

<b>Ascentium Capital LLC v Jah Seal Inc.</b>
2021 NY Slip Op 31713(U)
May 20, 2021
Supreme Court, New York County
Docket Number: 161945/2019
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM**

*Justice*

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ASCENTIUM CAPITAL LLC,  
  
Plaintiff,

INDEX NO. 161945/2019

MOTION DATE 11/30/2020

MOTION SEQ. NO. 001

- v -

JAH SEAL INC. and LESTER JOSEPH,  
  
Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

ORDER

Upon the foregoing documents, it is

ORDERED that plaintiff's motion for summary judgment is DENIED; and it is further

ORDERED that the cross-motion of defendant JAH SEAL INC. to vacate its default in answering herein is granted, on condition that such corporate defendant serve and file an answer to the complaint herein, or otherwise respond thereto, within thirty (30) days from service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed preliminary conference order or proposed competing preliminary conference orders on July 9, 2021.

DECISION

The court shall deny plaintiff's motion for summary judgment against the individual defendant on the guaranty and deny plaintiff's motion for a default judgment against the corporate defendant and shall grant the cross-motion of the corporate defendant to vacate its default in answering pursuant to CPLR 5015(a).

In opposition to the plaintiff's application for summary judgment against him, the individual defendant, who is President of the defendant corporation, submits an affidavit that states that he never transacted with the defendant and was not the signatory on the equipment leases upon which plaintiff seeks to collect. On this pre-discovery motion, the court notes that none of the affidavits submitted in support of the motion set forth that the plaintiff or plaintiff's agents ever met the defendant in person. Only in reply in further support of its motion for summary disposition, does plaintiff submit, as proof, a copy of the driver's license of the individual defendant. While the plaintiff argues that it used various services to authenticate defendant's identity, such extrinsic evidence demonstrates that there are issues of fact as to its claims. As there has been no discovery in this matter, the affidavit of the individual defendant at this point in the litigation sufficiently raises an issue of fact as to the very validity of

the contract that is sufficient to warrant denial of summary judgment.

Defendant's reliance upon Banco Popular N. Am. v Victory Taxi Mgt., Inc., 1 NY3d 381, 384 [2004] is inapposite. In Banco Popular, the Court stated that "an expert's opinion is not required to establish a triable issue of fact regarding a forgery allegation." Id. Furthermore, in that case, although the application concerned a motion under CPLR 3213, the record established that the parties had engaged in a series of transactions concerning the secured chattel (14 taxicabs) and, prior to the litigation, had agreed to sell the chattel to reduce the outstanding debt. Thus, unlike this case, the creditor and debtor had an ongoing relationship concerning the disputed obligation and the only issue in the litigation was the payment of the deficiency. There was no dispute in Banco Popular that the underlying debt had been incurred by the corporate defendant and this fact supported the creditor's prima facie case. In this case, plaintiff's submissions at this stage do not contest that there was neither course of dealings nor other personal contact between plaintiff and either the individual or corporate defendant. Thus, defendant's affidavit, even assuming the inadmissibility of defendant's purported "Signature Analysis Report" is sufficient on these facts to raise an issue of fact on a pre-discovery summary judgment

motion. Contrast Ulm I Holding Corp. v Antell, 155 AD3d 585, 586 (1<sup>st</sup> Dept 2017) (“guaranty, which was notarized in a form consistent with Real Property Law § 309-a” was not sufficiently rebutted by debtor’s unsworn expert report [emphasis supplied]).

As to the corporate defendant, it seeks an extension of its time to answer, which the court interprets as an application to vacate its default in answering the complaint in a timely manner based upon an excusable default under CPLR 5015(a). Here, the defendant was served via the Secretary of State pursuant to BCL 306. Defendant’s President asserts, in the affidavit in support of the cross-motion, an unawareness that the corporate defendant could only appear by counsel and that the pro se Answer filed by defendant’s President on March 12, 2020, did not satisfy the corporation’s obligation to answer the complaint. The court further notes that the court’s operations were paused immediately thereafter due to the public health emergency.

Now represented by counsel, the corporate defendant via its President presents a meritorious defense asserting that it in fact did not enter into a financing contract with the plaintiff. Under the circumstances presented, where the defendant by affidavit presents a defense that if established operates as a complete defense to the claims in the complaint, and given the public health emergency, the plaintiff has not been prejudiced by the failure to timely answer, the court shall exercise its

discretion under CPLR 5015(a) to vacate the corporate defendant's default in answering and shall direct that the case move forward to discovery, once issue is fully joined. See Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., Inc., 67 NY2d 138, 143 (1986). The cases cited by the plaintiff do not bind this court to do otherwise. See Chase Home Fin., LLC v Minott, 115 AD3d 634, 635 (2d Dept 2014) (multi-year failure to answer the complaint where statutory notice alerted defendant not excusable); U.S. Bank Nat. Ass'n v Slavinski, 78 AD3d 1167, 1168 (2d Dept 2010) (failed to demonstrate the existence of a potentially meritorious defense).

*Debra A. James*  
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5/20/2021  
 DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED  
 SETTLE ORDER  
 INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
 GRANTED IN PART  OTHER  
 SUBMIT ORDER  
 FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: