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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 25**
PNINA ANZA and JOHN TORTORELLA,	**NASSAU COUNTY**
Plaintiffs,	
-against-	**Index No: 004490-08**
	Motion Seq. Nos: 6 & 7
ERIC ARONSON and PERMAPAVE INDUSTRIES, LLC, and LUMI-COAT, INC.,	**Submission Date: 10/2/09**
Defendants.	
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Papers Read on these Motions:

Notice of Application for Default Judgment, Affirmation and Exhibits...x
Notice of Cross Motion, Affirmation, Affidavit and Exhibits.....x
Affirmation in Opposition/Further Support and Exhibits.....x
Affirmation in Reply and Exhibit.....x
Correspondence dated October 1 and 2, 2009.....x

This matter is before the court on 1) the motion by Plaintiffs Pnina Anza and John Tortorella for an Order directing the entry of a default judgment in favor of Plaintiffs and against Defendants, filed March 16, 2009, and 2) the cross motion by Defendants Eric Aronson, Permapave Industries, LLC and Lumi-Coat, Inc. for an Order extending the time for Defendants to answer the complaint and compelling Defendants to accept the Answer, filed April 15, 2009, both of which were submitted October 2, 2009. For the reasons set forth below, the Court 1) denies Plaintiffs' motion for a default judgment or, alternatively, for sanctions; and 2) grants Defendants' cross motion, extends the time for Defendants to serve an Answer to the Second Amended Verified Complaint ("Complaint") to on or before January 8, 2010, directs Plaintiffs to

accept Defendants' Answer to the Complaint, and directs counsel for Plaintiffs and counsel for Defendants to appear for a conference before the Court on January 14, 2010 at 9:30 a.m..

BACKGROUND

A. Relief Sought

Plaintiffs Pnina Anza ("Anza") and John Tortorella ("Tortorella") (collectively "Plaintiffs") move for an Order, pursuant to CPLR §§ 3215(a) and (b), granting them a default judgment against Defendants on the Complaint or, alternatively, awarding costs and fees to Plaintiffs as sanctions for Defendants' allegedly deleterious conduct.

Defendants Eric Aronson ("Aronson"), Permapave Industries, LLC ("Permapave") and Lumi-Coat, Inc. ("Lumi-Coat") (collectively "Defendants") oppose Plaintiffs' application. Defendants cross move for an Order, pursuant to CPLR §§ 2004 and 2005, extending the statutory time for Defendants to serve an Answer to the Complaint and compelling Plaintiffs to accept Defendants' Answer.

B. The Parties' History

In support of its Motion, Plaintiffs provide an Affirmation in Support of Plaintiffs' counsel, who affirms as follows:

The action is for 1) breach of obligations incurred pursuant to a letter of intent ("LOI") that the parties executed on October 4, 2007, and 2) payment of certain notes that Permapave executed and Aronson guaranteed. The portion of the Complaint seeking payment of the notes was the subject of a prior motion for partial summary judgment ("Prior Motion"), which the court (Austin, J.) granted from the bench on December 5, 2008 ("Prior Decision"). [1] In granting that motion, Judge Austin also directed Special Referee Thomas V. Dana ("Referee") to hear and determine the issue of legal fees.

The Referee conducted the hearing, as directed by Judge Austin, and subsequently signed a judgment that was entered into the County Clerk's Office on February 25, 2009 ("Judgment"). That Judgment directed that 1) Anza and Tortorella were entitled to recover from Permapave and Aranson a) the sum of $150,000 with interest of $2,654.16, and b) the sum of $85,000 with interest and late charges of $1,322.22, $25,092.51 and $33,456.69 and disbursements of $1,170, for a total of $298,695.58; 2) Anza was entitled to recover from Permapave, Aronson and Lumi-

[1] This Court assumed responsibility for this case in May of 2009.

Coat, jointly and severally, the sum of $29,699.71; and 3) Tortorella was entitled to recover from Permapave, Arson and Lumi-Coat, jointly and severally, the sum of $9,928.52.

The prior proceedings in this case are key to understanding its somewhat complicated history. Plaintiffs commenced this action against Permapave and Lumi-Coat by service of a Summons and Complaint dated February 28, 2008. Thereafter, Plaintiffs filed a Complaint, that also named Aronson, which Plaintiffs served on Aronson on April 15, 2008. Thereafter, Plaintiffs filed the Amended Verified Complaint dated October 10, 2008 against all Defendants, and served the Amended Verified Complaint on the Defendants on or about October 14, 2008. Plaintiffs subsequently filed the Second Amended Verified Complaint dated October 30, 2008 against all Defendants.

In the Prior Decision, Judge Austin also addressed an application by defense counsel to be relieved. In ruling on that application, which included the issuance of a stay, Judge Austin held that the Second Amended Verified Complaint ("Complaint") was "deemed served" (Ex. H to Ps' Mot. at p. 57). Judge Austin also directed that the Complaint did not have to be "answered or moved against" and that "all time" was extended to January 30th (Ex. H at p. 57).

With respect to the scheduling of the case, the transcript of the Prior Decision reflects the following:

> THE COURT: Everything is stayed so I am going to set the matter down for the severed portion of the matter. All the other causes of action that are not determined by what we have done today we will set that down for conference.
>
> Off the record.
>
> (A discussion was held off the record.)
>
> THE COURT: Last business day of January, January 30, 2009, and everything is stayed with regard to pleadings and responding otherwise.
>
> [COUNSEL FOR DEFENDANTS]: So it's accurate to say for the time being the second amended complaint is not deemed served?
>
> THE COURT: No. It's deemed served. It doesn't have to be answered or moved against. All time is extended to January 30th and when new counsel comes in at that time I will consider whether or not new counsel wants to make a motion to dismiss or the like. My view is it won't be necessary because [counsel for Plaintiffs] will be chatting with their client, and perhaps this will all become moot.

[COUNSEL FOR DEFENDANTS]: Thank you, your Honor.

THE COURT: Perhaps. This constitutes the decision and order of the court. Gentlemen, happy holidays and Happy and Healthy New Year.

[COUNSEL FOR ANZA]: Your Honor, thank you for your time.

[COUNSEL FOR DEFENDANTS]: Thank you for the time you put into this matter.

(Ex. H to P's Mot. at pp 56-57).

Plaintiffs' counsel affirms that Defendants have not submitted an Answer or other reply to the Complaint. Plaintiffs' counsel also submits that the court directed the individual and corporate Defendants to appear for a conference on January 30, 2009. Plaintiffs' counsel affirms that he was present for the conference on January 30, 2009 and that no one appeared on behalf of the Defendants. On January 30, 2009, Plaintiffs' counsel received the permission of the court to file the instant motion for a default judgment.

Plaintiffs' counsel submits that, in light of Defendants' failure to appear, to request an extension of time to answer, and to retain new counsel, the Defendants have defaulted. Plaintiffs' counsel also submits that Plaintiffs have meritorious causes of action related to the letter of intent ("LOI"), pursuant to which Defendants received monies from Plaintiffs.

Defendants oppose Plaintiffs' application, and cross-move for an Order extending the time for them to serve an Answer to the Complaint. In support, Defendants provide an Affidavit of Aronson dated April 3, 2009, in which he affirms the following:

Aronson affirms that the Defendants have not served their Answer in a timely manner because the Defendants are in the process of securing new counsel (their prior counsel having been relieved), and believed that the proceedings were stayed while they sought to secure substitute counsel.

Aronson submits that Defendants have a meritorious defense to this action. Plaintiffs have sued Defendants based on Defendants' alleged failure to perform their due diligence obligations pursuant to the LOI. Aaron submits that, contrary to the Plaintiffs' contention, the LOI did not require Defendants to complete their due diligence within the designated time. Rather, the LOI provided only that Defendants agreed not to conduct business with other companies during the period in question, and would permit Plaintiffs to conduct their due

diligence. Paragraph three (3) of the LOI, to which Aronson refers in his Affidavit, provides as follows:

> For a period of ninety (90) days from the date that this [LOI] has been executed by all parties, PERMAPAVE and ARONSON agree to negociate exclusively with ANZA and TORTORELLA towards the execution of a definitive agreement to carry into effect the intent of this [LOI]. ARONSON and PERMAPAVE will be at a standstill to open or enter into negotiations or discuss offers to or with outside parties on any equity investments into PERMAPAVE or any other entity entity owned or controlled by ARONSON. This period of time will allow ANZA and TORTORELLA to conduct their due diligence in evaluating PERMAPAVE'S and ARONSON'S business and products. PERMAPAVE and ARONSON agree not to sell or entertain offers from any other parties or negociate with any other parties with regard to the PERMAPAVE business in any manner whatsoever. If PERMAPAVE or ARONSON violate this provision or any other provisions of this [LOI], they shall reimburse ANZA and TORTORELLA for all expenses incurred in the due diligence period, including but not limited to all attorney's fees and other expenses including the recovery of these expenses from PERMAPAVE and ARONSON.

Aaron affirms that Defendants complied with their obligations under the LOI, and that the due diligence process was not completed due to the Plaintiffs' own conduct and unrealistic expectations. Aaron contends, further, that any binding agreements expired due to the failure to complete the due diligence requirements, and that Plaintiffs' claims are therefore based on agreements that are no longer in effect. Aronson submits that Defendants would be prejudiced by the entry of a default judgment, in that they would be liable for monies that, they contend, they do not owe to Plaintiffs.

In Plaintiffs' Affirmation in Opposition to Defendants' Motion, counsel for Plaintiffs affirms that Defendants filed three (3) separate Notices of Appeal in February and April of 2009 with respect to the Prior Decision, and were represented by different counsel as to each. Moreover, the attorney who handled the filing of the third Notice of Appeal was a firm whose services Defendants had terminated several months earlier. Counsel for Plaintiffs submits that these facts belie Aronson's claim that he believed that this matter was stayed while Defendants sought to secure new counsel.

Plaintiffs' counsel also submits that Defendant have intentionally sought to avoid litigating this matter, and to avoid paying Plaintiffs the money due them. Given that Judge Austin declined to stay enforcement of the Judgment, Plaintiffs' counsel affirms that Defendants

have thwarted Plaintiffs' efforts to collect on the Judgment by closing accounts and transferring assets to avoid satisfaction of their obligations.

C. The Parties' Positions

Plaintiffs submit that Defendants are in default for their failure to respond to the Complaint, and that Plaintiffs have a meritorious case based on Defendants' alleged non-compliance with the LOI.

Defendants submit that they reasonably believed that the proceedings were stayed and, therefore, their failure to interpose an Answer was not wilful. Moreover, they submit that they have a meritorious defense to Plaintiffs' action, which is that the agreements that Plaintiffs rely on expired due to the failure of compliance with the LOI.

RULING OF THE COURT

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987). To avoid the entry of a default judgment, Defendants are thus required to demonstrate a reasonable excuse for the default and a meritorious defense to the action. *Matone v. Sycamore Realty Corp.*, 50 A.D.3d 978 (2d Dept. 2008), *lv. app. den.* 11 N.Y.3d 715 (2009); *Grinage v. City of New York*, 45 A.D.3d 729 (2d Dept. 2007).

CPLR § 2004 provides that, except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed. CPLR § 2005 provides that, upon an application satisfying the requirements of subdivision (d) of § 3012 or subdivision (a) of rule 5015, the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure.

The Court concludes that Plaintiffs have not demonstrated their entitlement to the entry of a default judgment against the Defendants with respect to the remaining counts in the Complaint. Preliminarily, while the Court appreciates Plaintiffs' frustration with Defendants'

failure to respond to the Complaint and comply with the Judgment, the Court concludes that the transcript of the Prior Decision contains some ambiguity as to the procedural posture of the case. Specifically, Judge Austin directed that the case was stayed and, while mentioning the January 30th date and a future conference, did not specifically direct the individual and corporate Defendants to appear for a conference on January 30, 2009. There may have been conversations off the record regarding the scheduling of this matter, but this Court cannot speculate as to those. Moreover, the Court is not persuaded that the Defendants' filing of the Notices of Appeal demonstrates their knowledge of their obligation to respond to the Complaint. Under the circumstances, the Court concludes that Defendants have established a reasonable excuse for the default.

In addition, the Court concludes, based on its review of the motion papers, including the transcript of the Prior Decision, that Defendants have presented a meritorious defense to the action. Specifically, there is an issue regarding the parties' compliance with, and the enforceability of, the LOI.

In light of the foregoing, the Court denies Plaintiffs' motion for a default judgment or, alternatively, for sanctions. The Court grants Defendants' cross motion, extends the time for Defendants to serve an Answer to the Second Amended Verified Complaint to on or before January 8, 2010 and directs Plaintiffs to accept Defendants' Answer.

The Court also directs counsel for Plaintiffs and counsel for Defendants to appear for a conference before the Court on January 14, 2010 at 9:30 a.m.

While the Court has denied Plaintiffs' motion, and has granted Defendants time to respond to the Complaint, the Court is mindful of the history of this case. The Court will not look favorably upon any future failure of the Defendants to comply with the Court's directions.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
November 23, 2009

HON. TIMOTHY S. DRISCOLL

J.S.C.