

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

TGT, LLC v. Advance Entertainment, LLC

2022 NY Slip Op 05818 (App. Div. 2022) (Supreme Court of the State of New York Appellate Division First Department 2022) · No. Appeal No. 16491; Case No. 2021-02635; Index No. 650633/17 · Decided October 18, 2022

SUMMARY

The New York Appellate Division, First Department, affirmed an order denying Advance Entertainment, LLC and Joseph Meli's motions to vacate a default judgment. The court held that the motions under CPLR 5015(a)(1) were untimely and lacked a reasonable excuse for the default and a meritorious defense. The court also rejected the jurisdictional challenge under CPLR 5015(a)(4) because it was raised improperly for the first time in reply.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Acosta, P.J.; Renwick, J.; Webber, J.; Singh, J.; Moulton, J.
JURISDICTION	New York
DECIDED	October 18, 2022
DOCKET	Appeal No. 16491; Case No. 2021-02635; Index No. 650633/17
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants appealed from an order denying their motions to vacate a default judgment.
PRECEDENTIAL VALUE	Published appellate opinion
PARTIES	Advance Entertainment, LLC, Joseph Meli v. TGT, LLC

TOPICS

- default judgment
- default
- waiver
- civil procedure
- appellate procedure

PRACTICE AREAS

- civil procedure
- commercial litigation
- appellate procedure
- remedies

QUESTIONS PRESENTED

1. Whether defendants were entitled to vacatur of the default judgment under CPLR 5015(a)(1) based on excusable default.
2. Whether defendants were entitled to vacatur under CPLR 5015(a)(4) for lack of jurisdiction when that argument was raised for the first time in reply.

HOLDINGS

1. Defendants were not entitled to vacatur because their motions were made outside the one-year time limitation and they demonstrated neither a reasonable excuse for their default nor a meritorious defense.
2. The jurisdictional argument was not considered because defendants did not move on that ground and improperly raised it for the first time in reply.

FACTUAL BACKGROUND

Defendants failed to comply with court orders directing them to answer the third and fourth amended verified complaints, despite being warned that noncompliance could result in a default. They also failed to oppose plaintiff's motion for a default judgment, although they were properly served with notice. The fraud claims were based on facts that also supported federal criminal charges against Joseph Meli, to which he pleaded guilty.

PROCEDURAL HISTORY

The Supreme Court, New York County, entered a default judgment against defendants after they failed to comply with orders directing them to answer the third and fourth amended verified complaints. Defendants did not oppose the motion for default judgment and later moved to vacate the judgment under CPLR 5015(a)(1) and, alternatively, CPLR 5015(a)(4). The Supreme Court denied the motions to the extent appealed from, and the Appellate Division unanimously affirmed.

DISPOSITION

affirmed

CASES CITED

- Carter v. Daimler Trust, 177 A.D.3d 541 (1st Dep't 2019)
- U.S. Bank Trust N.A. v. Rivera, 187 A.D.3d 624, 625 (1st Dep't 2020)
- Gumbs v. Flushing Town Ctr. III, L.P., 114 A.D.3d 573, 574 (1st Dep't 2014)

OPINION

PER CURIAM.

TGT, LLC v Advance Entertainment, LLC (2022 NY Slip Op 05818) TGT, LLC v Advance Entertainment, LLC 2022 NY Slip Op 05818 Decided on October 18, 2022 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law

§ 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided and Entered: October 18, 2022 Before: Acosta, P.J., Renwick, Webber, Singh, Moulton, JJ. Index No. 650633/17 Appeal No. 16491 Case No. 2021-02635 [*1]TGT, LLC, Plaintiff-Respondent, vAdvance Entertainment, LLC et al., Defendants-Appellants, Reset Partners, LLC, et al., Defendants. Cyruli Shanks & Zizmor LLP, New York (James E. Schwartz of counsel), for appellants.

Condon & Forsyth LLP, New York (Joseph E. Czerniawski of counsel), for respondent. Order, Supreme Court, New York County (Andrea Masley, J.), entered on or about June 28, 2021, which, to the extent appealed from, denied defendants Advance Entertainment, LLC, and Joseph Meli's (collectively defendants) motions to vacate the default judgment against them, unanimously affirmed, without costs.

A default judgment was entered against defendants after they failed to comply with court orders directing them to answer the third and fourth amended verified complaints, or risk being held in default. Defendants did not oppose plaintiff's motion for a default judgment against them, although properly served with notice of the motion.

The court properly denied defendants' motions to vacate the default judgment pursuant to CPLR 5015(a)(1), which were made outside the one-year time limitation, and without a valid excuse (see *Carter v Daimler Trust*, 177 AD3d 541 [1st Dept 2019]). Defendants showed neither a reasonable excuse for their default in answering nor a meritorious defense to the fraud claims against them, which are based on the same facts that supported the criminal charges against Meli to which he has pleaded guilty in federal court (see *U.S. Bank Trust N.A. v Rivera*, 187 AD3d 624, 625 [1st Dept 2020]).

The court properly rejected defendants' alternative argument that they are entitled to vacatur under CPLR 5015(a)(4), based on lack of jurisdiction. Defendants did not move on that basis, but improperly raised the issue for the first time in reply (see e.g. *Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573, 574 [1st Dept 2014]).

We have considered defendants' remaining arguments and find them unavailing. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: October 18, 2022