

CM Collections, Inc. v CM Brand Holdings LLC

2016 NY Slip Op 30567(U)

April 4, 2016

Supreme Court, New York County

Docket Number: 651018/2015

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

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CM COLLECTIONS, INC.,

Plaintiff,

DECISION/ORDER
Index No. 651018/2015

-against-

CM BRAND HOLDINGS LLC, BLUESTAR ALLIANCE
LLC, JOSEPH GABBAY, RALPH GINDI, TAHARI A.S.L.
LLC, ELLIE TAHARI, ARTHUR LEVINE, LES
SCHREIBER

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action to recover damages for fraud, plaintiff CM Collections, Inc. (“Collections”) moves to vacate the court’s October 14, 2015 judgment, in which the court granted defendants Tahari A.S.L. LLC, Elie Tahari, Arthur Levine and Les Schreiber’s (the “Tahari Defendants”) motion to dismiss the complaint, on default.¹

In August 2013, Collections entered into a license agreement with former defendant CM Brand Holdings LLC for the right to sell an assortment of “Catherine Malandrino” brand goods at certain venues. The Tahari Defendants were non-controlling minority members of CM Brand Holdings LLC, and were not direct parties to the license agreement.

¹ Pursuant to a stipulation dated July 14, 2015, Collections dismissed, with prejudice, all claims asserted against defendants CM Brand Holdings LLC, Bluestar Alliance LLC, Joseph Gabbay, and Ralph Gindi.

Collections commenced this action in or about March 2015. Two causes of action in the complaint are asserted against the Tahari Defendants: the first cause of action, “Failure to Disclose Material Information Peculiarly Within the Possession of Defendants” and the third cause of action for “Actual Fraud.” The claims are based on the allegation that the Tahari Defendants stated during licensing negotiations that they “were committed to their stated plan of ‘building Catherine Malandrino into a global lifestyle brand’.” Collections alleged that this statement implied certain promises by the Tahari Defendants about maintaining the commercial value and validity of the intellectual property rights, promises which Collections claims the Tahari Defendants violated.

On July 15, 2015, the Tahari Defendants moved to dismiss the complaint insofar as asserted against them. They argued that dismissal of Collections’ fraud claim was appropriate because: (1) Collections expressly waived reliance on any representations made outside of the license; (2) the license directly contradicted the alleged representations and precluded justifiable reliance thereupon; (3) Collections failed to plead its claims with the requisite specificity; and (4) the Tahari Defendants’ actions were entirely consistent with the allegedly relied upon representations. The Tahari Defendants also argued that Collections’ failure to disclose claim was duplicative of the fraud claim and that the Tahari Defendants did not owe Collections any duty to disclose.

The parties agreed to two extensions for Collections to file opposition papers, with Collections’ counsel citing certain difficulties he was experiencing with regard to his law practice as the reason for his delay. Two days after the final agreed upon date for

Collections to file its opposition, September 10, 2015, Collections efiled the parties' previous stipulation of adjournment and nothing else.

On the return date, the Tahari defendants' motion to dismiss was granted on default. Judgment was entered on October 14, 2015. On October 22, 2015, Collections moved to vacate the default. Collections alleges that it did not default in opposing the motion to dismiss, rather, it took into consideration that arguments made on the motion to dismiss in criticism of the complaint, and attempted to file an amended complaint, thus mooting the motion to dismiss.

Specifically, Collections' counsel alleges that on September 10, 2015, he attempted to efile three documents. After he filed the stipulation of adjournment (docket no. 34), he filed an amended complaint. After he efiled that amended complaint, he realized that he failed to correct the caption of the action to reflect the fact that new claims were being asserted against two new parties, affiliates of the Tahari Defendants. He then created and efiled a corrected amended complaint that differed from the amended complaint in no substantive way, it just added the new parties ASL Holdings and ASL Operations LLC. He claims that he efiled both the amended complaint and corrected amended complaint, and can not explain why they do not appear in the docket.

Collections' counsel maintains that he failed to realize that the pleadings were not docketed properly because of extraordinary circumstances going on in his law practice at the time, which were extremely stressful and overwhelming. He explained that his "law firm exploded in the worst conceivable fashion, namely missing trust funds" and that "in over 40 years of practice [he has] never asked this or any other court to overlook a

procedural mishap due to so-called ‘law office failure’.” Counsel states that he had a good faith belief that the documents were efiled properly, and his failure to realize that they were not filed properly was inadvertent and only due to the difficult time he was experiencing in his practice.

In opposition, the Tahari Defendants argue that Collections’ counsel did not explain why he was late in *attempting* to efile the documents, two days after the opposition papers were due. Further, Collections’ counsel admits that he can not explain why the amended and corrected amended complaint do not appear on the docket and can only speculate that his default was the result of law office failure. Further, if he really had a good faith belief that his amended complaint and corrected amended complaint were actually efiled, he would have taken steps to advance the case in the weeks following that filing by, for example, serving the new parties.

Finally, the Tahari Defendants argue that the motion must be denied because Collections did not submit the required affidavit of merit, and did not submit any evidence from anyone with personal knowledge.

Discussion

CPLR 5015(a)(1) allows a Court to vacate a default judgment on the ground of a party’s “excusable default.” A party seeking to vacate an order entered upon default is required to demonstrate a reasonable excuse for its default and a meritorious defense to the action. *See Galaxy Gen. Contracting Corp. v. 2201 7th Ave. Realty LLC*, 95 A.D.3d 789, 790 (1st Dept. 2012). Under certain circumstances, law office failure may constitute a reasonable excuse, however, claims of law office failure which are conclusory and

unsubstantiated cannot excuse default. *See Wells Fargo Bank, N.A. v Cervini*, 84 A.D.3d 789 (2nd Dept. 2011); *Perez v. N.Y.C. Hous. Auth.*, 47 A.D.3d 505, 505-06 (1st Dep't 2008).

While Collections properly notes that New York courts prefer to have cases decided on the merits rather than by default (*See Smith v. Dacca Taxi*, 222 A.D.2d 209 [1st Dept. 1995]), here, Collections' counsel's excuse of law office failure is vague and conclusory. The difficulties surrounding Collections' counsel's law practice are unfortunate and understandably overwhelming. However, as the Tahari Defendants correctly point out, even if Collections' counsel did efile all three documents as he explained, he was still two days past the deadline in doing so, and offers no explanation as to why he did not pursue the case after that filing if he believed that the documents had been properly efiled.

In any event, a plaintiff moving to vacate must also "supply an affidavit of merits from a person competent to attest to the meritorious nature of the claim." *Pomerantz v. Long Island Paneling Co.*, 150 A.D.2d 665, 665 (2d Dep't 1989); *see Peacock v. Kalikow*, 239 A.D.2d 188 (1st Dept. 1997). Here, no such affidavit of merits was submitted.

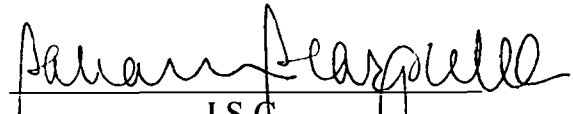
In accordance with the foregoing, it is hereby

ORDERED that plaintiff CM Collections, Inc.'s motion to vacate the court's October 14, 2015 judgment, in which the court granted defendants Tahari A.S.L. LLC,

Elie Tahari, Arthur Levine and Les Schreiber's motion to dismiss the complaint on default, is denied.

This constitutes the decision and order of the court.

Dated: April 4, 2016
New York, NY


J.S.C.
HON. SALIANN SCARPULLA