SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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GIBSON, DUNN & CRUTCHER LLP,

Plaintiff,

- v -

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

Defendants.

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INDEX NO. 160471/2016

MOTION DATE 03/26/2019

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for REARGUMENT/RECONSIDERATION.

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, pursuant to CPLR 2221, to reargue its motion for a default judgment pursuant to CPLR 3215 ("the default motion"). The default motion was denied by order of this Court entered January 29, 2019 ("the 1/29/19 order"). Doc. 31. Defendants oppose the motion. After oral argument and a review of the parties' papers and the relevant statutes and case law, the motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this matter are set forth in detail in the order of this Court entered January 29, 2019. Doc. 31. Additional relevant facts are set forth below.

In its order entered January 29, 2019, this Court denied the default motion on the grounds that plaintiff failed to set forth the facts constituting the claim since the affirmation of attorney Mitchell Karlan, Esq. it submitted in support of the motion was "neither a verified complaint nor an affidavit by one with knowledge" and because it did not submit a copy of the California judgment it allegedly domesticated in New York. Doc. 31 at 3. This Court also directed plaintiff to accept defendants' answer pursuant to CPLR 3012(d), reasoning that public policy favors disposition of cases on the merits and that plaintiff failed to establish that it would be prejudiced if defendants were permitted to answer.

Plaintiff now moves, pursuant to CPLR 2221, to reargue the default motion. In support of the instant motion, plaintiff argues that, in denying the default motion, this Court failed to consider, inter alia, the deposition testimony of Be In's Chief Financial Officer and Executive Director Alessandro Nomellini. It also asserts that the default motion should have been granted since defendants failed to establish a reasonable excuse for their failure to answer and a meritorious defense. Further, plaintiff maintains that this Court erred in allowing defendants to submit an untimely answer pursuant to CPLR 3012(d) since they did not cross-move for such relief pursuant to CPLR 2215 and, even if they had, they did not demonstrate their entitlement to the same.

Defendants argue that plaintiff's reargument motion must be denied since plaintiff's arguments are based entirely on evidence not submitted, and arguments not presented, in support of the default motion, and thus cannot be considered in connection with the instant motion. For example, defendants argue that, in support of its reargument motion, plaintiff improperly argues for the first time that this court should accept its untimely answer.

LEGAL CONCLUSIONS

The purpose of a motion for leave for reargument pursuant to CPLR 2221(d) is to afford a party an opportunity to demonstrate that, in issuing a prior order, the court overlooked relevant facts or that it misapplied a controlling principle of law. *See Foley v Roche*, 68 AD2d 558, 567 (1st Dept 1979). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992) (citations omitted). A reargument motion is not to be used as a vehicle for rehashing what was already argued or for raising new questions. *See Simpson v Loehmann*, 21 NY2d 990, 990 (1968).

Here, plaintiff correctly argues that, in its 1/29/19 order, this Court overlooked relevant facts and misapplied the law in denying the default motion and by allowing defendants to file an untimely answer.

Initially, plaintiff established its entitlement to a default judgment against defendants since it established proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of defendants' default in answering. It is undisputed that defendants were served and failed to answer or appear. However, in denying the default motion, this Court held that plaintiff failed to establish the facts constituting the claim since it failed to submit a verified complaint or an affidavit by an individual with personal knowledge of the facts of the claim.

Upon reargument, this Court notes that it erred in determining that plaintiff failed to establish the facts constituting the claim. Although defendants correctly assert that Karlan's affirmation, alone, does not contain information giving rise to plaintiff's claim, it annexes as an exhibit, inter alia, Nomellini's deposition transcript (Doc. 9), which sets forth his sworn testimony supporting plaintiff's claims. Additionally, although the 1/29/19 order reflects that plaintiff failed

to annex the California judgment to its default motion, this Court overlooked the fact that the said judgment was submitted to this Court at oral argument. Doc. 47 at 3. Since the judgment also contained facts constituting plaintiff's claim, plaintiff's motion for default should have been granted.

Additionally, defendants failed to meet their burden in opposing the default motion. "[S]uccessful opposition to a CPLR 3215 motion for leave to enter a default judgment requires the same showing as an affirmative motion for leave to extend the time to answer." *Clarke v Liberty Mut. Fire Ins. Co.*, 150 AD3d 1192, 1195 (2d Dept 2017) (citations omitted). "In order to compel the plaintiffs to accept service of [their] untimely answer, the defendant[s] also had to provide a reasonable excuse for the[ir] delay in answering and demonstrate a potentially meritorious defense to the action. *See* CPLR 3012 (d); *TCIF REO GCM, LLC v Walker*, 139 AD3d 704, 32 NYS3d 223 (2016); *Deutsche Bank Natl. Trust Co. v Kuldip*, 136 AD3d 969, 969 (2016); *Mannino Dev., Inc. v Linares*, 117 AD3d 995 (2014)." *Clarke*, 150 AD3d at 1195.

In determining that defendants had a reasonable excuse for their later answer, this Court cited defendants' contention that they believed that the action 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 such litigation was commenced in the United Kingdom. Doc. 31. However, as plaintiff asserts, defendants failed to explain how or why "waiting for approval to pursue their litigation against Google in another forum provide[d] them with a reasonable excuse for ignoring this action to collect on [plaintiff's] debt for almost an entire year." Doc. 38 at 15-16. Moreover, as plaintiff emphasizes, although defendants maintained that they were waiting for their application to pursue litigation against Google in the United Kingdom before answering, said application was granted on February 15, 2018, over one month after their untimely

answer was filed on January 11, 2018. Doc. 14. Thus, this Court misconstrued the facts in denying the default motion.

This Court also overlooked the applicable law in directing plaintiff to accept defendants' untimely answer. Initially, as plaintiff asserts, defendants were not entitled to this relief since they did not cross-move for the same and establish a reasonable excuse and meritorious defense. CPLR 2215; *see Hosten v Oladapo*, 44 AD3d 1006 (2d Dept 2007). Even assuming, arguendo, that such a cross motion had been made, defendants did not establish their entitlement to compel plaintiff to accept their untimely answer pursuant to CPLR 3012(d).

The Appellate Division, First Department recently held that:

> Under CPLR 3012 (d), a trial court has the discretionary power to extend the time to plead, or to compel acceptance of an untimely pleading "upon such terms as may be just," provided that there is a showing of a reasonable excuse for the delay. In reviewing a discretionary determination, the proper inquiry is whether the court providently exercised its discretion.
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> In *Artcorp Inc. v Citirich Realty Corp.* (140 AD3d 417, 30 NYS3d 872 [1st Dept 2016]), [the Appellate Division, First Department] adopted the factors set forth in *Guzetti v City of New York* (32 AD3d 234, 238, 820 NYS2d 29 [1st Dept 2006, McGuire, J., concurring]) as those that "must . . . be considered and balanced" in determining whether a CPLR 3012 (d) ruling constitutes an abuse of discretion. Those factors include the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense (32 AD3d at 238).

Emigrant Bank v Rosabianca, 156 AD3d 468, 472-473 (1st Dept 2017).

Here, defendants delayed over one year before answering. Further, as noted above, defendants' excuse for failing to answer, a purported instruction from their attorney, is dubious at best. The delay in answering was clearly willful, since defendants admitted that they knew that the answer was due and intentionally failed to answer the same on advice of counsel. The plaintiff could clearly be prejudiced by such a delay, since it has been attempting to collect its judgment

from defendants since August of 2016. Doc. 2. Finally, defendants do not elaborate on the merits of their defense, instead summarily stating in opposition to the default motion that they "possess numerous defenses to this action which they are confident will result in a dismissal of this action." Doc. 13 at par. 13.

Although defendants maintain that plaintiff improperly raises for the first time on this motion the issue of their failure to cross-move to compel plaintiff to accept their answer, this contention is disingenuous given that this Court improperly raised the issue of compelling plaintiff to accept the answer sua sponte. Thus, defendants could not have raised this argument until this Court issued the 1/29/19 order.

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

ORDERED that the motion by plaintiff Gibson, Dunn & Crutcher LLP seeking reargument of its motion for default pursuant to CPLR 2221 is granted; and it is further

ORDERED that, upon reargument, this Court vacates its prior order entered January 29, 2019 (Doc. 31) and grants a default judgment, pursuant to CPLR 3215, in favor of plaintiff Gibson, Dunn & Crutcher LLP as against defendants Joseph d'Anna, Elio d'Anna (Sr.), Elio d'Anna (Jr.), Elia d'Anna, and George Koukis, jointly and severally, in the amount of $325,346.03, plus interest at 9% per annum from August 22, 2016, as calculated by the Clerk; and it is further,

ORDERED that, within 20 days after this order is uploaded to NYSCEF, plaintiff Gibson, Dunn & Crutcher LLP shall serve a copy of this order, with notice of entry, on defendants Joseph d'Anna, Elio d'Anna Sr., Elio d'Anna Jr., Elia d'Anna, and George Koukis, on the Trial Support Office at 60 Centre Street, Room 158, and on the Clerk of the Court (Room 119), who is directed to enter judgment accordingly; and it is further,

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

6/11/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE