

City Natl. Bank v Bleecker St. Records, Inc.
2014 NY Slip Op 30061(U)
January 2, 2014
Supreme Court, New York County
Docket Number: 652350/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. JOAN A. MADDEN

PRESENT: _____ **J.S.C.**
Justice

PART 11

Index Number : 652350/2012
CITY NATIONAL BANK
vs.
BLEECKER STREET RECORDS, INC.
SEQUENCE NUMBER : 001
DEFAULT JUDGEMENT

INDEX NO. _____
MOTION DATE _____
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 *determined in accordance with the annexed decision and order.*

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

Dated: January 2, 2014

[Signature]
HON. JOAN A. MADDEN, J.S.C.
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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
CITY NATIONAL BANK,

Plaintiff,

INDEX NO. 652350/12

-against-

BLEECKER STREET RECORDS, INC., BLEECKER
STREET MUSIC, INC., MATTHEW WHITE and
BARBARA WHITE,

Defendants.

-----X

JOAN A. MADDEN, J.:

In this is an action for breach of a commercial credit card agreement, a personal guaranty and two promissory notes, plaintiff moves for a default judgment against three of the four named defendants, Bleecker Street Records, Inc., Bleecker Street Music Inc. and Matthew White (collectively “defendants”), based on their failure to appear and answer.¹ Defendants appear by counsel, oppose the motion and submit a proposed answer.

In support of the motion, plaintiff relies on documents showing that in January 2006, Matthew White as president and owner of Bleecker Street Music Inc. applied for a MasterCard business credit card; Bleecker Street Music Inc. defaulted on the credit card payments in November 2011; and as of March 30, 2012, a total amount of \$19,058.11 was due and owing. As part of same credit card application, White executed a personal guaranty. Also, in March 2010, Bleecker Street Records, Inc. executed a promissory note for \$12,500. Plaintiff alleges that Bleecker Street Records, Inc. defaulted on its obligations under the promissory note by not

¹Plaintiff filed a stipulation of discontinuance as to the fourth defendant, Barbara White.

paying principal and accrued interest that became due on March 1, 2012, and as of May 15, 2012, the amount due was \$7,675.78. In conjunction with the promissory note, White executed a Commercial Guaranty dated March 9, 2010, for the \$12,500 loan, and on March 10, 2011, he executed a second Commercial Guaranty.

In opposition, White submits an affidavit and an attorney's affirmation asserting that he has a meritorious defense and a reasonable excuse for his default. As to a meritorious defense, White provides sworn statements that he did not sign any of the foregoing agreements, he did not give anyone else the authority to sign the agreements, and he had no knowledge of the agreements. As to a reasonable excuse for not timely answering the complaint, White states that he was engaged in efforts to investigate the allegations, and find an attorney to represent the corporate defendants. White also argues that plaintiff will not be prejudiced if he is permitted to answer, and that he will be greatly prejudiced if he is not permitted to do so. White further states that one of the corporate defendants, Bleecker Street Records, Inc., "is dissolved and is no longer in existence."

In reply, plaintiff argues that defendants have not demonstrated a reasonable excuse for the delay or a meritorious defense to the action. Plaintiff notes that defendants were served on July 18, 2012, by in-hand delivery to White, and White admits he received the summons and complaint. Plaintiff objects that White's excuse that he was investigating the matter and looking for an attorney is "simply incredible," in view of the 13-month delay. Plaintiff's counsel states that he spoke with White "numerous times," including telephone conversations in August and October 2012 and August 2013, and he advised White that unless defendants answered by September 19, 2012, plaintiff would move for a default judgment. Notably, plaintiff not make

the instant motion on until July 26, 2013. Plaintiff argues that since defendants have not made out a reasonable excuse, the court need consider whether they have a meritorious defense, and in any event, White submits no evidence to support his contentions that he neither knew about nor signed the agreements. Plaintiff also argues that White's affidavit is self-serving, and that a "bald assertion" of forgery is not enough to raise an issue as to the authenticity of the documents.

As a general rule, a defendant opposing a motion for a default judgment must demonstrate a reasonable excuse for not answering and a meritorious defense to the action. See Zwicker v. Emigrant Mortgage Company, Inc, 91 AD3d 443 (1st Dept 2012); Morrison Cohen LLP v. Fink, 81 AD3d 467 (1st Dept 2011); Singh v. Gladys Towncars, Inc, 42 AD3d 313 (1st Dept 2007); ICBC Broadcast Holdings-NY, Inc v. Prime Time Advertising, Inc, 26 AD3d 239 (1st Dept 2006). Public policy, however, favors the resolution of cases on the merits, and courts have broad discretion to grant relief from pleading defaults where the defaulting party has a meritorious defense, the default was not willful and the opposing party is not prejudiced by the delay. See Pagan v. Four Thirty Realty LLC, 50 AD3d 265 (1st Dept 2008); Heskel's West 38th Street Corp. v. Gotham Construction Co., LLC, 14 AD3d 306 (1st Dept 2005).

In determining a motion for leave to serve a late answer pursuant to CPLR 3012(d), the court considers a number of factors including the length of defendant's delay, the excuse offered for the delay, the absence or presence of willfulness, the possibility of prejudice to plaintiff, the potential merits of the defenses, and the public policy favoring the resolution of disputes on their merits. See Cirillo v. Macy's, Inc, 61 AD3d 538 (1st Dept 2009); Jones v. 414 Equities LLC, 57 AD3d 65, 81 (1st Dept 2008); Pagan v. Four Thirty Realty LLC, supra. Where as here, no default order or judgment has been entered, a showing of the potentially meritorious nature of the

defenses is not an essential component of CPLR 3012(d) relief. See Empire Healthchoice Assurance, Inc. v. Lester, 81 AD3d 570 (1st Dept 2011); Jones v. 414 Equities LLC, *supra*; DeMarco v. Wyndham International, Inc., 299 AD2d 209 (1st Dept 2002).

Applying the foregoing standards, the court concludes that defendants should be permitted to answer, so this matter can be resolved on the merits. Even if defendants have not provided a compelling excuse, nothing in the record shows or suggests that the delay willful, and plaintiff has not demonstrated any prejudice as a result of the delay. Moreover, based on White's sworn statements that he neither signed, authorized nor had knowledge of the agreements on which this action is based, defendants have demonstrated the existence of a potentially meritorious defense of forgery. Plaintiff's reliance on Banco Popular, N.A. v. Victory Taxi Management, Inc., 1 NY3d 381 (2004) is misplaced, as that case involves the proof necessary to defeat a motion for summary judgment when defendant is seeking to raise an issue of fact as to the authenticity of a signature.

Thus, under the circumstances presented, where plaintiff has not been prejudiced by the delay and the delay was not willful, and in view of the public policy favoring the resolution of cases on the merits, the court in its discretion finds that defendants Bleecker Street Records, Inc., Bleecker Street Music, Inc. and Matthew White shall be permitted to answer.

Accordingly, it is

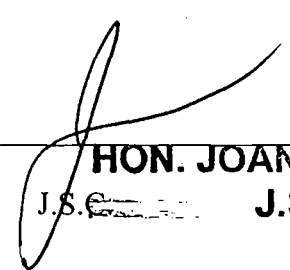
ORDERED that plaintiff's motion for a default judgment against defendants Bleecker Street Records, Inc., Bleecker Street Music, Inc. and Matthew White is denied; and it is further

ORDERED that the default by defendants Bleecker Street Records, Inc., Bleecker Street Music, Inc. and Matthew White, in serving a timely answer is vacated, and the proposed answer

annexed to their opposition papers is deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on January 30, 2014, at 9:30 am, Part 11, Room 351, 60 Centre Street.

DATED: ~~January 2, 2014~~ *January 2, 2014*

ENTER:


HON. JOAN A. MADDEN
J.S.C. J.S.C.