

Matter of Seymour v Greer

2011 NY Slip Op 30980(U)

April 12, 2011

Supreme Court, New York County

Docket Number: 107155/2010

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

LOUIS B. YORK
J.S.C.

PRESENT: _____

PART 2

Index Number : 107155/2010

SEYMOUR, SCOTT

VS.

GREER, STEVEN E.

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT/LIÉU COMPLAINT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the accompanying decision.*

FILED

APR 14 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/12/11

Ray

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S): _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- X
In the Matter of the Application of

SCOTT SEYMOUR,

Plaintiff,

Index No. 107155/10

– against –

STEVEN E. GREER and CORTEXTV, LLC,

Defendants.

----- X
LOUIS B. YORK, J.:

Motion Sequence Numbers 1 and 2 are consolidated for disposition, and decided as follows:

On May 9, 2008, Defendant CortexTV, LLC (“Cortex”), a New York limited liability company, executed a promissory note (“the Note”) in which it promised to pay Plaintiff Scott Seymour the principal amount of \$100,000.00. By the terms of the Note, defendant Cortex also promised to pay plaintiff Seymour interest on any and all principal amounts at an interest rate equal to ten percent per annum. The Note stated that “[b]orrower shall pay all reasonable costs and expenses incurred by or on behalf of Lender in connection with Lender’s exercise of any or all of its rights and remedies under this Note, including, without limitation, reasonable attorney’s fees.” Defendant Steven Greer, the Chief Executive Officer of Cortex, signed the Note on behalf of defendant Cortex. In addition, defendant Greer made a personal guarantee

("Guarantee") to plaintiff Seymour to repay the loan, in the event that the principal and accrued interest were not paid in full by the Maturity Date as defined by the Note.

According to plaintiff Seymour's affidavit, on August 22, 2007 plaintiff Seymour loaned \$100,000.00 to defendant Cortex. Over the next few months, defendant Cortex repaid part of this loan, and by December 2, 2007 reduced the principal to \$81,666.67. On May 9, 2008 plaintiff Seymour loaned defendant Cortex an additional \$20,000.00. Accordingly the parties executed the promissory note. Defendant Cortex failed to repay the loan by the Maturity Date as defined in the Note and defendant Greer has yet to repay the amount stipulated in the Note. Plaintiff Seymour notified defendant Greer by letter, a copy of which is annexed.

On June 1, 2010 plaintiff Seymour moved for summary judgment in lieu of complaint against defendant Greer and defendant Cortex. The motion sought the repayment of the loan and attorneys' fees. Defendants Cortex and Greer submitted an Ex Parte application in which they sought an extension of time to appear in this case. Justice Martin Shulman granted the extension to answer or move with respect to the complaint by July 26, 2010, providing that defendants served plaintiff by June 28.

It is not clear whether defendants provided this notice to plaintiff, and it does not appear that the motion submissions part was directed to adjourn the motion in question until July 26 to allow for defendants' appearances. At any rate, as a result the motion part did not adjourn the motion, which was submitted on the original return date of July 13, 2010, marked "fully submitted – no opp" and forwarded to this Part. Accordingly, the Court granted plaintiff Seymour's motion on default as to defendant Cortex on August 13, 2010. It awarded plaintiff Seymour \$100,000.00, with interest from May 9,

2008. The Order did not grant attorneys' fees, which plaintiff had requested. In addition, the Court denied the motion as to defendant Greer based on plaintiff Seymour's failure to conduct an adequate inquiry regarding defendant Greer's military status.

Defendant Greer subsequently moved for additional time to answer. In its order, the Court explained to defendant Greer, who was pro se, that the case was still active as to him. Therefore, he could move for leave to answer. In addition, plaintiff Seymour could move to reargue its motion for summary judgment in lieu of complaint against defendant Greer.

Plaintiff Seymour then filed the current motion to reargue/renew against defendant Greer, including an affidavit of non-military service. Defendant Greer opposed the motion. Also on October 18 2010, defendant Cortex cross-moved to vacate the default judgment against it. Independently, defendant Greer moved for an order vacating his default and allowing him leave to answer. The Court consolidates these motions for disposition and decides them below.

Analysis

Plaintiff's Motion for Summary Judgment in Lieu of Complaint against Defendant Greer

A court may grant summary judgment in lieu of complaint if there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law. Andre v. Pomeroy, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 133 (1974). The opposing party may not withstand summary judgment by "mere allegations... and nothing more" of the factual arguments of the moving party. Id. at 635, 362 N.Y.S.2d at 134; see Kamp v. Fiumera, 69 A.D.3d 1168, 1169, 893 N.Y.S.2d 662, 663 (3d Dep't 2010); Metal Mgmt, Inc. v. Esmark Inc., 49 A.D.3d 333, 854 N.Y.S.2d 6 (1st Dep't 2008). Thus, to

prevail in his opposition, defendant Greer must set forth precise and consequential evidence that supports the contention that there are genuine questions of material facts. See Andre, 35 N.Y.2d at 364, 362 N.Y.S.2d at 133.

Earlier, the Court denied judgment against defendant Greer because of the absence of an adequate nonmilitary affidavit. This defect has since been corrected; and, moreover, from defendant Greer's opposition and his separate motion, it is clear that he has received the documents. For the same reasons that summary judgment in lieu of complaint was proper as against defendant Cortex, therefore, the Court now awards summary judgment in lieu of complaint against defendant Greer.

In opposition, defendant Greer did not satisfy his burden of showing that material issues exist. He disputes the amount he owes plaintiff Seymour, based on alleged oral agreements that are not expressly incorporated into the Note. However, as already stated, arguments based on the alleged oral agreements are not relevant to this case. Moreover, defendant Greer does not appear to challenge the essential allegations of plaintiff. Plaintiff Seymour seeks \$100,000.00 from defendant Greer, the amount stipulated in the Note and Guarantee. Although defendant Greer disputes the amount of money he owed prior to the issuance of the note and the Guarantee, the Note on which this case is based is for \$100,000.00 and Greer's Guarantee relates to the Note. Thus, judgment against defendant Greer is appropriate.

Cortex's Cross-Motion To Vacate Default Judgment

As already stated, defendant Cortex filed a cross motion to vacate the default judgment that this Court granted against Cortex on August 13, 2010. A defendant seeking to vacate a default in appearing or answering must demonstrate both a

reasonable excuse for the default and the existence of a meritorious defense. Kaplinsky v. Mazor, 307 A.D.2d 916, 916, 762 N.Y.S.2d 902, 902 (2d Dep't 2003). Here, defendant Cortex submitted in support of the motion to vacate and Justice Schulman granted that extension to answer the complaint. Defendant Cortex asserts that this Court did not acknowledge this extension and improperly granted default judgment.

The determination of what constitutes a reasonable excuse for the default is a matter that rests within the sound discretion of the court. Rodgers v. 66 East Tremont Heights Housing Devel. Fund Corp., 69 A.D.3d 510, 510, 893 N.Y.S.2d 55, 56 (1st Dep't 2010). On numerous occasions, courts have opened default judgments that resulted from an honest mistake or were unintentional, inadvertent or stemmed from a misunderstanding of the proper procedure. E.g., Grant v. Rattoballi, 57 A.D.3d 272, 869 N.Y.S.2d 53 (1st Dep't 2008) (order dismissing complaint vacated where party showed reasonable excuse for default and meritorious claim); Polir Constr., Inc. v. Maks Etingin, 297 A.D.2d 509, 747 N.Y.S.2d 20 (1st Dep't 2002) (order dismissing action vacated where party adequately set forth reasonable excuse for default).

As explained above, the Court did not ignore or overlook Justice Shulman's order. Instead, it appears that the default occurred because neither the motion support office nor this Court was notified of the adjournment. As a result, motion support submitted the motion without opposition and the Court evaluated the motion according to the marking on the file. Defendants did not have counsel at the time of the motion, and it is not clear whether they were explicitly directed to file a copy of Justice Shulman's order with the motion support office or to notify the motion support office of the adjournment on the July 13 submission date. Given defendant Greer's

inexperience with the procedures of the Supreme Court, his failure to notify is understandable. Under the circumstances, therefore, the excuse for the default is reasonable.

However, a party attempting to vacate a default judgment must establish not only a reasonable excuse for the default but also a meritorious defense. Bank of N.Y. v. Resles, 78 A.D3d 469, 470, 912 N.Y.S.2d 35, 36–37 (1st Dep't 2010). Before opening a default judgment, the defendant may be required to make full and complete disclosure of a meritorious defense. Bryant v. N.Y.C. Hous. Auth., 69 A.D.3d 488, 489, 893 N.Y.S.2d 47, 48 (1st Dep't 2010). In seeking to vacate the order, defendant Cortex submits an affidavit of defendant Greer setting forth the facts and circumstances that lead defendant Cortex to fail to appear on the court date that resulted in default judgment. Defendant Greer submits an affidavit in support of Cortex's motion. In the affidavit, he asserts that there are material facts in dispute. However, all of his arguments relate to prior agreements between the parties. As this Court has already explained, including in its August ruling, the current action is based solely on the Note, which supplanted those prior agreements. Defendants have not shown a meritorious defense to the case at hand, therefore, and on this basis the cross-motion is denied.

Plaintiff's Motion to Reargue Prior Order Regarding Attorneys' Fees

Plaintiff Seymour moves to reargue its prior motion, which the Court decided on August 13, 2010. As indicated, although plaintiff Seymour prevailed on the motion the Court did not award plaintiff attorney's fees, which he requested. After consideration,

Pursuant to CPLR Section 2221(d):

A motion for leave to reargue: (1) shall be identified specifically as such; (2)

shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and (3) shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. Id.

The motion is granted in the discretion of the court. Frisenda v. X Large Enters., 280 A.D.2d 514, 515, 780 N.Y.S.2d 187, 187 (2d Dep't 2001).

Plaintiff Seymour properly made the motion within 30 days of the service of a copy of the order determining the prior motion and written notice of its entry. Therefore, the motion is timely. In addition, Seymour correctly notes that the Court's prior decision did not address plaintiff Seymour's request for attorneys' fees. Plaintiff Seymour makes this motion solely on the basis of matters already presented before this Court.

Therefore, the motion satisfies the requirements of CPLR section 2221(d). For the reasons set forth in the motion and accompanying documents, plaintiff is entitled to attorney's fees. A hearing is appropriate to determine the value of the services rendered. See Van Dusen v. Van Dusen, 13 A.D.3d 182, 182, 785 N.Y.S.2d 916, 916-17 (1st Dep't 2004).

Accordingly, it is

ORDERED, that plaintiff's motion for summary judgment in lieu of complaint against defendant Greer is granted in the sum of \$100,000; and it is further

ORDERED that defendant Cortex's cross-motion to vacate this Court's judgment against it is denied; and it is further

ORDERED that plaintiff's motion to reargue the motion against Cortex on the

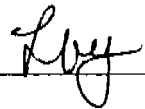
limited issue of attorney's fees is granted, and plaintiff Seymour is awarded reasonable attorneys' fees, the amount of which shall be determined at a hearing; and it is further

ORDERED that, a hearing on the issue of attorney's fees shall be held before this Court on May 10, 2011; and it is further

ORDERED that one judgment on the amounts ordered by this decision shall be determined at the hearing.

ENTER:

Dated: 4/12/11



LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.
FILED