Deutsch v Goldberg
2016 NY Slip Op 31402(U)
July 19, 2016
Supreme Court, New York County
Docket Number: 158998/2015
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 2

----------X

SCOTT DEUTSCH,

Plaintiff,

-against-

STEVEN GOLDBERG AND LISA GOLDBERG

Defendants.

----------X

DECISION/ORDER
Index No.158998/2015
Mot. Seq. No. 003

PRESENT:
Hon. Kathryn E. Freed, J.S.C.

HON. KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION, GOLDBERG AFFIRMATION AND EXHIBITS ANNEXED	1, 2 (Exs 1-3)
SONIKER AFF. AND EXHIBITS ANNEXED	3 (Exs. 1-3)
MEMORANDUM OF LAW IN SUPPORT	4
ROSS AFF. IN OPP. AND EXHIBITS ANNEXED	5 (Exs. A-H)
CARYL DEUTSCH AFF. IN OPP. AND EXHIBIT ANNEXED	6 (Ex. A)
SCOTT DEUTSCH AFF. IN OPP. AND EXHIBITS ANNEXED	7 (Exs. A-E)
MEMORANDUM OF LAW IN OPP	8
REPLY MEMORANDUM OF LAW	9

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

This is an action between family members sounding in breach of a secured loan agreement. Defendants now move, inter alia, pursuant to CPLR 5015(a) (4), to vacate a prior order of this Court, entered January 15, 2016, which, among other things, granted a default judgment against them.[1]

[1] Defendants also move for reargument. However, that relief is not available to them, as they never opposed the motion; rather this motion is properly understood, and will be so construed by this Court, as one to open a default. *See Matter of DiMatteo v Niagara County Bd. of Elections*, 133 AD2d 519, 519 (4th Dept 1987).

After a review of the parties' papers and the relevant statutes and case law, the motion is **denied with leave to renew upon proper papers**.

Factual and Procedural Background:

According to the complaint, "at some time prior to April 27, 2015," plaintiff loaned $292,500 to defendants. On April 27, 2015, defendants "acknowledged and confirmed, in writing, that they were indebted to [plaintiff]" in that amount. (Ex. C to Scott Deutsch's Aff. in Opp.) On April 29, 2015, defendants "executed a Security Agreement in favor of [plaintiff], by which [defendants became] obligated to give [plaintiff] certain collateral as security to ensure their repayment of the loan," but they never did so. (Ex. D. in Scott Deutsch's Aff. in Opp.) Plaintiff commenced this action in August 2015, demanding full repayment of the loan.

As the parties attempted to negotiate a settlement, defendants' time to serve and file and answer was extended by their own agreement, via email, until November 4, 2015. (Ex. C to Atty. Aff. in Opp.) On November 10, 2015, Rob Soniker, ostensibly representing defendants, informed plaintiff's counsel by email that they intended to serve a pro se answer by November 12, 2015. (Ex. F to Atty. Aff. in Opp.) In response, Alex Ross, plaintiff's counsel, sent an email on November 10, 2015 stating that there would be no consent to an adjournment "beyond the November 5, 2015 deadline that was previously agreed upon." (*Id.*) Soniker, via email on November 10, 2015, replied that he "[u]nderstood" that there was no consent, but noted that there had been settlement discussions "up until [that] morning" and defendants "want[ed] [plaintiff] to be aware that they will file an [a]nswer pro se by [November 12, 2015]." (Ex. 1 to Soniker Aff. in Supp.) Plaintiff moved that

same day for a default judgment against defendants. (NYSCEF Doc. No. 5.)[2] In support of the motion, plaintiff submitted an affirmation of Ross, in which he averred that defendants "ha[d] not served an answer or moved in response to the [s]ummons and [v]erified [c]omplaint herein, and [their] time to do so ha[d] not been extended." (NYSCEF Doc. No. 6.) No mention of the parties' ongoing negotiations or Soniker's emails indicating defendants' intent to serve an answer by November 12, 2015 was made in the motion papers, despite that the notice of motion and affirmation were uploaded to NYSCEF at 3:36 p.m., after the emails had been exchanged through 12:13 p.m. that day.[3]

On November 16, 2015, plaintiff moved by order to show cause for "more time to answer" the complaint. (NYSCEF Doc. No. 11.) Included as an exhibit to the proposed order to show cause was a verified answer. On November 20, 2015, this Court declined to sign the order to show cause on the ground that there was a pending motion for a default judgment against the movant. (NYSCEF Doc. No. 12.) Defendants did not oppose plaintiff's motion for a default judgment, and it was thereafter granted on default. (NYSCEF Doc. No. 13). Defendants now move to vacate that order.

Positions of the Parties:

Defendants assert that they mistakenly moved by order to show cause rather than by opposing plaintiff's motion, but always had the intention of answering the complaint in the event that settlement negotiations fell through. Plaintiff contends, in response, that defendants had no excuse for failing to answer by the date agreed upon by the parties, which was November 4, 2015. Ross

---

[2] This Court may take judicial notice of official court records. *See Kinberg v Kinberg*, 85 AD3d 673, 674 (1st Dept 2011)

[3] It is noted that the documents themselves were dated November 9, 2015.

avers in his affirmation in opposition to the motion that he informed staff in the submissions part of this Court that he believed defendants would be appearing pro se and that, in response, the clerk adjourned the return date of the default motion until January 11, 2016, so as to allow defendants time to appear. Plaintiff essentially asserts that, since defendants did not do so, he was entitled to a default judgment against them.

Legal Conclusions:

Pursuant to CPLR 5015 (a) (1), "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of, [as is relevant here,] excusable default, if such motion is made within one year after service of a copy of a judgment or order with written notice of its entry upon the moving party." To establish entitlement to vacatur of an order directing entry of a default judgment, the defendant must demonstrate a reasonable excuse for the default and a potentially meritorious defense. *See Travers v Kulynych*, 139 AD3d 611, 611 (1st Dept 2016); *Singh-Mehta v Drylewski*, 107 AD3d 478, 478 (1st Dept 2013); *Cummings v Rosoff*, 101 AD3d 713, 714 (2d Dept 2012). This Court is also guided by New York's "strong public policy that actions be resolved on their merits, [particularly where there is only a] brief delay involved, the defendant's [conduct does not demonstrate] willfulness, and [where there is an] absence of prejudice to the plaintiff." *Perez v Travco Ins. Co.*, 44 AD3d 738, 739 (2d Dept 2007).

Defendants' submission of a verified answer in support of an order to show cause indicates to this Court's satisfaction that they had every intention of answering the complaint in the event that settlement negotiations between the parties fell through. Indeed, the emails exchanged between the parties up until the day that plaintiff moved for a default judgment evinced defendants' intent to file

an answer.

Further, Steven Goldberg's affirmation submitted in support of the motion indicates that, while he concedes that he borrowed money from plaintiff, he contests the accuracy of the amounts owed. He also contests the allegation that there was not adequate collateral for the loan in the form of jewelry. Additionally, he contends that plaintiff is not entitled to payment in full at this time. Steven Goldberg's affirmation, on its face, would satisfy this Court that there is a potentially meritorious defense to some of plaintiff's claims. Nevertheless, this Court is constrained to deny the motion.

Goldberg's affirmation began with the statement that he is "an Orthodox Jew prohibited by his religion from taking an oath, [but] affirm[ed] the [paragraphs of the affirmation] to be true on penalty of perjury." However, the affirmation was not affirmed before a notary, and no jurat appears on the final page. The CPLR requires affidavits to be accompanied by "a notary's jurat or other form of an oath [or affirmation] so as to 'awaken the conscience and impress the mind of the person taking it in accordance with his [or her] religious or ethical beliefs.'" *Holliday v Hudson Armored Car & Courier Serv.*, 301 AD2d 392, 397 (1st Dept 2003); quoting CPLR 2309 (b); *see Collins v AA Trucking Renting Corp.*, 209 AD2d 363, 363 (1st Dept 1994). "[A]ny person who, for religious or other reasons, wishes to use an affirmation as an alternative to a sworn statement may do so. However, to be effective such an affirmation must be made before a notary public or other authorized official." *Slavenburg Corp. v Opus Apparel*, 53 NY2d 799, 801 n (1981); *see* CPLR 2309. Goldberg does not claim to be a member of a profession given the authorization to make written statements by mere affirmation and, even if he were a member of such a profession, the rule would not apply in this instance as he is a party to the action. *See* CPLR 2106 (a). Therefore, in light of

Steven Goldberg's failure to make an affirmation before an officer licensed to take oaths and affirmations so as to, in accordance with his religious beliefs, demonstrate that his conscience had been awakened, this Court is unable to consider the affidavit in support of the motion.

As there is no other affidavit that establishes a potentially meritorious defense, this Court is unable to grant the motion on the instant papers. Considering that this Court would have been inclined to grant the motion, had it been supported by proper papers, and in keeping with the public policy preferring resolution of disputes on the merits, it will, in its discretion, grant defendants an opportunity to renew the motion within 30 days after receipt of service of this order with notice of entry.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion to vacate this Court's prior order is denied with leave to renew upon proper papers within 30 days after the service upon defendants of a copy of this decision with notice of its entry by certified mail; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: July 19, 2016

ENTER:

Hon. Kathryn E. Freed, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT