

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T :

HON. CONRAD D. SINGER,
Justice

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UNION FUNDING SOURCE, INC.

Plaintiff,

-against-

WSD ENGINEERING INC D/B/A WSD
CONSTRUCTION, PD AND KYM PROPERTIES, L.P., DP
AND KYM PROPERTIES, L.P. AND DENIS HUGH
MORGAN,

Defendants.
-----X

Index No.: 604532/2022
Motion Seq. No.: 001
Motion Submitted: 6/21/22

DECISION AND ORDER
ON MOTION

The following papers read on this motion:

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| Notice of Motion for Default Judgment and Supporting Papers..... | 1 |
| Defendants’ Affirmation in Opposition and Supporting Papers..... | 2 |
| Plaintiff’s Affirmation in Reply and Supporting Papers..... | 3 |

Plaintiff, Union Funding Source, Inc. [“UFS” or “plaintiff”], moves this court for an order, pursuant to CPLR § 3215, granting it default judgment, jointly and severally, against the defendants, WSD Engineering Inc. d/b/a WSD Construction, PD and Kym Properties, L.P., DP and KYM Properties, L.P. [collectively, “company defendants”], and Denis Hugh Morgan [individually, “guarantor”; and when referenced collectively with “company defendants”, then “defendants”], in the amount of \$92,400.00, with interest thereon from January 18, 2022. The defendants have opposed the motion for default judgment and the plaintiff filed a reply affirmation in further support thereof. The defendants submitted a further filing on or about June 14, 2022,

which they characterized as an “Affidavit or Affirmation in Reply”, but which is more accurately defined as an impermissible “sur-reply” and which has not been considered by the Court in deciding the within motion¹. The plaintiff’s motion for default judgment is determined as follows:

UFS commenced this action by way of a Summons and Verified Complaint dated April 6, 2022. It is alleged therein that the parties entered into a contract whereby UFS agreed to purchase \$224,850.00 of the company defendants’ future receivables in return for an up-front payment of \$150,000.00. It is further alleged that UFS would receive its payment by taking 15% of daily receivables from a certain bank account, until it received the \$224,850.00. It is further alleged that Denis Hugh Morgan, as CEO of WSD Engineering Inc., personally guaranteed the contract. UFS tendered payment of the agreed purchase price, minus fees. It is alleged that although the defendants initially made payments pursuant to the parties’ agreement, such payments promptly stopped on or about January 18, 2022, which constituted a breach of the parties’ agreement.

The parties’ contract contained a choice of law provision, which stated that the parties’ agreement would be governed by the laws of the State of New York, that New York is the “Acceptable Forum” for the plaintiff to initiate its lawsuit against the defendants, that the “Acceptable Forum” is convenient, that the parties are submitting to the jurisdiction of the Acceptable Forum, and that the parties waive any and all objections to inconvenience of the jurisdiction or venue. (NYSCEF Doc. No 12, Ex. A to Plaintiff’s Motion).

The parties’ contract also contained a provision stating that the defendants waived personal service of any summons and complaint or other process to commence any litigation and agreed

¹ Pursuant to 22 NYCRR 202.8-c, entitled “Sur-Reply and Post-Submission Papers”, the only sur-reply papers that may be submitted without advanced leave of court consists of counsel informing the court by letter of the citation of any post-submission court decision that is relevant to the pending issues. Such shall contain no additional argument. Materials submitted in violation of such rule will not be considered by the Court.

that service of such documents would be effective and complete if sent by Certified Mail, Return Receipt Requested to mailing addresses listed elsewhere in the parties' agreement, and emailed to email address(es) listed elsewhere in the agreement, and that service would be effective 5 days after the Certified Mailing . The defendants would then have 30 calendar days after service was complete to appear in the action or proceeding. (NYSCEF Doc. No 12, Ex. A to Plaintiff's Motion).

To date, the defendants have not interposed an answer.

A motion for default judgment can be made under CPLR § 3215 once a defendant has failed to appear. CPLR § 3215(f) provides the following as to the proof required on a default motion:

On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint...and proof of the facts constituting the claim, the default and the amount due...by affidavit made by the party....Where a verified complaint has been served it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or his attorney...Proof of mailing the notice required by subdivision (g) of this section, where applicable, shall also be filed. (*See* CPLR § 3215[f]).

Once the plaintiff has proffered the required proof on its motion for default judgment, such motion must be granted unless the defendant can establish that it has a meritorious defense to the claims made, and a reasonable excuse for the delay in interposing its answer. (*Buywise Holding, LLC v. Harris*, 31 AD3d 681, 683 [2d Dept 2006]).

In this case, the plaintiff has provided proof that the defendants were served pursuant to the terms of the parties' contract, i.e., through electronic mail and certified mail, return receipt.

(NYSCEF Doc. No. 56, Ex. E to Plaintiff's Motion). The plaintiff has also provided proof that the defendants were served with an additional mailing of the summons and complaint pursuant to CPLR 3215(g). (NYSCEF Doc. No. 57, Ex. F to Plaintiff's Motion).

The defendants do not address the propriety of the manner in which they were served with the summons and complaint. Even if they had, such argument would likely have been fruitless, as "parties to a contract are free to contractually waive service of process", which is what the parties in this case have apparently done in their contract. (*Alfred E. Mann Living Tr. V. ETIRC Aviation S.a.r.l.*, 78 AD3d 137, 140 [1st Dept. 2010]; NYSCEF Doc. No. 12, Ex. A to Plaintiff's Motion).

The defendants also do not refute the material facts set forth in the plaintiff's affidavit supporting the merits of the plaintiff's claim. (*See Affidavit of Shaul Dahan in Support of Motion for Summary Judgment* ["*Dahan Aff. In Support*"], dated 5/19/2022).

Instead of disputing the method of service and/or the merits of the plaintiff's claim, they argue that the plaintiff's summons and complaint must be dismissed due to lack of subject matter jurisdiction over the litigation. In the alternative, they argue that the defendants have a colorable defense of criminal usury, and that they are therefore entitled to the vacatur of a default judgment without having to prove an excusable default.

The defendants argue that BCL § 1314 requires dismissal of the plaintiff's action due to lack of subject matter jurisdiction, because the action was brought by a foreign entity as against another foreign entity and none of the limited statutory exceptions apply to this case. They argue that such objection may be raised at any stage of the action and that the action can be dismissed by the Court *sua sponte* if subject matter jurisdiction is absent.

However, as the plaintiff points out, it appears that BCL § 1314 does not preclude the plaintiff from bringing litigation in New York, based on the plaintiff's showing that UFS is a corporation that was formed under the laws of the United States and UFS maintains an office in New York state. (*see* BCL § 1314[c]; *Dahan Aff. In Support*, ¶ 2). Accordingly, the Court will not dismiss the plaintiff's complaint due to lack of subject matter jurisdiction.

However, the Court is persuaded to deny the plaintiff's motion for default judgment based on the defendants' arguments concerning a meritorious defense of usury. Pursuant to CPLR § 5015[a][3], the Court may vacate a default judgment, even in the case of inexcusable neglect, upon the ground of criminal usury. (CPLR § 5015[a][3]; *Nat'l Travis Inc. v. Gialousakis*, 120 Misc. 2d 676, 680 [Sup Ct Nassau County 1983], *aff'd*, 99 AD2d 800 [1984]). In this case, the Court has reviewed the parties' Sale and Purchase Agreement [NYSCEF Doc. No. 12, Ex. A to Plaintiff's Motion], and considered the parties' respective arguments concerning the reconciliation clauses contained therein. The Court is mindful of the plaintiff's argument that plaintiff was subject to a "mandatory" obligation to reconcile payment within two business days of a request for reconciliation. (*Reply Affirmation of Joshua Kesselman, Esq.*, dated June 13, 2022 ["Kesselman Reply Aff."], p. 9). However, the Court is also mindful of defense counsel's argument concerning five ways that the plaintiff appeared to be "insulated" from ever having to actually carry out a reconciliation. (*Affirmation of Amos Weinberg in Opposition to Plaintiff's Motion*, dated June 8, 2022, ¶¶ 14 through 19).

Following such review and evaluation of the parties' respective claims, the Court finds a sufficient basis to deny the plaintiff's application for default judgment against the defendants, both under CPLR § 5015(a)(3), and pursuant to the Court's inherent ability to do so in furtherance of

the interests of justice and the Court's policy of deciding cases on the merits. The defendants have put forth a sufficient basis to give them the opportunity to defend against the plaintiff's lawsuit. Therefore, the plaintiff's motion for default judgment will be denied against the defendants.

Accordingly, it is hereby,

ORDERED, that the plaintiff's motion for default judgment is DENIED, without prejudice; and it is further,

ORDERED, that the defendants are directed to serve their answer within 20 days of being served with notice of entry of this decision and order; and it is further,

ORDERED, that the parties are directed to appear for a preliminary conference on August 23, 2022 at 9:30 AM in the Preliminary Conference Part.

This constitutes the Decision and Order of the Court.

Dated: July 7, 2022
Mineola, NY



HON. CONRAD D. SINGER, J.S.C.