

Global Diamond Group, Ltd. v BMW Diamonds, Inc.
2010 NY Slip Op 31447(U)
June 4, 2010
Supreme Court, New York County
Docket Number: 602112/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Global Diamond Group

INDEX NO.

602412/09

- v -

BNW Diamonds

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED
JUN 10 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 6/4/10

J. GISCHE
HON. JUDITH J. GISCHE

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
GLOBAL DIAMOND GROUP, LTD.,

Plaintiff,

-against-

BMW DIAMONDS, INC. & MENDEZ MOSKOWITZ,

Defendants.
-----X

DECISION/ ORDER

Index No.: 602112/09

Seq. No.: 001

PRESENT:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers

Def's OSC (§5015 etc.) w/MM affid, PJS affirm, exhs	1
Pltf opp w/MJD affirm, exhs	2
PJS reply affirm w/exh	3
MM reply affid	4
NPO supplemental affirm in opp	5

FILED
Numbered
JUN 10 2016
NEW YORK
CLERK'S OFFICE

-----X
Upon the foregoing papers, the decision and order of the court is as follows:

The defendants have moved by Order to Show Cause to vacate the default judgment obtained by plaintiff in or about September 10, 2009 and to stay the execution of any enforcement procedure in connection therewith. CPLR § 5015. Plaintiff opposes the motion. For the reasons that follow, the motion is denied.

On July 9, 2009, plaintiff commenced this action by filing a verified complaint. In the complaint, plaintiff alleged that on September 25 and November 17, 2008, it sold and delivered to defendant BMW Diamonds, Inc. ("BMW") two items valued at \$204,910. The goods were an 11.02 carat diamond, delivered under Invoice No. 1496, and one platinum and 18 karat yellow gold ring, delivered under Invoice No. 1518. Copies of the invoices were annexed to the verified complaint.

BMW allegedly accepted delivery of the goods without comment or objection, and paid plaintiff \$147,000, leaving a balance due and owing in the amount of \$57,910. Plaintiff asserted two causes of action against BMW, only, for goods sold and delivered (the first cause of action) and account stated (the second cause of action).

Plaintiff's claims against defendant Mendez Moskowitz, President of BMW, arose from a personal check that Moskowitz allegedly gave to the plaintiff in the amount of \$57,910. A copy of the check was annexed to the verified complaint. Plaintiff claims that said check was dishonored by the drawee bank for insufficient funds. Despite due notice, the defendant refused to make good on the check. Plaintiff's third cause of action was against Moskowitz, only, for compensatory damages in the amount of \$57,910 as well as liquidated damages pursuant to GOL § 11-104 (2) (3) (third cause of action). The fourth cause of action was for fraud against both defendants.

On September 10, 2009, a default judgment was entered against BMW on the first and third causes of action (the second and fourth cases of action were withdrawn by plaintiff) against the defendants, joint and severally, for \$57,910 plus interest, costs and disbursements.

The defendants claim in the instant motion that they were never served with the summons and verified complaint. The defendants further argue that BMW objects to the value of the subject goods, and seeks to interpose defenses based upon duress and statute of limitations. Moskowitz claims that he never intended to guarantee BMW's obligations to plaintiff, and should not be held liable in the absence of a written guaranty.

Plaintiff argues that the defendants' excuse for defaulting in this action is conclusory and unsubstantiated. Plaintiff has provided copies of the affidavits of service with respect to

* 4]
the summons and verified complaints, as well as a letter sent to BMW on July 20, 2009 notifying in conformance with CPLR § 3215 (g) (4) (i).

Discussion

To obtain relief from an order or judgment on the basis of excusable default, a party must provide a "reasonable excuse" and demonstrate the merit of the cause of action or defense (CPLR § 5015 [a] [1]). What constitutes a reasonable excuse for default lies within the sound discretion of the trial court (Incorporated Village of Hempstead v. Jablonsky, 283 AD2d 553 [2d Dept 2001]).

1. BMW

Here, BMW has failed to establish a reasonable excuse for its default. An unsubstantiated excuse of non-receipt is insufficient to rebut the presumption of proper service created by an affidavit of service (see Crespo v. Kynda Cab Corp., 299 AD2d 295 [1st Dept 2002]; see also Town House St., LLC v. New Fellowship Full Gospel Baptist Church, 29 AD3d 893 [2d Dept 2006]). Moskowitz merely denies having ever received the summons and complaint on behalf of BMW without establishing a basis for such knowledge. He doesn't claim to have personal knowledge of the corporation's books and records or otherwise any other basis to support such a conclusion. Instead, he just says that his "office for BMW is... run out of [his] residence address" at Herrick Ave., Spring Valley, New York. Moskowitz never squarely addresses whether BMW maintains an office at the address listed on the affidavit of service - 36 West 47th Street, Suite 1004, New York, New York - which is the address listed on the subject invoices.

Nor has Moskowitz addressed the information contained in the affidavit of service respecting the person of suitable age and discretion to whom the summons and complaint

were delivered. The affidavit of service indicates that the person who was served is "believed to be Mendez Moskowitz." Moskowitz never rebuts that claim, or otherwise provides any information about his physical characteristics which would raise a question of fact as to whether he was the person served. Nor has BMW adequately rebutted the presumption that it received notice of this action pursuant to CPLR § 3215 (g) in July 2009 in the regular course of the mail (see Crespo v. Kynda Cab Corp., *supra*).

Since BMW has failed to establish a reasonable excuse for its default, the motion must be denied, regardless of whether it has a meritorious defense (Crespo v A.D.A. Mgt., 292 AD2d 5, 10 [1st Dept 2002]).

2. Moskowitz

Here, Moskowitz has many of the same problems concerning whether he has a reasonable excuse for his default, Moskowitz has also utterly failed to establish a meritorious defense. Under UCC § 3-413 (b), upon dishonor of the check and notice of dishonor, the drawer of a check must "pay the amount of the draft to the holder or to any indorser who takes it up" (see generally Hibernia Nat. Bank v. Lacombe, 84 NY 367 [1881]). The only way to escape such liability is to clearly write on the check "without recourse." Therefore, Moskowitz' arguments about not agreeing to be a guarantor of BMW's liabilities to plaintiff are rejected by the court.

Accordingly, the motion to vacate the default judgment against Moskowitz is also denied.

Conclusion

In accordance herewith, it is hereby:

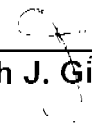
ORDERED that the defendants' motion to vacate the default judgment is denied in its entirety.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
 June 4, 2010

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
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