SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: *HON. THOMAS P. PHELAN,* *Justice*

TRIAL/IAS PART 4
NASSAU COUNTY

BAINTON MCCARTHY LLC,

Plaintiff,

-against-

CBC CAPITAL VENTURES, INC., CBC CAPITAL VENTURES, LLC, EKN FINANCIAL SERVICES, INC., LOUIS OTTIMO, ANTHONY OTTIMO, SR. and RICHARD OTTIMO,

Defendant(s).

ORIGINAL RETURN DATES: #3 - 07/29/09; #4 - 08/03/09; #5 - 08/03/09
SUBMISSION DATES: #3 - 08/05/09; #4 - 08/03/09; #5 - 08/03/09

INDEX No.: 17307/08

MOTION SEQUENCE #3,4,5

The following papers read on this motion:

Order to Show Cause.....	1,2,3
Answering Papers.....	4,5,6
Reply.....	7
Affidavit of Louis Ottimo.....	8

Defendants, EKN Financial Services, Inc. and Anthony Ottimo, Sr. (Motion Sequence #3), Louis Ottimo (Motion Sequence #4), and Richard Ottimo (Motion Sequence #5), move for an order pursuant to CPLR 5015 vacating the judgment against defendants dated June 4, 2009, and restoring this matter to the calendar. Plaintiff opposes the motions.

By order dated March 10, 2009 (Phelan, J.), former counsel for defendants', EKN Financial Services, Inc. and Anthony Ottimo, Sr. ("EKN and Anthony Ottimo"), motion for leave to withdraw from the representation of defendants EKN and Anthony Ottimo was granted. The Compliance Conference scheduled for April 7, 2009, was adjourned to May 4, 2009. The order further provided that: "All parties are forewarned that failure to appear on May 4, 2009, may result in the dismissal of this action or other sanction."

A copy of the order was mailed by the court to plaintiff, the Ottimo defendants, EKN and former counsel for defendants EKN and Anthony Ottimo. Former counsel for defendants EKN and

Anthony Ottimo submitted an affirmation of service to the court that service of the order dated March 10, 2009, was made upon plaintiff, the Ottimo defendants and EKN by first class mail, and upon EKN and Anthony Ottimo by certified mail, return receipt requested. Plaintiff also submitted a copy of an affidavit service of the order upon EKN and Anthony Ottimo via certified mail with return receipt requested. Attached to the affidavit of service were copies of the return receipts signed by A. Ottimo

The defendants did not appear on May 4, 2009, and plaintiff's oral application on the record for entry of a judgment by default was granted. Thereafter on June 9, 2009, both the court and plaintiff received a telephone call from Anthony Ottimo that he never received notice of the May 4, 2009, conference (Aff. in Opp. Ex C).

It is well settled that on a motion to vacate, defendants must demonstrate both a reasonable excuse for the default and the existence of a meritorious defense. (*Kaplinsky v. Mazor*, 307 AD2d 916 [2d Dept. 2003]). Equally well settled is the principle that "whether a default should be vacated is a matter within the sound discretion of the trial court (*see, Fidelity & Deposit Co v Anderson & Co.,* 60 NY2d 693)" (*Zachary v. County of Nassau*, 167 AD2d 537 [2d Dept. 1990]).

EKN submits that its failure to appear was not in bad faith, willful or purposeful, claiming that it had not yet retained new counsel and did not realize that it should have appeared "irrespective of whether new counsel was in place" (Giugliano Aff. ¶7). Anthony Ottimo makes the same allegations. It is submitted that EKN and Anthony Ottimo have meritorious defenses and, in fact, have a counterclaim against plaintiff. Anthony Ottimo, CEO of EKN, avers that

> "neither EKN nor the undersigned ever signed a written agreement to do either of the following: (a) retain Plaintiff to perform legal services for EKN or any other individual, person or entity, and/or (b) guaranty payment or collection of any attorneys fees for services allegedly rendered by Plaintiff to any other individual person or entity." (Anthony Ottimo Aff. ¶14).

Both Louis Ottimo and Richard Ottimo allege that they were led to believe that the matter was stayed until such time as new counsel was retained and that their failure to appear was not wilful but due to a misunderstanding. It is submitted that they have a meritorious defense in that they never signed a written agreement to retain plaintiff for legal services nor did they ever guaranty payment.

In opposition plaintiff submits that it was never served with an executed copy of the Order to Show Cause by the pro se defendants. Louis Ottimo submitted an "affidavit of mailing" which was not notarized alleging that he served the Orders to Show Cause on behalf of Richard Ottimo and Louis Ottimo by mail on July 27, 2009, by certified mail on July 29, 2009, and by fax on July 30, 2009. This information is reiterated in Louis Ottimo's affidavit in reply, which is notarized. Mistake, omission, defect or irregularity shall be disregarded if a substantial right of a party is not prejudiced (CPLR 2001; *see also, Legg v. Fitzmaurice,* 112 Misc.2d 283 , 287 [Sup. Ct., Albany Co. 1981]).

Plaintiff contends that defendants do not have a meritorious defense. This contention is based upon the allegations in the complaint. Plaintiff also submits that the purported counterclaims do not have merit. Plaintiff has failed, however, to submit evidence of any agreement in writing. Defendants have, therefore, presented a potentially meritorious defense.

"Courts have broad discretion to grant relief from [] defaults where the moving party's claim or defense is meritorious, the default was not willful, and the other party is not prejudiced (citations omitted)." (*Goldman v. City of New York*, 287 AD2d 482 [2d Dept. 2001]). Vacatur of a default under such circumstances is not an abuse of discretion since it furthers the "strong public policy" in favor of resolving cases on the merits. (*Altairi v. Cineus*, 45 AD3d 707 [2d Dept. 2007]). Permitting vacatur in such instances has also been described as warranted since "the interest of justice is best served by vacating the default and permitting the case to be decided on its merits (citation omitted)." (*Vita v. Alstom Signaling, Inc.*, 308 AD2d 582, 583 [2d Dept. 2003]).

So strong is the state's public policy favoring determinations on the merits that if defendant has demonstrated a potentially meritorious defense and the delay was both brief and without resultant prejudice to plaintiff, it has been held an abuse of discretion to deny vacatur notwithstanding that the proffered excuse is "somewhat dubious." (*Cotter v. Consolidated Edison Co.*, 99 ad2D 738 [1ST Dept. 1984]). The approach adopted by the First Department in *Cotter* has been cited with approval by the Second Department in both *Shopsin v. Siben & Siben*, 189 AD2d 811 [2d Dept. 1993] and *DeCicco v. Cobble Hill Nursing Home, Inc.*, 196 AD2d 476 [2d Dept. 1993].

Based upon all of the foregoing, defendants' motions are granted. Accordingly, the judgment dated June 4, 2009, is hereby vacated as to the moving defendants.

The Compliance Conference is hereby rescheduled for September 29, 2009, at 9:30 a.m., at which time a schedule for the completion of disclosure shall be made. No adjournments of this conference will be permitted absent the explicit permission of the undersigned or order of the court. All parties are forewarned that failure to attend conferences may result in the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanction (22 NYCRR 130-2.1 et seq.).

This decision constitutes the order of the court.

Dated: 9-9-09

HON THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C.

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