Schalberg v Broadway Pops Intl., Inc.
2018 NY Slip Op 31412(U)
June 29, 2018
Supreme Court, New York County
Docket Number: 650800/2016
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Jeremiah James Schalberg, an individual,

- against -

Broadway Pops International, Inc., and
Teri Kocyigit a/k/a Teri Hansen Wilborn,
an individual,

Defendants.

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Index No: 650800/2016

Decision/Order

Mot. Seq. 4

HON. EILEEN A. RAKOWER, J.S.C.

This action involves claims for breach of contract, breach of fiduciary duty, negligent misrepresentation and conversion against defendants Teri Kocyigit a/k/a Teri Hansen Wilborn ("Kocyigit") and Broadway Pops International, Inc.'s ("BPI") (collectively, "Defendants") arising from Defendants' alleged failure to book plaintiff Jeremiah James Schalberg ("Plaintiff") for certain shows in accordance with the parties' booking agent agreement.

By Decision and Order dated January 3, 2017, this Court granted Plaintiff's motion for a default judgment as to liability and ordered an assessment of damages against Defendants. The matter was assigned to Justice Gammerman, and a hearing was conducted on March 30, 2017. By Decision and Order dated November 27, 2017, plaintiff's motion to confirm Justice Gammerman's findings was granted. The order directed the Clerk to enter judgment in favor of Plaintiff and against Defendants in the amount of $62,500.00 with interest.

By Notice of Motion filed on March 21, 2018, Defendants move pursuant to CPLR § 5015 to set aside Plaintiff's entry of default and judgment based on excusable default. Defendants submit the affidavit of Kocyigit, affidavit of Drew Sherman ("Sherman"), and the affirmation of Anthony K. McClaren.

Plaintiff opposes, and submits the attorney affirmation of Corey D. Boddie ("Boddie").

Legal Standards and Analysis

Timeliness

Pursuant to CPLR § 5015, the court which rendered a judgment or order may, on motion, grant relief from the judgment or order upon the ground of "excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry." CPLR § 5015(a)(1).

Here, this Court granted Plaintiff's motion for a default judgment to Plaintiff against Defendants on liability on January 3, 2017. (See Exhibit F to Boddie Aff.). The order was served with notice of entry upon Defendants on January 9, 2017. (See Exhibit G to Boddie Aff.). On November 27, 2017, this Court ordered judgment against Defendants. Since Defendants made this motion in March 21, 2017 and less than one year after a final judgment, the motion is timely.

Requirements of CPLR 5015(a)(1)

In order to prevail on a motion to vacate a default judgment upon the ground of excusable default under CPLR § 5015(a)(1), the moving party must satisfy the burden of showing a "meritorious claim or defense" and "a reasonable excuse for the default." *Sheikh v. New York City Transit Auth.*, 258 A.D.2d 347, 348 (1st Dep't 1999); *Pena v. Mittleman*, 179 A.D.2d 607, 609 (1st Dep't 1992); *Mutual Marine Office, Inc. v. Joy Const.*, 39 A.D.3d 417 (1st Dep't 2007).

The determination of what constitutes a reasonable excuse for a default lies within the motion court's discretion. *Orimex Trading, Inc. v. Berman*, 168 A.D.2d 263 [1st Dept 1990]. "The determination whether a reasonable excuse has been offered is *sui generis* and should be based on all relevant factors, among which are the length of the delay chargeable to the movant, whether the opposing party has been prejudiced, whether the default was willful, and the strong public policy favoring the resolution of cases on the merits." *Chevalier v. 368 E. 148th Street Associates, LLC*, 80 A.D.3d 411 (1st Dept 2011) (citations omitted). A claim of law office failure may be accepted as a reasonable excuse where the claim is supported by a "detailed and credible" explanation of the default at issue. *Henry v. Kuveke*, 9 A.D.3d 476, 479 (2d Dep't 2004).

Kocyigit's Affidavit

Here, Kocyigit submits an affidavit in which she avers that neither she nor BPI have ever "been personally served with the underlying Summons and Complaint in this action." (Kocyigit Aff., ¶5). She avers:

> "The Summons and Complaint were purportedly served via posting at my address in or around March 3, 2016, when I was not in New York City, and thereafter mailed, allegedly. At the time the Summons and Complaint were deposited at my residence, I was out of New York City, touring with the North American tour of The Sound of Music. I am the only representative of Broadway Pops International, Inc. and therefore, I am the only person registered to receive service."
>
> (Kocyigit Aff., ¶6).

Kocyigit avers that on March 3, 2016, she was informed by her husband that she had received a package from Plaintiff's attorney Boddie. (Kocyigit Aff., ¶7). She states that on March 4, 2016, she wrote to Boddie "telling him that [she] was away on The Sound of Music tour and would not be finished touring until September 2016 (this tour was later extended through the end of July 2017)," "no representative of BPI would be at the office," and that she should be contacted via email. (Kocyigit Aff., ¶7). She states that Boddie never responded to her email. (Kocyigit Aff., ¶8). A copy of the referenced email is not provided by Defendants.

Kocyigit states that after she emailed Boddie, she engaged the law firm of The Adli Law Group, P.C. ("ASLI") to represent her, and officially retained Drew Sherman as her lawyer on March 22, 2016. (Kocyigit Aff., ¶9). She states that after she retained Sherman, she "left the care of this case in his hands," and while she would receive correspondence at her home, she "merely passed the contents of those mailings on to Mr. Sherman" and assumed that Boddie was also sending the letters to Sherman too. (Kocyigit Aff., ¶11).

Here, while Kocyigit states in her affidavit that she was never "personally served," she does not assert and fails to demonstrate that service by other means was improper. A process server's sworn affidavit of service ordinarily constitutes prima

facie evidence of proper service pursuant to the CPLR and raises a presumption that a proper mailing occurred. (*See, Strober King Bldg. Supply Centers, Inc. v. Merkley*, 697 N.Y.S. 2d 319 [2nd Dept 1999]). A sworn affidavit alleging the particulars concerning why service is improper is required. (*See, Hinds v. 2461 Realty Corp.*, 169 A.D. 2d 629 [1st Dept 1991]). According to Plaintiff's affidavits of service, Kogyigit was served on March 3, 2016 at her usual place of abode pursuant to nail and mail (CPLR 308[4]), after three previous attempts were made on different dates at different dates. BPI was served via the Secretary of State on August 4, 2016. Kocyigit does not challenge these affidavits of service and the manner in which service was rendered pursuant to them.

Sherman's Affidavit

Instead, Defendants' purported excuse for their default is that they relied on their attorney Sherman, and Plaintiff's counsel should have sent all correspondence to Sherman on their behalf, and not to them.

In Sherman's affidavit, Sherman states that he is "a duly licensed attorney in the State of California," and is "not licensed to practice in New York." (Sherman Aff. ¶1). Sherman avers that in March 22, 2016, BPI and Kocyigit retained him to defend them in this case. (Sherman Aff. ¶3). Sherman states that on March 22, 2016, he contacted Boddie by telephone and left him a voicemail advising him that he was Defendants' attorney of record. (Sherman Aff. 4). Sherman states that Boddie did not return his voicemail. (Sherman Aff. ¶4). Sherman states that on March 29, 2016, he called Bodie and left him another voicemail, advising him that he was Defendants' attorney of record and that he would accept service of the Summons and Complaint. (Sherman ¶5). Sherman states that after a few more attempts to speak to Boddie on the telephone including one missed voicemail from Boddie, he sent Boddie a letter on April 19, 2016 advising him that he represented Defendants, believed service was improper, and was reviewing the merits of the claims. (Sherman Aff. ¶¶ 6-8). Sherman also proposed a settlement in that letter. (Sherman Aff. ¶ 8). Sherman states:

> "Mr. Boddie never responded to my letter, nor did he ever respond to any of my phone calls. In fact, no sooner than two (2) days after I faxed him written correspondence of my representation did Mr. Boddie file a Motion for Default Judgment. Furthermore, at no time subsequent to April 9 [sic], 2016 have I ever received any

> communication (phone call, email, or letter) from Mr. Boddie regarding this matter."
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> (Sherman Aff., ¶9).

Sherman further states that he learned of Plaintiff's default judgment on March 8, 2017, but thereafter "felt seriously ill and spent time in the hospital." (Sherman Aff., ¶11). Sherman states, "By the time I was able to get back to reviewing this file, after I recovered in August 2017, started to get back to work, and caught up on my work, it was already 2018." (Sherman Aff., ¶11).

Discussion

As stated above, Defendants' purported excuse for their default is that they relied on their attorney Sherman, and Plaintiff's counsel should have sent all correspondence to Sherman on their behalf, and not to them.

First, there is nothing in the record to demonstrate that Boddie should have served Sherman with papers on Defendants' behalf. Nowhere in Sherman's April 19, 2016 letter to Boddie does he state that would accept service on behalf of Defendants. Furthermore, neither Sherman nor his LA based law firm made an actual appearance on behalf of Defendants prior to the entry of default judgment.

Furthermore, even assuming that Sherman was acting as Defendants' counsel and representing them in this matter as early as April 19, 2016, Sherman does not explain why he did not file an answer on Defendants' behalf or motion to dismiss, or request an extension of time to answer or otherwise appear. Sherman states that although he learned of Plaintiff's default judgment on March 8, 2017 and was "preparing to remedy Boddie's secret default," he "felt seriously ill and spent time in the hospital." (Sherman Aff., ¶11). Sherman states, "By the time I was able to get back to reviewing this file, after I recovered in August 2017, started to get back to work, and caught up on my work, it was already 2018." (Sherman Aff., ¶11). However, Sherman provides no details or medical proof to substantiate his claim of illness. *See generally Cynan Sheetmetal Products, Inc. v. B.R. Fries & Assoc.*, 83 A.D.3d 645 (2d Dep't 2011) (attorney illness insufficient to demonstrate a reasonable excuse where "plaintiff failed to submit any medical proof documenting its former attorney's alleged illness" illness"). Sherman states that he recovered in August 2017; however, he does set forth a reasonable excuse for the seven month delay in making the present motion. *See generally Borgia v. Interboro Gen. Hosp.*, 59 N.Y. 2d 802 (1983) ("While a disabling illness may excuse an attorney's delay in serving

a [pleading], in this case the default occurred well after the illness and therefore the default was not excused."). Sherman states that it took him several months to be "caught up on [his] work," but there are also other lawyers in his law firm. See Affirmation of Anthony K. McClaren, ¶1).

Lastly, another issue is whether the law firm of ADLI, which represents Defendants is authorized to practice law in New York and represent Defendants in this New York action. Plaintiff argues *inter alia* that Sherman is not licensed to practice law in New York. In reply, Defendants argue that while Sherman is not licensed to practice law in New York, Defendants' motion was filed by Anthony K. McClaren, who is another lawyer at ADLI and who is admitted to practice law in New York. See Affirmation of Anthony K. McClaren, ¶1. However, Judiciary Law § 470, which recognizes a nonresident attorney's right to practice law in New York if admitted, requires such attorney to maintain a physical office in this state for such purpose. S*ee e.g. Webb v. Greater N.Y. Auto. Dealers Assn., Inc.*, 93 A.D.3d 561 [1st Dept.2012]. There is no indication in Defendants' submission that ADLI maintains a physical office in this state to practice law.

In conclusion, Defendants have failed to demonstrate a reasonable excuse. In view of the lack of reasonable excuse, the court need not reach the issue of meritorious defense. (*Hodson v. Vinnie's Farm Market*, 103 A.D.3d 549, 959 [1st Dept 2013], *citing Aaron v. Greenberg & Reicher, LLP*, 68 A.D.3d 533, 534 [1st Dept 2009]).

Wherefore, it is hereby

ORDERED that Defendants' motion to vacate the default judgment is denied.

This constitutes the Decision and Order of the Court. All other requested relief is denied.

DATED: JUNE 29, 2018

EILEEN A. RAKOWER, J.S.C.