SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 27

PRESENT: HON. WILLIAM R. LaMARCA
Justice

LEE DIVITO d/b/a L.F.D. PROVISIONS,

Plaintiff,

-against-

ROBERT MONTGOMERY, individually and d/b/a BREAD BASKET,

Defendant.,

Motion Sequence # 01
Submitted March 26, 2004
XXX

INDEX NO: 14392/02

The following papers were read on this motion:

Notice of Motion/Order to Show Cause.....1
Affidavits and Affirmation in Opposition.....2
Affidavit and Affirmation in Reply.....3

Defendant, ROBERT MONTGOMERY(hereinafter referred to as "MONTGOMERY") individually and d/b/a BREAD BASKET, moves to vacate a money judgment in the sum of $42,340.54, entered against MONTGOMERY individually on February 14, 2003. By Order to Show Cause, dated February 13, 2004, MONTGOMERY seeks to vacate the judgment and restore the matter to the court's calendar for determination on the merits and asserts

that his default was "excusable". Plaintiff, LEE DIVITO d/b/a L.F.D. PROVISIONS, (hereinafter referred to as "DIVITO") opposes the motion which is determined as follows:

Background

DIVITO relates that he is a distributor of BOAR'S HEAD food products to local delicatessens on Long Island. He states that in January 2000, he signed up customers MONTGOMERY and his partner DAVID WEISBERG (hereinafter referred to as "WEISBERG"), who were opening a new delicatessen in Hauppauge, New York. DIVITO states that he agreed to lend MONTGOMERY and WEISBERG $15,000.00 for start up costs, which he claims is a common practice among BOAR'S HEAD distributors who are highly competitive in acquiring new accounts. DIVITO states that after negotiations with the partners he drew up the agreement, which was signed by WEISBERG on behalf of himself and his partner, and that $15,000.00 in cash was given to the partners, with payments of $300.00 per week to be made commencing May 1, 2000 after a four (4) month grace period. Thereafter, DIVITO, claims he commenced delivery of BOAR'S HEAD products to MONTGOMERY and WEISBERG, and between May 2000 and July 2000, they made payments to DIVITO. He states that when the delicatessen experienced financial problems, DIVITO continued to deliver products to MONTGOMERY and WEISBERG and agreed to permit them to hold off the loan repayments until business improved. That did not occur. In June 2001, WEISBERG left the business and filed a Chapter 7 petition in bankruptcy, listing DIVITO as one of his creditors. DIVITO asserts that MONTGOMERY advised him that MONTGOMERY was now the sole owner of the business and that the outstanding loan obligation of $11,700.00 was now his obligation and that DIVITO would be paid in full. On that basis, DIVITO claims he continued to deliver products to

MONTGOMERY until sometime in June, 2002 when he found the delicatessen closed and out of business.

DIVITO states that on August 30, 2002 he instituted the instant action for a money judgment when MONTGOMERY failed to return his calls. He claimed $11,700.00 remained due under the loan and $25,994.85 remained due for goods sold and delivered. An Affidavit of Service, sworn to September 23, 2002, reflects service of the Summons and Verified Complaint upon MONTGOMERY's wife, DOROTHY MONTGOMERY, a person of suitable age and discretion, on September 18, 2002 at 77 Westminster Road, Garden City, New York and mailing to the same address on September 23, 2002. When no response was received, an additional copy of the Summons and Verified Complaint was mailed to MONTGOMERY at the 77 Westminster Road address on December 5, 2002, in preparation to obtain a default judgment pursuant to CPLR § 3215. Counsel for DIVITO claims that no answer was received and a default judgment was obtained on February 14, 2003 in the total sum of $42,340.54, inclusive of interest and disbursements.

In support of the motion to vacate the default, MONTGOMERY states that he first learned of the action on December 6, 2002 when he received a copy of the Summons and Complaint by mail, which he then forwarded to his attorney. He claims an Answer and various discovery demands were served on plaintiff's counsel on December 30, 2002, receipt of which is denied. MONTGOMERY states that he was unaware of the default judgment until sometime in January 2004, when his wife was served with a contempt motion seeking enforcement of the judgment. MONTGOMERY's counsel states that he assumed DIVITO no longer wished to pursue the action as he received no further communication from DIVITO's attorney after service of the Answer. It is MONTGOMERY's

position that he was never properly served and, further, that he never personally guaranteed payment for goods delivered as the business was conducted under a corporate entity, B & D 900 W CORPORATION, which is the responsible party. Moreover, MONTGOMERY claims that the loan agreement is insufficient, the acknowledgment is improper, that his alleged signature is a forgery and that he never entered into a loan agreement with DIVITO or gave permission for WEISBERG to sign his name.

The Law

There are two sections within the CPLR that provide for the vacatur of a default judgment. CPLR § 317 provides as follows:

> A person served with a summons other than by personal delivery to him... who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment ... 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 ...

Additionally, pursuant to CPLR § 5015 (a) (1), the Court which rendered a judgment or order may relieve a party from it if the party demonstrates both a reasonable excuse for the default and a meritorious defense (see, CPLR §5015 [a][1]; see *Titan Realty v. Schlem*, 283 AD2d 568, 724 NYS2d 908 [2nd Dept. 2001]; *Matter of Gambardella v. Ortov Light* , 278 AD2d 491 [2nd Dept 2000]; *Parker v. City of New York*, 272 AD2d 310, 707 NYS2d 199 [2nd Dept.2000]). What constitutes a reasonable excuse is within the sound discretion of the Court. (*Parker v. City of New York*, *supra*). MONTGOMERY asserts that because he was not personally served with the Summons and Complaint he can move pursuant to CPLR § 317 and does not have to provide a reasonable excuse for his default as he was not personally served. However, he alleges both a reasonable excuse and a meritorious defense.

Conclusion

Based upon the submissions of the parties and counsel, it is the judgment of the Court that MONTGOMERY has not made a *prima facie* showing of a meritorious defense. He does not deny receipt of the $15,000.00 loan nor delivery of goods to the deli. Nor does he deny payments on the note and for the goods received. Rather, he simply claims that his signature is a forgery and that he operated as a corporate entity and should not be personally responsible for payments. DIVITO continued deliveries of goods to MONTGOMERY's deli based on MONTGOMERY's personal representations that he would take over the entire obligation and become primarily liable for the debt. (Cf. *Kramer v. Harrington Wells & Rhodes, Ltd.*, 275 AD2d 302, 711 NYS2d 507 (2nd Dept. 2000). It is well settled that conclusory allegations of a meritorious defense are not sufficient to prevail in a motion to vacate a default judgment. *Peacock v. Kalikow,* 239 AD2d 188, 658 NYS2d 7 (1st Dept. 1997); *Amity Plumbing & Heating Supply Corp. v. Zito Plumbing and Heating Corp.,* 110 AD2d 863, 488 NYS2d 418 (2nd Dept. 1985). Therefore, whether proceeding under CPLR § 317 or CPLR § 5015, the failure to demonstrate a meritorious defense based upon admissible evidence is fatal to MONTGOMERY's motion to vacate (*Peacock v. Kalikow, supra*). It is therefore

ORDERED, that defendant MONTGOMERY's motion to vacate the default judgment is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: June 28, 2004

WILLIAM R. LaMARCA, J.S.C.

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