

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JEFFREY K. OING
J.S.C.
Justice

PART 48

Index Number : 652947/2014
LUDWIGS DRUG STORE INC
vs.
BROOKLYN EVENTS CENTER LLC
SEQUENCE NUMBER : 002
VACATE / MODIFY AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

*Mtn decided in accordance w/ the accompanying
Memorandum decision/order of this Court.*

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

Dated: 5/8/15

JEFFREY K. OING
J.S.C., J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

-----x
LUDWIG'S DRUG STORE, INC., JERMAINE PRATT,
SEAN SCARBOROUGH, RICHARD MASTROTA and
GLEN DEFREITAS,

Plaintiffs,

-against-

BROOKLYN EVENTS CENTER, LLC d/b/a
BARCLAYS CENTER,

Defendant.

Index No. : 652947/2014

Mtn Seq. No. 002

DECISION AND ORDER

-----x
JEFFREY K. OING, J. :

Plaintiffs, Ludwig's Drug Store, Inc., Jermaine Pratt, Sean Scarborough, Richard Mastrotta and Glen Defreitas, move, pursuant to CPLR 2221, to vacate this Court's order, entered on April 17, 2015, dismissing their complaint and awarding defendant as the prevailing party attorneys' fees. Plaintiffs also move, pursuant to CPLR 3025, for leave to amend the verified complaint. Defendant opposes and cross-moves for additional attorneys' fees.

Factual and Procedural Background

Briefly stated, in October of 2013, plaintiff Ludwig's Drug Store, Inc. ("Ludwig's") entered into a written three-year license agreement with defendant Brooklyn Events Center, LLC d/b/a Barclays Center ("BEC") for use of a suite located within the Barclays Center in Brooklyn, New York (the "Suite License Agreement") (Ver. Compl., Ex. A). In 2014, plaintiffs commenced the instant action alleging that BEC fraudulently induced them to enter into this Suite License Agreement by promising plaintiffs

that they would be able to resell their suite tickets for upwards of \$35,000 per night, for an annual total of approximately \$600,000 per year. Plaintiffs alleged that they relied on this representation in signing the Suite License Agreement, but were ultimately unable to sell tickets for that amount.

In motion seq. no. 001, BEC moved to dismiss plaintiffs' verified complaint. Plaintiffs were served with a copy of BEC's motion papers via both NYSCEF and courtesy e-mail dated December 19, 2014 (Rosselli Affirm., Ex. 2). Nevertheless, plaintiffs' counsel failed to oppose the motion or even appear on its return date. Accordingly, in a decision, entered January 23, 2015, this Court granted BEC's motion to dismiss on default and declared that, as the prevailing party, BEC was entitled to its attorneys' fees pursuant to the Suite License Agreement. BEC served notice of entry on plaintiffs on January 21, 2015. On February 2, 2015, BEC served a notice of settlement, proposed order, and an affidavit setting forth its attorneys' fees. No counter order having been submitted, this Court entered an order on April 17, 2015 dismissing the case and awarding BEC attorneys' fees in the amount of \$19,000 (NYSCEF Doc. No. 47).

Plaintiffs have filed the instant motion seeking, as above-noted, to vacate the dismissal on the basis of law office failure and to amend the verified complaint as "it has come to light that the complaint misstates certain key facts and leaves other facts out altogether" (Ptf. Memo of Law, p. 3).

Discussion

A plaintiff seeking to vacate an order of dismissal granted on default must demonstrate both a reasonable excuse for the default and a potentially meritorious cause of action (CPLR 5015[a][1]; Mutual Marine Office, Inc. v Joy Const. Corp., 39 AD3d 417 [1st Dept 2007])). The determination of what constitutes a reasonable excuse lies within the sound discretion of the trial court (Id.). Law office failure, for example the misplacement of motion papers, may under some circumstances constitute a reasonable excuse justifying vacatur of a default (e.g., Hunter v Enquirer/Star Inc., 210 AD2d 32 [1st Dept 1994]). In making this determination, courts are mindful of the strong public policy favoring the resolution of disputes on their merits.

Here, plaintiffs' counsel's proffered excuse is that he is generally a solo practitioner who sometimes employs one associate, and at the time the motion to dismiss was made in December of 2014 counsel did not employ an associate (Zack Reply Affirm., ¶¶ 3, 5). Further, he does "not personally have a computer for business or personal use;" he has "never used a computer in his practice," and all e-mail correspondence addressed to him goes to his wife's computer, who is also his office manager (Zack Reply Affirm., ¶ 4). Accordingly, "[a]ny e-file notifications to [plaintiffs' counsel] also go to [his]

wife's computer" (Id.). Additionally, counsel's office manager/wife had eye surgery scheduled for December 22, 2014, and did not work in the office the week following her surgery and "had trouble looking at a computer screen" (Id., ¶ 6). On December 19, 2014, the day that the notice of motion was e-filed and e-mailed to plaintiffs' counsel, his wife had "a doctor's appointment for a pre-operative evaluation" (Id.). By the time his wife returned to work on December 29, 2014, "any e-file notifications or e-mail correspondence sent to [his firm] inbox would, at that point, have been buried under 10 days of correspondence" (Id.). Thus, plaintiff's counsel was "unaware" that the motion to dismiss was submitted unopposed until January 15, 2015 (Id.).

Failure to check e-filing notifications in an e-filed case or one's e-mail inbox for several weeks does not ordinarily constitute reasonable excuse. This is especially so in 2015 when the Commercial Division has for years been a mandatory e-filing Court and New York Courts have long encouraged use of the e-filing system. Although this Court is sympathetic to the fact that plaintiffs' counsel's law office manager/wife was having eye surgery at the time that the notice of motion was served and could not check e-mails, plaintiffs' counsel should have made alternate arrangements or at least checked on the status of this case, as he was aware that defendant's time to respond to the verified complaint was on December 19, 2014, the day defendant

served its motion. In fact, counsel does not explain why no one thought to, at a minimum, check his inbox between the pre-operative appointment on December 19th and the surgery on December 22nd.

Even if this Court were to overlook this initial lapse, the excuse that the notice of motion was "buried under 10 days of correspondence" is not reasonable (Zack Reply Affirm., ¶ 6). Nothing in the record suggests that there was an impediment to go through such backlog in a timely fashion or that the task was insurmountable. Had plaintiffs' counsel or his wife checked his inbox at the time she came back to work on December 29, 2014 either one of them would have seen the pressing time limits, and he would have been able to submit opposition to the dismissal motion or at least to request an extension of time before the motion was submitted unopposed on January 5, 2015.

In any event, were this Court to accept plaintiffs' counsel's proffered excuse as a reasonable law office failure, the motion still lacks the critical second element necessary to vacate this Court's order: a potentially meritorious cause of action. In this regard, plaintiffs' counsel fails to submit any proof of a meritorious claim, and admits that the verified complaint, verified by each of the four individual plaintiffs, "was insufficient to support the claim of fraudulent

misrepresentation as it failed to fully state the events as they occurred between the parties" (Ptf. Memo of Law, p. 1).

Moreover, the proposed Amended Verified Complaint's central allegation is that plaintiffs were allegedly told they could make vast sums of money by reselling tickets to the suite. This allegation is contradicted by the express language of the Suite License Agreement prohibiting the resale of suite tickets in bold, capital letters (Ver. Compl., Ex. A, § 8).

In addition, section 23 of the Suite License Agreement contains a broad merger clause disclaiming the existence of any oral representations or understandings that would "modify, amend or vary any of the terms" of that agreement (Ver. Compl., Ex. A, § 23). Plaintiffs' proposed Amended Verified Complaint does not cure any of these pleading deficiencies.

Notwithstanding the above, although the Court does not find that plaintiffs' have established either a meritorious cause of action or a reasonable excuse for the default, the Court grants that branch of plaintiffs' motion seeking a hearing with regard to amount of the attorneys' fees awarded.

Defendant's cross-motion for additional fees is denied.

Accordingly, it is

ORDERED that branch of plaintiffs' motion to vacate this Court's Order, entered April 17, 2015 is denied; and it is further

ORDERED that branch of plaintiffs' motion to amend their verified complaint is denied; and it is further

ORDERED that this Court's Order, entered April 17, 2015, directing an award of \$19,000 in attorneys' fees to defendant is vacated; and it is further

ORDERED that the issue of the amount of reasonable attorneys' fees to which defendant may be entitled is respectfully referred to a Special Referee or J.H.O. to hear and report, or if the parties so agree to hear and determine, and it is further,

ORDERED that counsel for the defendant shall, within fourteen (14) days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet¹, upon the Special Referee Clerk in the General Clerk's Office (room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the decision and order of the Court.

Dated: 5/8/15


HON. JEFFREY K. OING, J.S.C.
JEFFREY K. OING
J.S.C.

¹ Copies available in Room 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supcmanh under the "References" section of the "Courthouse Procedures" Link).