SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

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INDEX NO. 160471/2016

GIBSON, DUNN & CRUTCHER LLP,

Plaintiff,

MOTION SEQ. NO. 001

- v -

JOSEPH D'ANNA, ELIO d'ANNA, ELIO d'ANNA, ELIA d'ANNA, GEORGE KOUKIS,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 15

were read on this motion to/for JUDGMENT - DEFAULT.

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this action by plaintiff Gibson Dunn & Crutcher, LLP seeking, inter alia, to set aside allegedly fraudulent conveyances by defendants Joseph d'Anna, Elio d'Anna (Sr.), Elio d'Anna (Jr.), Elia d'Anna, and George Koukis ("defendants") which, plaintiff claims, were violative of the Debtor Creditor Law, plaintiff moves for a default judgment pursuant to CPLR 3215. Defendants oppose the motion. After oral argument and a review of the parties' papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

During January of 2013, non-party Be In, Inc. ("Be In"), through its Chief Financial Officer and Executive Director Alessandro Nomellini, retained plaintiff law firm Gibson Dunn & Crutcher, LLP to represent it in a federal court action in California styled *Be In, Inc. v Google Inc.*,

et al. ("the underlying action"). Doc. 2 at par. 12. Although plaintiff provided legal services to Be In, it claims it was never paid for the same. Doc. 2, at pars. 12 and 17. Plaintiff and Be In thereafter proceeded to arbitration regarding the amount of counsel fees owed in the underlying action. Doc. 2, at par. 18. On August 5, 2015, plaintiff obtained an arbitration award against Be In in California. Doc. 2, at par. 18. On October 28, 2015, the Superior Court of California entered judgment confirming the arbitration award in favor of plaintiff and against Be In in the amount of $325,346.03, plus interest. Doc. 2, at par. 19. Although Be In made several payments, it thereafter failed to comply with the terms of the arbitration award. Doc. 2, at par. 19.

This Court thereafter domesticated the California judgment and, on August 22, 2016, Court entered judgment in favor of plaintiff as against Be In in the amount of $325,346.03. Doc. 2, at par. 20.

After the entry of the judgment in this Court, defendants, founders, shareholders, officers and directors of Be In, allegedly committed fraudulent conveyances, as well as other transactions violative of the Debtor Creditor Law in an attempt to avoid paying the domesticated judgment. Doc. 2, at pars. 21-69. Plaintiff claims that defendants' conduct is established through Nomellini's deposition testimony and that this evidence warrants the entry of a default judgment in its favor.

On December 13, 2016, plaintiff commenced the captioned action seeking, inter alia, to set aside defendants' fraudulent conveyances and allowing it to attach and execute on defendants' assets to the extent necessary to satisfy its judgment against Be In. Doc. 2.

On November 17, 2017, plaintiff filed the instant motion for a default judgment. Doc. 5. In support of the motion, plaintiff submitted the summons and complaint, Nomellini's deposition transcript, and proof of service of the summons and complaint. Docs. 7-10.

By stipulation filed December 11, 2017, plaintiff allowed defendants until January 11, 2018 to respond to the default motion. Doc. 12.

On January 11, 2018, defendants opposed the motion and filed a proposed answer. Docs. 13-14.

LEGAL CONCLUSIONS:

CPLR 3215(a) provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him." It is well settled that a party moving for a default judgment pursuant to CPLR 3215 must establish proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the default in answering or appearing. *See Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 (1st Dept 2016).

In order to set forth the facts constituting the claim in a motion for default judgment pursuant to CPLR 3215, a party must submit either a complaint verified by a party with personal knowledge of the facts of the case, or an affidavit by such an individual. *See Mullins v DiLorenzo*, 199 AD2d 218, 219–20 (1st Dept 1993). An attorney affirmation will not suffice for this purpose. *See Mattera v Capric*, 54 AD3d 827, 828 (2d Dept 2008). It is well settled "that a complaint verified by counsel amounts to no more than an attorney's affidavit and is insufficient to support entry of judgment pursuant to CPLR 3215." *Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994). Here, since plaintiff submits neither a verified complaint nor an affidavit by one with knowledge, the motion for a default must be denied. Further, although plaintiff's claim is based upon a California judgment domesticated in New York, that judgment is not submitted in support of the motion.

This Court further directs that plaintiff accept defendants' answer. Pursuant to CPLR 3012(d), the court may extend the time of a party to appear or plead in an action or compel the acceptance of an untimely pleading upon a showing of a reasonable excuse for the delay or default. In exercising its discretion, the court may consider factors including, inter alia, prejudice and "public policy favoring the resolution of disputes on their merits." *See Jones v 414 Equities LLC*, 57 AD3d 65, 81 (1st Dept 2008).

Here, defendants assert that their excuse for failing to answer sooner was their belief that the dispute between Be In and Google should have been venued in the United Kingdom, and that their attorney advised them not to answer the complaint in the captioned action until Be In commenced an action against Google in said venue. Doc. 13, at pars. 6, 10. Given the foregoing excuse, the stipulation allowing defendants until January 11, 2018 to respond to plaintiff's default motion, plaintiff's failure to establish prejudice in the event defendants serve an answer, and this Court's policy, where possible, of resolving cases on their merits, this Court directs plaintiff to accept defendants' answer in the form submitted as NYSCEF Doc. No. 14. Doc. 12.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Gibson, Dunn & Crutcher LLP seeking a default judgment against defendants Joseph d'Anna, Elio d'Anna, Elia d'Anna, and George Koukis pursuant to CPLR 3215 is denied; and it is further

ORDERED that plaintiff is directed to accept the answer filed by defendants in the form submitted as NYSCEF Doc. No. 14, and said answer shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that the parties are to appear for a preliminary conference in this matter on May 28, 2019 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

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

1/22/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

APPLICATION: [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [X] OTHER
[ ] SETTLE ORDER [ ] SUBMIT ORDER

CHECK IF APPROPRIATE: [ ] INCLUDES TRANSFER/REASSIGN [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE