| **7th Ave. Tax & Accounting v Walf** |
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| 2017 NY Slip Op 31331(U) |
| May 26, 2017 |
| Supreme Court, New York County |
| Docket Number: 654376/2016 |
| Judge: Gerald Lebovits |
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**NEW YORK STATE SUPREME COURT**
**NEW YORK COUNTY: PART 7**

7th AVE. TAX & ACCOUNTING,
SHOTKIN, LEE & ASSOCIATES,

Plaintiffs,

-against-

KAREN WALF, FIRST DATA MERCHANT SERVICES CORPORATION a/k/a FIRST DATA MERCHANT SERVICES L.L.C., JANE DOE and ABC CORPORATION,

Defendants.

Index No: 654376/2016
**DECISION/ORDER**
Mot. Seq. Nos. 02-05

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing (1) plaintiffs' motion for a default judgment against defendants under CPLR 3215; (2) defendants' order to show cause to compel arbitration under CPLR 7503 (a); (3) plaintiffs' motion to amend the verified complaint to add causes of action under CPLR 3025 (b); and (4) defendants' motion to hold plaintiffs in civil contempt under N.Y. Judiciary Law § 753.

| **Papers** | **Numbered** |
|---|---|
| Papers from Motion Seq. No. 02: | |
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| Papers from Motion Seq. No. 04: | |
| Plaintiffs' Motion to Amend Verified Complaint | 10 |
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| Plaintiffs' Affirmation in Reply | 14 |
| Papers from Motion Seq. No. 05: | |
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*Shotkin, Lee, & Associates P.C.*, New York (Isaiah Shotkin of counsel), for plaintiffs.
*Markotsis & Lieberman, P.C.*, New York (Douglas Lieberman of counsel), for defendants.

Gerald Lebovits, J.:

## I. Background

Plaintiffs, 7th Ave. Tax & Accounting and Shotkin Lee & Associates, filed a summons and complaint against defendants Karen Walf, First Data Merchant Services LLC, Jane Doe and ABC Corporation (collectively, FDMS defendants) on September 7, 2016, alleging nine causes of action including breach of contract, replevin, conversion, fraud, unjust enrichment, and defamation. This action was transferred from the Commercial Division because plaintiffs failed to meet the amount in controversy requirement. (Order, Hon. Eileen Bransten, Nov. 16, 2016.)

The following motion sequences are currently before the court: (1) sequence 2, in which plaintiffs move to enter a default judgment against FDMS under CPLR 3215; (2) sequence 3, in which FDMS moves to compel arbitration under CPLR 7503 (a); (3) sequence 4, in which plaintiffs move to amend the verified complaint to add a tenth cause of action; and (4) sequence 5, in which FDMS moves for civil contempt against plaintiffs under N.Y. Judiciary Law § 753.

The court consolidates motion sequences 2, 3, 4, and 5 for disposition. Each motion sequence is discussed in turn, below.

## II. Motion Sequence 2: Motion for a default judgment under CPLR 3215

Plaintiffs' motion for a default judgment under CPLR 3215 is denied. CPLR 3215 (a) provides that "[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against [defendant]." Under CPLR 3215 (f),[1] the moving party must show that defendant defaulted. The movant must demonstrate that the defaulting party had an obligation to respond to the movant's pleading and failed to do so. (*PVI Indus. LLC v 224 Wythe Ave., LLC*, 40 Misc 3d 1219 [A], *1, 2013 NY Slip Op 51234 [U], *1, 2013 WL 3927821, at *1 [Sup Ct Kings County 2013].)

A court will deny a drastic remedy of a default judgment when a delay in serving an answer is not deliberate or willful or lengthy enough to cause any prejudice to plaintiffs, and where defendant demonstrates both a reasonable excuse and the existence of a meritorious

[1] CPLR 3215 (f) provides that "on any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party."

defense. (*US Bank Nat. Ass'n v Brown*, 147 AD3d 428, 428 [1st Dept 2017]; *Scott v Allstate Ins. Co.*, 124 AD2d 481, 483–84 [1st Dept 1986] [vacating the trial court's default judgement where defendant had a 10-day delay in serving its answer].)

An amended complaint becomes the only complaint in the action and supersedes the original complaint. (*Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89, 99 [1st Dept 2012] ["Once plaintiff served the amended complaint, the original was superseded, and the amended complaint becomes the only complaint in the action."].)

A defendant appears by "serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer." (CPLR 320 [a].) An informal communication between parties can constitute an appearance as long as it reflects that defendant "clearly indicated a desire to participate in the proceedings without jurisdictional objection." (*Matter of Sessa v Bd. of Assessors of Town of N. Elba*, 46 AD3d 1163, 1166 [3d Dept 2007].) Attending a preliminary conference may constitute an appearance: "[P]articipation at the preliminary conference sufficiently demonstrated active involvement, constituting an appearance by both parties, in the litigation." (*Rubenstein v Manhattan & Bronx Surface Tr. Operating Auth.*, 280 AD2d 312, 313 [1st Dept 2001].) A court will not likely grant a default judgment when a defendant appears in court numerous times, files a petition to remove the case, enters into a stipulation with plaintiff, and opposes plaintiff's motion to hold it in contempt. (*City of Newburgh v 96 Broadway LLC*, 72 AD3d 632, 633 [2d Dept 2010] [reversing Supreme Court's default judgment against defendant and finding that defendant appeared in the action].) A court will also not grant a default where a defendant's attorney appears in court on the same day plaintiff brought an order to show cause seeking a preliminary injunction, where a defendant appeared at a preliminary conference and filed other papers in opposition. (*Jeffers v Stein*, 99 AD3d 970, 971 [2d Dept 2012] [denying a motion for default judgment on the grounds that the communications and opposition papers filed constituted an appearance for the purposes of CPLR 3025]; *accord Carlin v Carlin*, 52 AD3d 559, 560-561 [2d Dept 2008] [finding that a defendant was not in default when it failed timely to file an answer but timely opposed plaintiff's numerous motions, interposed cross-motions, and appeared and participated at a preliminary conference].)

The parties disagree about whether defendants properly appeared in this action. Plaintiffs allege that service of its amended verified complaint was effectuated on FDMS on September 14, 2016, and that FDMS failed timely to respond or appear within CPLR 3215's 20-day time limit. To support its argument, plaintiffs include an Affidavit of Mailing indicating that it mailed an amended summons and amended verified complaint, and notice of commencement of action on September 20, 2016. (Notice of Motion, Exhibit B.) In opposition, FDMS contends that it made appearances in the Commercial Division on this case and that for the purpose of CPLR 3215, it made an appearance in this case. FDMS further contends that it provided notice of its intent to respond to plaintiffs' complaint when it phoned plaintiffs' counsel and sent emails requesting plaintiffs' Affidavits of Service because the Affidavit of Service was not yet available on the e-filing system. According to FDMS, it needed plaintiff's affidavit of service to determine the amount of time it had to answer the complaint. FDMS also contends that it appeared when it filed for a motion to compel arbitration and to stay the proceedings (Mot. Seq. 3) on the same day that plaintiffs filed for a default judgment against plaintiffs. (FDMS Affirmation in Opposition, Exhibit C.)

FDMS further alleges that even if it delayed in responding to plaintiffs' complaint, defendants' delay does not prejudice plaintiffs because plaintiffs filed an amended complaint on November 11, 2016, motion sequence 4. (FDMS Affirmation in Opposition.) FDMS also contends that plaintiffs were not prejudiced because plaintiffs filed their Affidavit of Service on October 27, 2016, the same day that plaintiffs filed their motion for a default judgment. (FDMS Affirmation in Opposition.)

Plaintiff's motion for a default judgment against FDMS under CPLR 3215 is denied.

FDMS's communications with plaintiffs constituted an appearance. FDMS's attorneys along with plaintiff's attorneys appeared at oral argument to request an immediate stay on the proceedings on October 28, 2016. (Order, Hon. Saliann Scarpulla, Oct. 2016.) At oral argument, FDMS attorneys also requested that plaintiffs withdraw their motion for a default judgment, and both parties appeared in court when it signed a stipulation of adjournment on November 3, 2016, for motion sequence 2. FDMS's attorneys also indicated to plaintiffs their intent to answer plaintiffs' complaint when FDMS's attorneys called and sent five emails to plaintiffs' counsel on September 29, October 5, 7, 11, and 19, 2016, requesting information from plaintiffs' properly to respond to the complaint. Further, FDMS filed the pending motions, sequences 3 and 5. FDMS's communications to plaintiffs, appearances in the Commercial Division for oral argument and the motions it filed in this court constitute an appearance under CPLR 3215.

Any delay by FDMS to answer plaintiffs' complaint was insignificant and did not cause any prejudice to plaintiffs. Plaintiffs filed their motion for a default judgment on the same day that defendants filed motion sequence 3. Also, that plaintiffs filed their amended complaint after it filed this motion for a default judgment indicates that plaintiffs were not prejudiced by defendants' delay. Because of the insignificant delay defendants may have caused to plaintiffs, the drastic remedy of granting plaintiffs' motion for a default judgment against defendants is not warranted in this instance.

In light of New York State's public policy in favor of courts' disposing of cases on the merits, plaintiffs' motion for a default judgment against FDMS is denied. (*See Scott v Allstate Ins. Co.*, 124 AD2d 481, 483-84 [1st Dept 1986].)

### III. Motion Sequence 3: FDMS's order to show cause to compel arbitration under CPLR 7503 (a).

FDMS's order to show cause to compel arbitration under CPLR 7503 (a) is granted.

Under CPLR 7503 (a), "[w]here there is no substantial question whether a valid agreement was made or complied with, . . . the court shall direct the parties to arbitrate." An agreement to enter into arbitration "must be clear, explicit and unequivocal, and must not depend upon implication or subtlety." (*Matter of Waldron [Goddess]*, 61 NY2d 181, 183–184 [1984].) An agreement to arbitrate is unambiguous and enforceable when a party fails to submit a written waiver opting out of arbitration. (*Tsadilas v Providian Natl. Bank*, 13 AD3d 190, 191 [1st Dept

2004] [determining that where a plaintiff did not read the agreement's opt-out provision, it was too speculative for the court to invalidate the entire arbitration agreement].)

A non-signatory to an agreement containing an arbitration clause can still be bound under five different theories: "(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel." (*Am. Bur. of Shipping v Tencara Shipyard S.P.A.*, 170 F3d 349, 352 [2d Cir 1999].) Because the rationale for granting defendants' order to show cause under agency theory and estoppel theories are sufficient, they will be analyzed below.

Under agency law, an employee who has actual or apparent authority binds its employer to agreements it enters into with third parties. (Restatement [Third] of Agency § 6.01 ["Where an agent acting with actual or apparent authority makes a contract on behalf of a disclosed principal, the principal and the third party are parties to the contract."].)

Under an estoppel theory, a non-signatory to an agreement containing an arbitration clause is estopped from denying its obligation to arbitrate when it receives a direct benefit from that agreement. (*Am. Bur. of Shipping*, 170 F3d at 352.) A written signature on a contract containing an arbitration clause is not required as long as the acceptance of the entire contract is clear and unambiguous. (*God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374 [2006] [holding that no signature was required on an arbitration clause because both parties operated under the contract's terms, and therefore plaintiffs clearly intended to be bound by the entire contract.]; *accord Sutphin Retail One, LLC v Sutphin Airtrain Realty, LLC*, 143 AD3d 972, 973-74 [2d Dept 2016] [finding that the trial court "erred in denying defendants' motion to compel arbitration and stay all proceedings in the action pending arbitration."].)

As a matter of public policy, "New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration." (*Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66-67 [2007].) Once parties who broadly agree to arbitrate a dispute, "it is for the arbitrators to decide what the agreement means and to enforce it according to the rules of law which they deem appropriate in the circumstances." (*Weinrott v Carp*, 32 NY2d 190, 195-96 [1973].)

The parties disagree about whether there was a valid assent to arbitration. FDMS alleges that it entered into a valid Merchant Agreement with plaintiffs on December 14, 2015, and that plaintiffs signed the "Confirmation Page" section of the agreement in which the signatory acknowledged the "General Terms & Conditions," containing an arbitration clause. In opposition to FDMS's motion, plaintiffs allege that the Merchant Agreement is invalid and that they should not be bound by the arbitration clause. Plaintiffs allege that the agreement is a "forged document" because Yi Yang, a shareholder of plaintiff 7th Ave Tax (Plaintiff's Amended Verified Complaint, ¶ 8) whose signature appears in the agreement's "Application" and "Confirmation" sections, was in China on a "leave of absence" from plaintiffs' firm when the document was signed. (Plaintiff's Affirmation in Opposition, ¶ 18-19.)

Plaintiffs and FDMS entered into a valid Merchant Agreement dated December 14, 2015. The acceptance of the terms of the agreement was clear and unambiguous. The text of the

arbitration clause in the "General Terms & Conditions" contains an opt-out provision, written in all capital letters, and requires a written waiver if the signatory does not consent to arbitration.[2] That plaintiffs may not have read the opt-out clause or may not have seen the person who signed the Merchant Agreement is too speculative to invalidate the entire agreement. Plaintiffs clearly and unambiguously consented to arbitration when it failed to provide a written waiver to FDMS within 30 days of signing the Merchant Agreement.

Under a theory of agency law, plaintiffs, or a member of plaintiff's firm, signed the Merchant Agreement. The name Yi Yang appears on portions of the Merchant Agreement including the "Confirmation Page" section in which the signatory acknowledged the "General Terms & Conditions," containing an arbitration clause. (Order to Show Cause, Exhibit A.) Yi Yang acted as an agent of plaintiff's firm, 7th Ave Tax & Accounting. Yang had apparent authority to enter into an agreement with FDMS when the name, address, and phone number of plaintiffs' firm, 7th Ave. Tax & Accounting was written on various sections of the Merchant Agreement. Yang may have been temporarily on a "leave of absence" from the firm on the date she signed the Merchant Agreement on plaintiffs' behalf, but plaintiffs do not indicate that she is no longer a shareholder or employee of the firm. Nor do plaintiffs submit a notarized affidavit from Yang that she never signed the Merchant Agreement and that her signature was forged. Thus, plaintiff's allegation that the Merchant Agreement is a forgery is conclusory, self-serving, and unavailing. Yang acted with apparent authority and bound plaintiffs to the Merchant Agreement.

Further, even if no one signed the Merchant Agreement as plaintiffs allege, under an estoppel theory plaintiffs received a direct benefit from the services that FDMS provided. Plaintiffs used FDMS's services when it began processing credit-card transactions in January 2016 and operated under the terms of the Merchant Agreement. (Order to Show Cause, ¶ 10.) Plaintiffs are estopped from denying the validity of the Merchant Agreement and its obligation to participate in arbitration.

Therefore, this court will not interfere with the parties' agreement to arbitrate. FDMS's order to show cause to compel arbitration is granted.

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[2] The arbitration clause provides: "28.1 This arbitration provision shall be broadly interpreted. If you have a dispute with us that cannot be resolved informally, you or we may elect to arbitrate that Dispute in accordance with the terms of this arbitration provision rather than litigate the Dispute in court.

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28.11 IF YOU DO NOT WISH TO ABRITRATE DISPUTES YOU MUST NOTIFY US IN WRITING WITHIN 30 DAYS OF THE DATE THAT YOU FIRST RECEIVE THIS AGREEMENT BY WRITING YOUR NAME, ADDRESS AND ACCOUNT NUMBER AS WELL AS A CLEAR STATEMENT THAT YOU DO NOT WISH TO RESOLVE DISPUTES THROUGH ARBTIRATION AND SENDING THAT NOTICE." (FDMS Order to Show Cause, Exhibit A [emphasis in original].)

**IV. Motion Sequence 4: Plaintiffs' motion to amend its verified complaint**

Because this court grants FDMS's order to show cause to compel arbitration, plaintiffs' motion to amend its verified complaint under CPLR 3025 (b) is denied as academic.

**V. Motion Sequence 5: FDMS's motion for contempt under Judiciary Law § 753**

FDMS's motion to hold plaintiffs in contempt is denied. To sustain a finding of civil contempt under Judiciary Law § 753, "a court must find the alleged contemnor violated a lawful order of the court, clearly expressing an unequivocal mandate of which that party had knowledge, and that, as a result of the violation, a right of a party to the litigation was prejudiced." (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015].) The movant has the burden to show with clear and convincing evidence that it was prejudiced. (*Id.*; *accord Karg v Kern*, 125 AD3d 527, 528-529 [1st Dept 2015]; *N.A. Dev. Co. v Jones*, 99 AD2d 238, 242 [1st Dept 1984] ["Civil contempt requires proof with a reasonable certainty."] [internal quotation omitted].)

FDMS contends that plaintiffs should be held in contempt because when plaintiffs filed a new amended complaint after FDMS filed an order to show cause to compel arbitration and stay the proceedings (motion sequence 3), the stay was violated as sub judice. FDMS alleges that plaintiffs forced FDMS to expend additional and unnecessary legal fees in connection with plaintiffs' motion for leave to serve a second amended complaint (motion sequence 4) and filing this motion to hold plaintiffs in civil contempt. (FDMS Notice of Motion, Affidavit of Douglas M. Lieberman, at ¶ 9.)

FDMS does not provide clear and convincing evidence that it was prejudiced as a result of plaintiffs' motion to amend its complaint (motion sequence 4) while its motion to compel arbitration and stay the proceedings (motion sequence 3) was pending. This court denied plaintiffs' motion to amend its complaint (motion sequence 4), and therefore FDMS cannot be prejudiced as a result of plaintiffs' motion to amend. Also, FDMS's costs in connection with responding to plaintiffs' motion to amend, their second amended complaint, and moving for contempt of court did not prejudice the parties' rights. Therefore, FDMS's contempt motion is denied.

Accordingly, it is

ORDERED that plaintiffs' motion for a default judgment under CPLR 3215 is denied; and it is further

ORDERED that defendants' order to show cause to compel arbitration under CPLR 7503 (a) is granted; and it is further

ORDERED that plaintiffs 7th Ave. Tax & Accounting, Inc. and Shotkin, Lee & Associates shall arbitrate its claims against defendants Karen Walf, First Data Merchant Services Corporation a/k/a First Data Merchant Services LLC, Jane Doe and ABC Corporation in accordance with the Merchant Agreement; and it is further

ORDERED that plaintiffs' motion to amend the verified complaint to add causes of action under CPLR 3025 (b) is denied; and it is further

ORDERED that defendants' motion to hold plaintiffs in civil contempt under N.Y. Judiciary Law § 753 is denied; and it is further

ORDERED that defendants must serve a copy of this decision and order with notice of entry on all parties and on the County Clerk's Office, which is directed to enter judgment accordingly.

Dated: May 26, 2017

J.S.C.
HON. GERALD LEBOVITS
J.S.C.