SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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ALLEN GOLDMEIER, STEVEN GOLDMEIR, and CENTURY SPORTS, INC. f/k/a RAND INTERNATIONAL LEISURE PRODUCTS, LTD.,

Plaintiffs,

- against -

MARK WORKSMAN, RAND INTERNATIONAL LEISURE PRODUCTS, LLC f/k/a RAND INTERNATIONAL ACQUISITION I, LLC, and MELTZER, LIPPE, GOLDSTEIN & BREITSTONE, LLP,

Defendants.

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TRIAL/IAS PART: 22
NASSAU COUNTY

Index No: 001315-10
Motion Seq. Nos: 3 & 4
Submission Date: 7/8/11

The following papers have been read on these motions:

Notice of Motion, Affirmation in Support,
Affidavit in Support and Exhibits.....x
Memorandum of Law in Support.....x
Notice of Cross Motion, Affirmation in Support,
Affidavit in Support and Exhibits.....x
Affirmation in Opposition/Further Support and Exhibits.....x
Cross Reply Affirmation.....x

This matter is before the Court for decision on 1) the motion filed by Plaintiff Century Sports, Inc. ("Century") on February 14, 2011, and 2) the cross motion filed by Defendant Mark Worksman ("Worksman") on April 4, 2011, both of which were submitted on July 8, 2011, following oral argument before the Court. For the reasons set forth below, the Court 1) denies

Century's motion; and 2) grants Worksman's cross motion to the extent that the Court grants Worksman leave to file a late Answer in the form provided in his Proposed Verified Answer, and deems that Answer served.

BACKGROUND

A. Relief Sought

Century moves 1) pursuant to CPLR § 3215, for a default judgment against Worksman on the Third, Fourth and Ninth Causes of Action in the Complaint; or, alternatively, 2) pursuant to CPLR § 3212, for summary judgment on the Third, Fourth and Ninth Causes of Action in the Complaint. Those Causes of Action are: 1) against Worksman for breach of the Guaranty (Third), 2) against Worksman for recovery of counsel fees pursuant to the Guaranty (Fourth), and 3) for replevin of the Membership Interests by directing seizure of the Certificates.

Worksman opposes Century's motion and requests that, should the Court conclude that there has been a default by Worksman in answering, the Court vacate that default and grant Worksman leave to serve and file his Answer.

B. The Parties' History

The parties' history is set forth in detail in a prior decision of the Court dated February 18, 2010 ("Prior Decision") in which the Court, *inter alia*, denied Plaintiffs' applications for injunctive relief and orders of seizure. The Court incorporates the Prior Decision herein by reference.

As outlined in the Prior Decision, Century and other entities owned by the Goldmeiers entered into an Asset Purchase Agreement ("APA"), which Worksman signed in his capacity as Manager of Rand, for the sale of substantially all of their assets to Rand. Rand paid a portion of the Purchase Price at the Closing, and the balance of the Purchase Price was evidenced by a Promissory Note payable by Rand to Century. As collateral for the repayment of the Promissory Note, the parties executed numerous Loan Documents, including the Workman Guaranty. To finance its acquisition of the Purchased Assets and provide working capital, Rand obtained two (2) loans from Wells Fargo Bank, N.A. ("Wells Fargo") pursuant to the Wells Fargo Credit Agreement. Plaintiffs have alleged that, following the Closing, Rand was constantly delinquent in making payments to suppliers, resulting in the loss of valuable business relationships and a

restriction of Rand's credit lines, and Rand failed to make required payments to the Goldmeirs. Plaintiffs also allege, *inter alia*, that Worksman caused Rand to default on the Wells Fargo obligations, which prompted Wells Fargo to declare a default and accelerate the balance due. Plaintiffs allege that this default resulted from Rand's improper and fraudulent characterization of returned goods as inventory. The Complaint contains thirteen (13) causes of action, three of which are the subject of Century's motion now before the Court.

In March of 2010, an involuntary chapter 7 case was commenced against Rand in the United States Bankruptcy Court for the Eastern District of New York ("Bankruptcy Action"). The Goldmeiers and Century were two of the petitioning creditors in the Bankruptcy Action. The Bankruptcy Court permitted the parties to file amended pleadings, and an amended petition ("Amended Petition") against Rand was filed in May of 2010.

By Decision and Order dated June 18, 2010 (Ex. 15 to Kushner Aff. in Supp.), the Bankruptcy Court denied Rand's Motion for Summary Judgment, and deferred ruling on Rand's Motion for Abstention Dismissing Voluntary Petition. A trial on the Amended Petition was conducted and by decision after trial dated August 31, 2010 ("Bankruptcy Decision") (Ex. 17 to Kushner Aff. in Supp.), the Bankruptcy Court (Trust, J.) rendered an opinion that addressed the issue "whether to enter an order for relief against the debtor" and "a subsidiary issue...whether the Court should abstain from entering an order for relief if an order for relief were otherwise proper" (Bkcy. Dec. at p. 4). The Bankruptcy Court concluded that an order for relief should be entered, and that it should not abstain from entering such an order (*id.*). The Bankruptcy Court determined that Century is a petitioning creditor that holds a claim in the amount of $3,331,702.41 that is not subject to a bona fide dispute as to either liability or amount (*id.* at p. 14). [1] By Order dated September 28, 2010, the Bankruptcy Court granted Rand's motion to convert the Bankruptcy Action from Chapter 7 to Chapter 11 (Kushner Aff. in Supp.Opp. at ¶ 68).

The Court has received correspondence and conducted conferences addressing the issue

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[1] In the Prior Decision, the Court denied Defendants' cross motion, with leave to renew upon a showing, that Wells Fargo had not been fully repaid in connection with the loans at issue. At the trial of the Bankruptcy Action, the Bankruptcy Court heard testimony and received exhibits that established that the Wells Fargo debt had been paid off in full prior to the Bankruptcy Filing (Bank. Dec. at p. 22).

of whether the automatic bankruptcy stay ("Stay") was applicable to Worksman as well as Rand. Worksman opposes the imposition of a default judgment against him, and asks the Court to grant him leave to serve and file an Answer. Worksman provides a Proposed Verified Answer (Ex. B to Rudofsky Aff. in Opp./Supp.) which contains nine affirmative defenses, predicated in part on claims of fraud and other improper conduct by Plaintiffs previously raised by Worksman in connection with prior motions before the Court, and on Worksman's claim that the instant action is stayed against him pursuant to the automatic stay provision in 11 U.S.C. § 362(a).

C. The Parties' Positions

Century submits that it has demonstrated its right to a default judgment against Worksman by establishing 1) proof of service of the Complaint on Worksman, 2) proof of the facts supporting Century's claim against Workman, consisting of a) evidence that the Worksman Guaranty was pledged in connection with the APA, and served as collateral security for the repayment of Rand's obligations to Century, and b) the Bankruptcy Decision which constitutes a judicial determination of Rand's liability to Century, and 3) Worksman's failure to answer the Complaint.

Alternatively, Century argues that it has demonstrated its entitlement to partial summary judgment by 1) demonstrating the existence and validity of the Subordinated Note and Worksman Guaranty; 2) providing proof, specifically the Bankruptcy Decision, that the Subordinated Note was not subject to a bona fide dispute as to amount or liability, and was due and owing as of March 8, 2010; 3) establishing its right to attorney's fees pursuant to the express provisions of the Worksman Guaranty; and 4) demonstrating its right to replevin of the Certificate, pursuant to the Pledge Agreement.

Worksman opposes Century's motion arguing, *inter alia*, that 1) the Court should reject Century's claim that Worksman has defaulted in the instant action, in light of documentation reflecting that Worksman has consistently taken the position that the instant action is stayed against him by virtue of the bankrupt Defendant's obligation to defend and indemnify him; 2) should the Court conclude that there has been a technical default by Worksman, the Court should vacate that default and permit Worksman to serve and file an Answer; and 3) the Court should deny Century's alternative application for summary judgment, which was made prior to

the joinder of issue, and permit discovery to proceed .

RULING OF THE COURT

A. Default Judgment

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

A party seeking to vacate an order entered upon his default is required to demonstrate, through the submission of supporting facts in evidentiary form, both a reasonable excuse for the default and the existence of a meritorious cause of action or defense. *White v. Incorp. Village of Hempstead*, 41 A.D.3d 709, 710 (2d Dept. 2007). Public policy favors the resolution of cases on the merits. *Bunch v. Dollar Budget, Inc.*, 12 A.D.3d 391 (2d Dept. 2004).

B. Summary Judgment

CPLR § 3212(a) provides that any party may move for summary judgment in any action, after issue had been joined. Joinder of issue requires the service of a complaint by the plaintiff and an answer or counterclaim by the defendant. *Shaibani v. Soraya*, 71 A.D.3d 1121 (2d Dept. 2010) (trial court erred in considering merits of motion and cross motion, in effect, for summary judgment where issue had not yet been joined).

C. *Res Judicata* and Collateral Estoppel

The doctrine of *res judicata* operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief which arise out of the same factual grouping or transaction and which should have or could have been resolved in the prior proceeding. *Luscher v. Arrua*, 21 A.D.3d 1005, 1006-07 (2d Dept.), quoting *Koether v. Generalow*, 213 A.D.2d 379, 380 (2d Dept. 1995). Under the doctrine of collateral estoppel, a party is precluded from relitigating an issue which has been previously decided against him in a prior proceeding where he had a full and fair opportunity to litigate such issue. *Luscher*, 21 A.D.3d at 1007.

D. Bankruptcy Stay

Stays pursuant to 11 U.S.C. § 362(a) are limited to debtors and do not encompass non-bankrupt co-defendants. *Uto v. Job Site Services, Inc.*, 2011 U.S. Dist. LEXIS 12587, ** 2 (E.D.N.Y. 2011), quoting *Teachers Ins. & Annuity Ass'n of Am. v. Butler*, 803 F.2d 61, 64 (2d Cir. 1986). In some cases, however, the automatic stay can be extended to non-debtors, but only where there exist unusual circumstances that would require something more than the mere fact that one of the parties to the lawsuit has filed for bankruptcy. *Id.* at ** 3, quoting *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986). Such circumstances are typically found only when a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate. *Id.*, quoting *Queenie, Ltd. v. Nygard Int'l*, 321 F.3d 282, 287 (2d Cir. 2003). Examples of such circumstances include 1) a claim to establish an obligation of which the debtor is a guarantor, *id.*, quoting *Queenie* at 288, citing *McCartney v. Integra Nat'l Bank N.*, 106 F.3d 506, 510-11 (3d Cir. 1997), 2) a claim against the debtor's insurer, *id.*, quoting *Queenie* at 288, citing *Johns-Manville Corp. v. Asbestos Litig. Group*, 26 B.R. 420, 435-36 (Bankr. S.D.N.Y. 1983), and 3) actions where there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant, *id.* at ** 4, citing *Queenie* at 288, quoting *A.H. Robins*, 788 F.2d at 999.

E. Application of these Principles to the Instant Action

The Court denies Worksman's application to extend the Stay to apply to him based on the Court's determinations, *inter alia*, that 1) the recovery sought by Plaintiffs against Worksman involves an independently enforceable personal guaranty; and 2) Worksman has not demonstrated that permitting the claims against him to proceed would pose a serious threat to the debtor's reorganization efforts or have an immediate adverse economic consequence upon the debtor's estate.

The Court also concludes that, in light of the procedural history of this matter and the public policy favoring the determination of actions on the merits, it is appropriate to excuse Worksman's failure to timely serve an answer to the Complaint. Accordingly, the Court grants Worksman's cross motion to the extent that the Court grants Worksman leave to file a late answer, and deems his Proposed Verified Answer served. The Court thus denies Century's

motion for a default judgment .

The Court denies Century's motion for summary judgment on procedural grounds, as issue has not yet been joined. The Court also denies Century's motion for summary judgment on substantive grounds. First, the Court concludes that the Bankruptcy Decision lacks the requisite identity of issues and parties to warrant the application of the principles of collateral estoppel or *res judicata* to that Decision, in part because the Bankruptcy Decision did not consider or resolve Worksman's liability on the Guaranty and the merit of his defenses with respect to that Guaranty. In addition, as outlined in the Prior Decision, there exist numerous disputed issues regarding the parties' pre-litigation business relationship that render summary judgment inappropriate at this juncture.

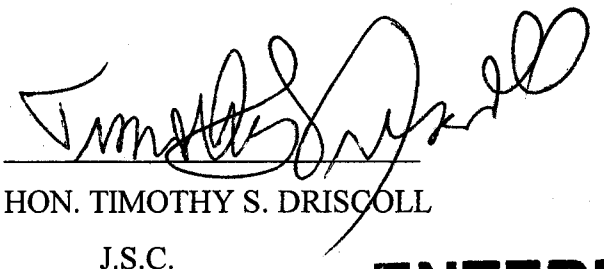
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court on October 6, 2011 at 9:30 a.m. for a Preliminary Conference.

ENTER

DATED: Mineola, NY
August 30, 2011



HON. TIMOTHY S. DRISCOLL
J.S.C.