Bank v Park Side Constr. Contr. Inc.
2018 NY Slip Op 32916(U)
November 8, 2018
Supreme Court, Kings County
Docket Number: 511904/18
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8
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ALMA BANK,

Plaintiff, Decision and order

- against - Index No. 511904/18

ms #1

PARK SIDE CONSTRUCTION CONTRACTORS INC.,
PARK SIDE CONSTRUCTION BUILDERS CORP.,
LIZARD CONSTRUCTION CO., INC.,
FRANCESCO PUGLIESE

Defendants, November 8, 2018
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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to vacate a default entered. The plaintiff has opposed the motion and papers were submitted by both parties and arguments held. After reviewing the arguments of all parties this court now makes the following determination.

On March 29, 2018 the defendants as borrower executed to the plaintiff a promissory note in the amount of $2,500,000 as security for a line of credit. The maturity date of the loan was October 1, 2018 with other payments due prior to the maturity date. The plaintiff obtained a default judgement on July 16, 2018 and this motion has now been filed.

Conclusions of Law

A default judgement may be vacated when the party demonstrates a reasonable excuse for failure to appear and a meritorious defense (AIU Insurance Company v. Fernandez, 281 AD2d

542, 721 NYS2d 840 [2d Dept., 2001]).

Further, a motion to vacate will prove unsuccessful if the party does not allege a defense at all (Halali v. Gabbay, 223 AD2d 623, 636 NYS2d 838 [2d Dept., 1996], Riverhead Savings Bank v. Garone, 183 AD2d 760, 583 NYS2d 483 [2d Dept., 1992]). The defense need not entitle the party to judgement as a matter of law, rather it must simply raise the possibility that the case can be adequately defended (Bellcourt v. Bellcourt, 169 AD2d 855, 564 NYS2d 580 [3rd Dept., 1991], Parker v. City of New York, 272 AD2d 310, 707 NYS2d 199 [2d Dept., 2000], Hitter v. Rubin, 208 AD2d 480, 617 NYS2d 730 [1st Dept., 1994], Cotter v. Con. Ed. Of New York, 99 AD2d 738, 472 NYS2d 384 [1st Dept., 1984], Damselle Ltd. v. 500-12 Seventh Avenue Associates, 184 AD2d 367, 584 NYS2d 846 [1st Dept., 1992]). Thus, where a defense cannot be asserted at all, for example where the defendant was already convicted of felony charges regarding the events which now comprise the civil action, then vacating the default would be improper (Boorman v. Deutsch, 152 AD2d 48, 547 NYS2d 18 [1st Dept., 1989]).

The defendants does not present any meritorious defenses per se. Rather, the defendants argue the plaintiff committed wrongdoing which prevented the defendants from fulfilling their obligations under the promissory note. First, the defendant asserts the plaintiff commenced an action in Queens County even though a temporary restraining order had been issued upon the

presentment of the order to show cause. However, even if true that the plaintiff violated the restraining order, an issue the plaintiff cannot refute since it was raised in reply, the defendants fail to explain how the plaintiff's alleged improper conduct is a legitimate meritorious defense.

More significantly the defendants argue the plaintiff's set-off of funds on deposit violated the Lien Law. Following the default, the plaintiff set off an amount of $536,902.03 which was on deposit in a small business checking account. The defendant assert that account was designated for payroll of workers and was thus a trust account under the Lien Law and hence no set-off was permitted. However, again, even if true that such set-off was improper the defendants have failed to explain how that conduct raises a meritorious defense. The defendant Francesco Pugliese does assert that "on May 31, 2018, Alma Bank diverted the trust fund monies to itself, in violation of the Lien Law and the underlying promissory note which precludes Alma Bank from setting off against trust funds" and that "the effect of Alma Bank's actions was to put Parkside out of business, requiring its surety to take over the ongoing work" (see, Reply Affidavit of Francesco Pugliese, ¶¶ 9,11). Moreover, the defendants argue that Alma's conduct caused the defendants to be forced out of business and left hundreds of construction workers unpaid. However, that does not raise any defense regarding the default under the note, the

judgement and the unpaid balance that was due. Indeed, the defendants are curiously arguing that Alma's conduct renders them deeper in debt. That is a permitted strategy they may pursue but does not create any legitimate defense. Further, while the defendants may pursue claims against Alma for any alleged Lien Law violations or any business damage they may argue Alma precipitated, the defendants have failed to present any meritorious defense concerning the eventive defaults and the judgement itself.

Therefore, based on the foregoing, the motion seeking to vacate the judgement is denied.

So ordered.

ENTER:

DATED: November 8, 2018
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC