

**Zakłady Tytoniowe W Biosyntec Lublinie SA v MS
Global Funding LLC**

2023 NY Slip Op 31445(U)

May 1, 2023

Supreme Court, New York County

Docket Number: Index No. 652975/2015

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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 ZAKLADY TYTONIOWE W LUBLINIE SA, BIOSYNTEC
 SA, IMAN EMAMI,

Plaintiffs,

- v -

MS GLOBAL FUNDING LLC, MS GLOBAL FINANCE LLC,
 MS TRADE FINANCE LLC, MARGARET MARY MACKAY
 AS TRUSTEE OF MACKAY FAMILY TRUST, CLAIR
 MARIE NEARY AS TRUSTEE OF THE MACKAY FAMILY
 TRUST, KEN MACKAY, MICHAEL SHORE, CORPORATE
 TRUST LLC, HSBC BANK USA, BPA LONDON LTD,
 JOHN DOE, JANE DOE, ABC CORPORATIONS' TRUE
 NAMES BEING UNKNOWN, ABC ENTITY TRUE NAMES
 BEING UNKNOWN

Defendants.

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INDEX NO. 652975/2015

MOTION DATE 03/08/2023

MOTION SEQ. NO. 006

**DECISION + ORDER ON
 MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 164, 165, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 183, 184, 185

were read on this motion to

VACATE DEFAULT JUDGMENT

Pursuant to CPLR 5015 (a)(1), (3) and (4), and CPLR 317, Defendant MS Global Funding LLC ("MS Global") moves for an order vacating the May 6, 2019 Default Judgment (the "Default Judgment") (NYSCEF 79) entered in this matter. Plaintiffs Zaklady Tytoniowe W Lublinie SA ("ZTL"), Biosyntec SA ("Biosyntec"), and Imam Emami ("Emami") (collectively, "Plaintiffs") oppose the motion by principally arguing MS Global admits to intentionally defaulting, this Court has jurisdiction over MS Global, no fraud was committed in obtaining the Default Judgment, and MS Global has no meritorious defenses to the complaint. For the following reasons, MS Global's motion is **granted**.

CPLR 5015 enables the court “which rendered a judgment or order [to] relieve a party from it upon such terms as may be just...upon the ground of: (1) 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;” “(3) fraud, misrepresentation, or other misconduct of an adverse party; or (4) lack of jurisdiction to render the judgment or order.” Alternatively, CPLR 317 permits a defendant “to defend the action within one year after he obtains knowledge of the entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense.”

“A defendant seeking to vacate its default pursuant to CPLR 5015(a)(1) on the ground of excusable default must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action” (*Global Liberty Ins. Co. v Shahid Mian, M.D., P.C.*, 172 AD3d 1332, 1332 [2d Dept 2019]). Similarly, when “a CPLR 5015(a)(3) motion alleges intrinsic fraud, i.e., that the plaintiff’s allegations are false” the defendant must also “provide a reasonable excuse for the default” (*Bank of N.Y. v Stradford*, 55 AD3d 765, 765-66 [2d Dept 2008]). However, when a “defendant asserts that the court lacked personal jurisdiction over him or her, the defendant should seek dismissal of the action under CPLR 5015(a)(4)...a motion that has no stated time limit and can be made at any time” (*Caba v Rai*, 63 AD3d 578, 580 [1st Dept 2009]). “When a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015(a)(4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015(a)(1)” (*Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d 896, 897 [2d Dept 2013]). Finally, “[i]n addition to the grounds set forth in section 5015(a), a court may vacate its own

judgment for sufficient reason and in the interests of substantial justice” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]).

The Court finds the current record insufficient to warrant vacatur of the Default Judgment for lack of jurisdiction pursuant to CPLR 5015(a)(4). Here, the Complaint relies exclusively on general jurisdiction pursuant to CPLR 301 as the basis for this Court’s jurisdiction (NYSCEF 2 ¶¶2, 7). In response, however, MS Global has submitted evidence showing that by March 2016, its principal place of business was no longer located in New York (*see e.g.*, NYSCEF 86 ¶7, NYSCEF 89-90). Plaintiffs’ reliance on CPLR 301 as the sole basis for jurisdiction appears to be based on the fact that MS Global was based in New York during the period of time in which the acts giving rise to the claim took place (*see* NYSCEF 86 ¶6; *see also* NYSCEF 88). Moreover, Plaintiffs now argue this Court has jurisdiction pursuant to CPLR 302 (NYSCEF 126 at 8-10), an argument that likely would have been raised, and considered, in response to any pleading or pre-answer motion brought by MS Global. Accordingly, the Court declines to vacate the Default Judgment for lack of jurisdiction pursuant to CPLR 5015(a)(4).

MS Global has, however, established that vacatur of the default judgment is appropriate under CPLR 5015(a)(1). To start, MS Global’s motion to vacate was timely because notice of entry of the Default Judgment was not filed until February 28, 2023 (NYSCEF 163) and there is no proof of service of the notice of entry. Thus, the one-year deadline under CPLR 5015(a)(1) was not triggered (*see Gottlieb v Northriver Trading Co. LLC*, 106 AD3d 580, 580 [1st Dept 2013] [finding “[t]he record contains no proof of service of the notice of entry of the default judgment; therefore, the one-year deadline of CPLR 5015 was not triggered”] [internal citations omitted]; *see also Donnelly v Treeline Cos.*, 66 AD3d 563, 564 [1st Dept 2009] [holding

“[w]here the dismissal order has never been served with notice of entry, there is no time limit on making a motion to vacate the dismissal” under CPLR 5015)).

Further, MS Global has demonstrated “a reasonable excuse for the default” (*Global Liberty*, 172 AD3d at 1332 [2d Dept 2019])¹. Among other things, MS Global was contemporaneously litigating substantially related issues in a Polish court pertaining to Loan 2, in which the Bankruptcy Trustee accepted ZTL’s debt to MS Global, over the objections of ZTL, which never raised the issue of this invoice (NYSCEF 183 at 8:12-18). Moreover, Emami made a claim for the money allegedly due under the invoice in this case to the trustee overseeing ZTL’s bankruptcy proceeding in Poland, who found insufficient evidence to support the claim that the invoice existed (*id.* at 10:17-25). MS Global also notes it was a special purpose entity who was owed money by ZTL, and as a result, had no funds to hire counsel in New York (NYSCEF 86 at ¶ 41). Finally, the “potentially meritorious defense[s] to the action” (*Global Liberty*, 127 AD3d at 1332 [2d Dept 2019]) advanced by MS Global, including whether this Court has jurisdiction over MS Global and whether ZTL had standing to bring this action (NYSCEF 85 at 14-18), persuade the Court that vacatur is appropriate “in the interests of substantial justice” (*Woodson*, 100 NY2d at 68).

Accordingly, it is

ORDERED that MS Global’s motion to vacate the Default Judgment is **granted**; and it is further

¹ To the extent MS Global also moves under CPLR 5015(a)(3), the Court finds its foregoing analysis adequately addresses MS Global’s arguments advanced under this provision. (*see Bank of N.Y.*, 55 AD3d at 765-66 [where, as here, “a CPLR 5015(a)(3) motion alleges intrinsic fraud, i.e., that the plaintiff’s allegations are false” the movant must “make the motion within a reasonable time” and “provide a reasonable excuse for the default”]).

ORDERED that MS Global serve and file an answer or otherwise respond to the Complaint within 20 days from the date of this Decision and Order.

This constitutes the Decision and Order of the Court.

5/1/2023
DATE


JOEL M. COHEN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE