arguments in reply was improper"]).

Even had plaintiff set forth proof of the facts constituting the claim, Orly has shown a reasonable excuse for the default and a potentially meritorious defense to the action. (*US Bank N.A. v Louis*, AD3d , 2017 NY Slip Op 01590, *1 [2d Dept 2017]; *Morrison Cohen LLP v Fink*, 81 AD3d 467, 468 [1st Dept 2011]). While the inability to afford counsel does not ordinarily constitute a reasonable excuse for a default (*see Buro Happold Consulting Engrs., PC v RMJM*, 107 AD3d 602, 602 [1st Dept 2013] [defendant's "bare and self-serving contention that it was unable to afford counsel, made without any offer of financial proof," did not constitute reasonable excuse]), here, in light of the relatively short delay between the final adjournment of the settlement discussions until Orly filed her opposition, the absence of any indicia that defendants willfully delayed the settlement negotiations, or any prejudice to plaintiff, and in the interest of resolving disputes on the merits, and in my discretion, I find that Orly's default in answering the complaint is excused. (*See Jones v 414 Equities LLC*, 57 AD3d 65, 81 [1st Dept 2008] [even though general contractor's proffered excuse was underwhelming, default nevertheless excused where delay was brief and plaintiff not prejudiced thereby]; *cf. Hermitage Ins. Co. v Athena Mgt. Corp.*, 115 AD3d 628, 628 [1st Dept 2014] [defendants' delay in over two year not excused by claim they could not afford attorney]). In addition, Orly sets forth a potentially meritorious defense based on her allegations that plaintiff abused her trust in him with respect to the agreements in issue. (*See eg Holstein v MTB Banking Corp.*, 211 AD2d 510, 510 [1st Dept 1995] [in action to recover upon guarantees, issues of fact existed as to whether "plaintiff assumed fiduciary obligations by managing the defendant company and not maintaining the arm's length debtor-creditor relationship"]).

However, as Orly may not represent the corporation in which she is an officer (*see generally* CPLR 321[a] ["A party, . . . may prosecute or defend a civil action in person or by attorney, except that a corporation or voluntary association shall appear by attorney, ..."]), Sefer is unrepresented in the action and has thus failed to answer or appear.

Orly's request in her opposition papers that the complaint be dismissed is not considered.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order granting him a default judgment is denied.

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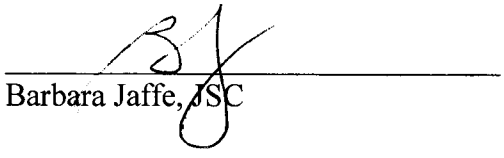

Barbara Jaffe, JSC

DATED: March 22, 2017
New York, New York