SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 18

X

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

-against-

Index No.: 022479/09
Motion Sequence...02
Motion Date...08/24/11
XXX

APT IDEAS, INC. ALEX KAPLAN a/k/a ALEXANDER M. KAPLAN a/k/a ALEXANDER KAPLAN, GUY RENKOVSKI, a/k/a GUY K. RENKOVSKI and DIMITRY SAVRANSKY a/k/a SMITRY SAVRANSKY,

Defendants.

X

Papers Submitted:
Order to Show Cause.....x
Memorandum of Law.....x

Upon the foregoing papers, the Defendants' unopposed Order to Show Cause, brought pursuant to CPLR § 5015 (a) (1), seeking an order vacating the Decision and Order of this Court, dated July 19, 2010, and the subsequent default judgment, dated August 20, 2010, and entered on September 2, 2010, and, upon vacating the default judgment, granting partial summary judgment, pursuant to CPLR § 3212, in favor of the individual Defendants, is decided as hereinafter provided.

The Plaintiff commenced this action on or about November 4, 2009, to recover

on a Business Revolving Credit Agreement (hereinafter referred to as "BRCA") the principal sum of $150,000.00 with interest on the unpaid principal BRCA balance at the Prime Rate plus 2.25%. The Defendants interposed a Verified Answer, dated December 2, 2009, which contained affirmative defenses denying that the individual Defendants executed a personal guarantee on the BRCA. On or about May 10, 2010, the Plaintiff moved for summary judgment on the claims in its complaint and to correct certain clerical errors contained in the complaint, *nunc pro tunc*. The Defendants failed to submit any opposition to the Plaintiff's motion, whereupon the Court granted the relief requested by the Plaintiff, which resulted in the issuance and entry of the Decision and Order dated, July 19, 2010, and the subsequent Judgment dated August 30, 2010. *See* Short Form Order (Marber, J., 07/19/10).

The Defendants now seek to vacate of the Decision and Order, dated July 19, 2010 and the subsequent Judgment, dated August 30, 2010, contending that the Defendants' default is excusable and that there is a meritorious defense to the Plaintiff's complaint. The Plaintiff does not oppose the Defendants' motion to vacate the default or the branch of the motion which seeks partial summary judgment in favor of the individual Defendants.

In support of the argument that their default was excusable, the Defendants submit the Affidavit of Akiva Ofshtein, Esq., principal attorney for the prior law firm of record for the Defendants. Mr. Ofshtein states in his Affidavit that opposition papers and a cross-motion to the Plaintiff's motion for summary judgment were prepared but not filed due to the inadequacy of his former paralegal, Roman Pyatetsky. (*See* Ofshtein Affidavit, dated

July 21, 2011, annexed to the Defendants' Order to Show Cause) According to Mr. Ofshtein's Affidavit, he periodically requested an update from his paralegal regarding the status of the motion and cross-motion, to which Mr. Pyatetsky repeatedly responded that the motions had not yet been decided. Mr. Ofshtein further states that Mr. Pyatetsky failed to inform him that a decision was rendered, entered and served with notice of entry and that subsequently a judgment was entered against the Defendants. Mr. Ofshtein states that Mr. Pyatetsky was terminated immediately upon learning of these failures.

In addition to Mr. Ofshtein's Affidavit, an Affidavit was submitted by each of the individual Defendants, Kaplan, Renkovski and Savransky[1]. The Defendant, Kaplan's Affidavit confirms that the Defendants were under the impression that the opposition and cross-motions were filed and that they were awaiting a decision. In or about May, 2011, the Defendant, Savransky's tax refund was seized as a result of the Judgment that the Plaintiff was seeking to enforce. According to the Defendants, it was only at that time that they, as well as Mr. Ofshtein, had learned that the opposition and cross-motion was never filed and a subsequent default judgment was obtained against them. Shortly after learning this information, the Defendants executed a consent to change attorney substituting the Ofshtein Law Firm, P.C. for Smith & Shapiro, the Defendants' present attorneys of record. (*See* Consent to Change Attorney, dated July 19, 2011, attached to the Defendants' Order to Show Cause as Exhibit "F")

With respect to the Defendants' meritorious defense, the Defendants contend

---

[1] The statements contained within the Kaplan Affidavit are incorporated by reference in the Affidavits of the Defendants, Renkovski and Savransky.

in their Affidavits in Support of the Order to Show Cause that the BRCA executed on June 7, 2004 did not contain a personal guarantee by the individual Defendants. Specifically, the Defendants contend that in the BRCA, dated June 7, 2004, the section entitled "PERSONAL GUARANTEE AND COLLATERAL AGREEMENT" was redacted and initialed. (*See* BRCA, dated June 7, 2004, attached to the Defendants' Order to Show Cause as Exhibit "C") The Defendants further contend that a representative of the Plaintiff contacted the Defendant, Renkovski, and informed him that the June 7th BRCA was shredded in error, that a person was terminated as a result of the error, and that it was necessary to execute a new BRCA. The second "new" BRCA executed by the Defendants, Renkovski and Savransky contained the personal guaranty section without any redactions. The Defendants submit that they were unaware the second BRCA included the personal guaranty provision. As such, the Defendants maintain that the BRCA was only executed on behalf of the corporation, obviating them of any personally liabity on the BRCA.

A court may vacate a default pursuant to CPLR §5015(a) where the moving party demonstrates both a reasonable excuse for the default and the existence of a meritorious defense. *Rockland Transit Mix, Inc. v. Rockland Enterprises, Inc.*, 28 A.D.3d 630, 814 N.Y.S.2d 196 (2d Dept. 2006) A default by a defendant should be vacated where there is "minimal prejudice caused by the defendant's short delay in answering, as well as the public policy in favor of resolving cases on the merits." *Classie v. Stratton Oakmont, Inc.*, 236 A.D.2d 505 (2d Dept. 1997). Furthermore, "it is within the sound discretion of the Court to determine whether the proffered excuse and the statement of merits are sufficient." *Navarro*

v. A. Trenkman Estate, Inc., 279 A.D.2d 257 (1st Dept. 2001) citing *Mediavilla v. Gurman*, 272 A.D.2d 146 (1st Dept. 2001). The court also has discretion to consider whether the defendant acted promptly in curing the default without delay or prejudice to the plaintiff. *Statewide Ins. Co. v. Bradham*, 301 A.D.2d 606 (2d Dept. 2003) citing *Matter of Statewide Ins. Co. v. Bradham*, 301 A.D.2d 606 (2d Dept. 2003).

In the instant matter, the Defendants proclaim an excusable default due to the law office failure by the Defendants' former attorney of record. Submitted in support of their contention is a detailed explanation by the Defendants' former counsel, Mr. Ofshtein, stating that, while opposition papers and a cross-motion were prepared, the office failed to file the documents without the knowledge of Mr. Ofshtein. Immediately upon learning of the failures committed by Mr. Ofshtein's office, the Defendants assert that prompt action was taken in securing new counsel. The Court may, in its discretion, accept law office failure as a reasonable excuse where the claim of law office failure is supported by a "detailed and credible" explanation of the default or defaults at issue. *Henry v. Kuveke*, 9 A.D.3d 476 (2d Dept. 2004). The Court finds the excuse proffered by the Defendants credible and properly supported by their Affidavits as well as a detailed Affidavit from the Defendants' former counsel. Accordingly, the Defendants' failure to submit opposition papers which resulted in a default judgment, is excusable.

Turning next to the element of a meritorious defense, the Defendants submit that the original BRCA executed by them contained a redaction of the personal guaranty, and, as such, they cannot be held personally liability on the loan. The Plaintiff, in its complaint,

relies on a second BRCA which was executed by the Defendants, Renkovski and Savransky, but was not executed by the Defendant, Kaplan. The Defendants, Renkovski and Savransky contend in their Affidavits that they were not aware that the second BRCA included a personal guaranty provision. It is well settled that the party seeking vacatur of a default need only demonstrate "a potentially meritorious opposition to the motion". *NY SMS Waterproofing, Inc. v. Congregation Machne Chaim, Inc.*, 81 A.D.3d 617 (2d Dept. 2011).

This Court, in its discretion, finds that the Defendants have provided a potentially meritorious defense and sufficient evidence that the default was not willful. The delay was short and the Plaintiff will not be prejudiced by allowing the Defendant to defend the action. Moreover, vacatur of a default is consistent with the strong public policy of resolving cases on their merits. *Dimitriadis v. Visiting Nurse Serv. of N.Y.*, 84 A.D.3d 1150 (2d Dept. 2011); *O'Loughlin v. Delisser*, 15 A.D.3d 372 (2d Dept. 2005).

Upon vacating the Defendants' default, the Defendants seek partial summary judgment in favor of the individually named Defendants, Kaplan, Renkovski and Savransky. It is undisputed that the Defendant, Kaplan, did not execute any documents personally guaranteeing the loan in favor of the Plaintiff. The record establishes that, arguably, Renkovski and Savransky may be held personally liable on the BRCA due to the subsequent BRCA which contained the un-redacted personal guaranty provision. However, the Plaintiff has not opposed the individual Defendants' motion for partial summary judgment in their favor. The Defendants, Renkovski and Savranski, unequivocally state in their affidavits in support of the motion for partial summary judgment, that the second BRCA should not have

included the personal guaranty provision. In light of the record before the Court, the individual Defendants, Kaplan, Renkovski and Savranski are entitled to summary judgment, as a matter of law.

Accordingly, it is hereby

ORDERED, that the Defendants' Order to Show Cause, pursuant to CPLR § 5015 (a) (1), seeking an order vacating the Decision and Order of this Court, dated July 19, 2010, and the subsequent default judgment, dated August 20, 2010, and entered on September 2, 2010, is **GRANTED**; and it is further

ORDERED, that the branch of the Defendants' Order to Show Cause, seeking partial summary judgment in favor of the individual Defendants, is **GRANTED**.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
October 27, 2011

Hon. Randy Sue Marber, J.S.C.
XXX