

6-18-10
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. Sue Ann Hoahng PART 89R

Justice

TEDESCO, RENATO,

INDEX NO. 109767/06

MOTION DATE _____

- v -

MOTION SEQ. NO. 003

ECOBANK TRANSNATIONAL INCORPORATED d/b/a
ECOBANK AND ECOBANK NIGERIA LTD.,

MOTION CAL. NO. _____

TEDESCO, RENATO,

INDEX NO. 109766/06

SEQ # 002

- v -

CENTRAL BANJK OF NIGERIA INCOPORATED
d/b/a ECOBANK AND ECOBANK NIGERIA LTD.,

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

**MATTER IS RESOLVED IN ACCORDANCE WITH THE ANNEXED
DECISION/REPORT.**

RECEIVED

JUN 1 7 2010

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

FILED

JUN 18 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/11/10

[Signature]
Sue Ann Hoahng
Special Referee

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED: _____
J.S.C.

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

-----X
TEDESCO, RENATO,

Plaintiff,

Index No.109767/06

- against -

ECOBANK TRANSNATIONAL INCORPORATED d/b/a
ECOBANK AND ECOBANK NIGERIA LTD.,
Defendants.

**REFEREE'S DECISION
and
ORDER**

-----X
TEDESCO, RENATO,

Plaintiff,

Index No.109766/06

- against -

CENTRAL BANJK OF NIGERIA INCOPORATED
d/b/a ECOBANK AND ECOBANK NIGERIA LTD.,

Defendants.

-----X
THE SUPREME COURT: NEW YORK COUNTY - PART 21

A P P E A R A N C E S :

Movant:	Respondent Charles A. D'Agostino
Ann G. Kayman, Esq.	Marshall R. Isaacs, Esq.
29 Broadway - Suite 2222	20 Vesey Street, Ste. 503
New York, NY 10006	New York, NY 10007
(212) 227-8283	(212) 732-1901

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Pursuant to Honorable Stallman's reference dated December 24, 2009, the Order to Show Cause dated January 15, 2009 was referred to the Special Referee for a hearing pursuant to CPLR §§ 5015 (a)(1) and (a)(3) to vacate the Special Referee' Decision and Judgment of December 14, 2007 as modified December 30, 2007 insofar as the judgments were entered against movant Ann G. Kayman, Esq. (Kayman). The hearing on the motion was scheduled for January 19, 2010.

On January 19, 2010, Marshall R. Isaacs, Esq. (Isaacs) appeared on behalf of respondent Charles A. D'Agostino, Jr., and Kayman appeared *pro se* for the hearing. Kayman argued that she was never offered the opportunity to defend the Special Referee's proceeding, which led to the default judgment entered against her on default. Kayman claimed that her default was excusable, and the result of fraud. She testified at the hearing that she was unaware of the underlying proceeding, because that Howard L. Blau, Esq. (Blau), her purported law partner and ex-fiancé concealed the proceedings from her. She further claimed that no notice of entry was served by any of the parties upon Kayman in the underlying *Tedesco* action.

Kayman argued that her default is excusable pursuant to CPLR §5015(a)(1) and CPLR §5010(a)(3) on the grounds of Blau's fraudulent concealment of said proceedings from Kayman:

The court which rendered a judgment or order may relieve a party from it upon it upon such terms as may be just, . . . upon the ground of: . . . (3) fraud, misrepresentation, or other misconduct of an adverse party. . . .

Kayman argued that the only basis for her purported liability is on a theory of vicarious liability as a law "partner" of Blau. She further asserted that the only basis for arguing that Kayman was ever a "partner of Blau is based on a theory of partnership in fact, or partnership by estoppel. She argued that a partnership in fact, or partnership by estoppel, has two essential elements: 1.) An agreement to share in the profits and losses of the partnership business; and 2) reliance. She argued that in the instant case both elements are missing.

Kayman admits to sharing office space with Blau since September 2006, allowing Blau to use her name¹ on the partnership letterhead business cards and facsimile cover sheets, *Blau & Kayman*, and severing all **professional** ties with Blau on or about February 2007 when she claims

¹She claimed that it was for the purpose of giving notice to clients she referred to Blau that she was affiliated with Blau. (Kayman Aff, para 8).

she learned of Blau's problems with the New York State Grievance Committee. She claimed that she evicted him out of the office in May 2007. (Kayman Aff, para 6). She testified that she never signed a partnership agreement with Blau, and that they never established any PC, LLC, LP or any other entity for the practice of law. (Kayman Aff, para 9). Kayman further asserted that she never earned any compensation from Blau or from the Law Offices of *Blau & Kayman*. (Kayman Aff, para 11).

Kayman testified that while she was aware that Blau was using her name on his masthead as *Blau & Kayman*, and had given him permission to do so, she claimed that she never authorized him to hold her out as his general partner, and that she never held herself out as his general partner. (Kayman Aff, para 14).

Kayman claimed that she never met the plaintiff in the instant case, and had never communicated with him until his third party creditor brought the enforcement proceeding against her in 2008. She claimed that it was the first time she learned of the decision and judgment in the instant case. She asserted that Blau concealed the instant lawsuit from her. (Kayman Aff, para 15 & 16).

Respondent's attorney Isaacs argued that in order for the judgment to be vacated against Kayman, Kayman must establish pursuant to CPLR §5015(a)(1) and CPLR §5015(a)(3) that she has a meritorious defense and an excusable default.. He asserts that Kayman erroneously relies on CPLR §5015(a)(3) on the ground that judgment was procured by the fraud of Blau. Isaacs argued that CPLR §5015(a)(3) requires proof that a party obtained an order by defrauding or deceiving the court. *Lins v Lins*, 98 AD2d 608 (1st Dept 1983). He asserted that while Kayman may have been defrauded by Blau, nowhere does Kayman contend that Blau duped the court into rendering

the underlying decision resulting in a judgment against Kayman. Isaacs argued that Kayman's true contention is that she simply was not aware of the hearing or the resulting decision.

Therefore, her only remedy is to vacate on the grounds of excusable default pursuant to CPLR §5015(a)(1).

Isaacs argued that Kayman had not provided a reasonable excuse for her delay in filing her OSC to vacate the default judgment. He asserted that Kayman cannot show a reasonable excuse for her delay. Kayman moved to vacate the default on January 15, 2009. He argued that she should have learned of the default in December 2007; especially since two decisions were mailed out by the Special Referee, the initial decision dated December 14, 2007 and the modified decision dated December 30, 2007. Isaacs pointed out that by Kayman's own admission, she claimed that she evicted Blau out of the office in May 2007. (Kayman Aff; para 6). He contends that she waited over a year to file her motion to vacate. He argued that Kayman claims not to have received the decision, and only learned of it when she was served with the D'Agostino petition in April 2008. (T, 24). Yet, at the hearing to vacate the default judgment, Kayman testified that she had evicted Blau from the office they shared in May 2007, seven months prior to the default judgment being rendered against her. (T, 23). Therefore, Isaacs contended that Kayman cannot use the excuse that Blau intercepted or hid the Special Referee's decision. Blau no longer had access to the office.

Isaacs argued that Kayman cannot establish that she has an excusable default since she waited over a year to file her OSC to vacate the default judgment against her, and even assuming she learned of the default judgment against her in April of 2008, she still waited approximately nine months before filing the OSC to vacate the default judgment as against her. Further, Isaacs

contends that Kayman does not even attempt to explain her delay. She merely asserted that , “I have been working on these proceedings with a huge file to show for it.” (T, 29). Yet, for all her contentions, Isaacs argued that Kayman submitted no documentary proof to support her arguments.

As for a meritorious defense, Isaacs argued that Kayman failed to establish a meritorious defense. He argued that Kayman merely asserted that she is not a partner in the firm of *Blau & Kayman*, and therefore is she is not responsible for the debts of the partnership individually. Isaacs argued that the courts have set forth various factors to be considered in determining whether a partnership exists, including: sharing of profits, sharing of losses, ownership of partnership assets, joint management and control, intention of the parties and compensation. No single factor is determinative. *Brodsky v Stadlen*, 138 AD2d 662 (2nd Dept 1988). Therefore, Isaacs argued that based on *Brodsky*, the great weight of these factors dictated that Kayman was a general partner in the law firm of *Blau & Kayman*. He directed the court to Kayman’s intention to form a partnership in that she knowingly and willingly allowed her name to be placed on the *Blau & Kayman* masthead, facsimile cover sheets and business cards. (T, 6). Moreover, Isaacs asserted that Kaymen’s intent to form a partnership is also betrayed by her business acumen. He pointed out that Kayman is an experienced business woman, who is the Chief Operating Officer of the New York Grant Company. (Petitioner’s Memorandum of Law In Opposition to Kayman’s OSC, Ex. B). He further asserted that Kayman is a licensed attorney who actively practiced law for no less than ten years. (T, 13-14). He argued that Kayman’s savvy and experience belies her claim that she is a penniless victim, who had no idea what she was getting herself into.

Isaacs argued that Kayman and Blau did in fact share expenses. Kayman testified that she

shared office space with Blau for over six months, and acknowledged that they split the rent fifty-fifty. (T, 7-8). Moreover, he argued that the shared employees like associate, Yuet Wong, Esq. (Wong) . He pointed out that when Wong appeared at the hearing on behalf of *Blau & Kayman*, and Wong made no indication that she was appearing solely on behalf of Blau.

Lastly, Isaacs argued that it was implausible that Kayman received no compensation from the firm of *Blau & Kayman's* activities, even though Kayman denied receiving any money. (T, 7) Isaacs argued that Kayman did not submit any evidence of proof that she was not compensated by the firm, and if it were true that she did not receive any compensation from the firm of *Blau & Kayman*, she would have submitted her own tax returns, bank statements and financial statements which would have shown that her only income was from salary or any other source unrelated to *Blau & Kayman*.

Based on the above, Kayman's order to show cause to vacate the default judgment against her is denied. Kayman failed to establish that she had a meritorious defense and an excusable default. Pursuant to CPLR 5015 (a)(1) *excusable default*, "if such motion is made within one year after service of copy of the judgment or order written with notice of entry upon the moving party, or, if the moving party has entered a judgment or order, within one year after such entry;" Kayman must assert an excusable default within one year. Kayman's contention that she was unaware of the underlying proceedings is not credible. She asserted that Blau intercepted or hid the Special Referee's decision. However, by her own admission, Blau no longer had access to the office. At the instant hearing, Kayman testified that she had evicted Blau from the office they shared in May 2007, seven months prior to the default judgment being rendered against her. (T, 23). Kayman should have learned of the default in December 2007; especially since two

decisions were mailed out by the Special Referee, the initial decision dated December 14, 2007 and the modified decision dated December 30, 2007. Kayman moved to vacate the default on January 15, 2009. Kayman waited over a year to file her motion to vacate. Kayman cannot use the excuse that Blau intercepted or hid the Special Referee's decision. Therefore, Kayman failed to establish an excusable default.

As Kayman's second defense pursuant to CPLR §5015(a)(3), "fraud, misrepresentation, or other misconduct of an adverse party," this section is inapplicable, and Kayman has not established a meritorious defense. First, Blau is not an adverse party of Kayman's. Blau is a co-respondent of Kayman in the underlying proceeding. Kayman argued that Blau perpetrated a fraud against her. She testified at the hearing that she was unaware of the underlying proceeding, because Blau, Esq., her purported law partner and ex-fiancé concealed the proceedings from her. As for the fraud, Kayman has failed to establish that a fraud was committed against her and that Blau fraudulently influenced the court to render a judgment against Kayman pursuant to CPLR §5015(a)(3). She merely made assertions. No evidence was submitted to support her allegation. Moreover taken together with her claims of not having received a copy of the Special Referee decision when it was mailed to the firm during the time period when Kayman had full control of the office space, and her incredible testimony that she was not a partner in the firm of *Blau & Kayman*, when she admittedly allowed her name to be placed on the firm's masthead, facsimile cover sheets and business cards testimony, Kayman's testimony is found to be not credible; especially since she is an experienced attorney and business woman. In addition, she fails to submit any proof to support her allegations.

Accordingly, Kayman's motion to vacate the default judgment against her is denied.

Kayman has not established a meritorious defense nor an excusable default pursuant to CPLR §§ 5015 (a) (1) and (a)(3).

This constitutes the decision and order of the court

Dated: June 11, 2010



**SUE ANN HOAHNG
SPECIAL REFEREE**

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