COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-177

XAVIER ORTIZ

vs.

NH BOSTON, LLC,[1] & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendants, NH Boston, LLC and NHNE LLC, appeal from an amended judgment in favor of the plaintiff, Xavier Ortiz, after a default and a damages assessment. We conclude that the motion judge acted within his discretion in partially denying the motion to remove the default judgment. Further concluding that there was a proper basis for G. L. c. 93A liability based on the allegations of the complaint, and that the damages assessment judge (second judge) properly found an adequate basis for consequential and G. L. c. 93A damages, we affirm the amended judgment.

[1] Doing business as New Horizons Computer Learning Centers of Boston.

[2] NHNE LLC, doing business as New Horizons Computer Learning Centers of Boston.

1. Default judgment. "Rule 60(b)(1) of the Massachusetts Rules of Civil Procedure authorizes the court to grant relief from judgment in cases of 'mistake, inadvertence, surprise or excusable neglect.'" Christian Book Distribs., Inc. v. Wallace, 53 Mass. App. Ct. 905, 906 (2001). Where a default judgment is issued against the defendant, "[t]he burden to establish one of these conditions is on the defendant." Hermanson v. Szafarowicz, 457 Mass. 39, 46 (2010). "Although general factors have been identified for courts to consider on a rule 60(b)(1) motion,[] the inquiry is fact intensive and case specific."[3] McIsaac v. Cedergren, 54 Mass. App. Ct. 607, 609 (2002). "A motion for relief under rule 60(b) is directed to the sound discretion of the motion judge, and we review the judge's ruling for abuse of discretion." Haffey v. Rock, 75 Mass. App. Ct.

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[3] The motion judge is to consider the following factors:

> "(1) whether the offending party has acted promptly after entry of judgment to assert his claim for relief therefrom; (2) whether there is a showing either by way of affidavit, or otherwise apparent on the record, that the claim sought to be revived has merit; (3) whether the neglectful conduct occurs before trial, as opposed to during, or after the trial; (4) whether the neglect was the product of a consciously chosen course of conduct on the part of counsel; (5) whether prejudice has resulted to the other party; and (6) whether the error is chargeable to the party's legal representative, rather than to the party himself."

Hermanson, 457 Mass. at 47 n.11, quoting Berube v. McKesson Wine & Spirits Co., 7 Mass. App. Ct. 426, 430-431 (1979).

686, 690 (2009), quoting Nortek, Inc. v. Liberty Mut. Ins. Co., 65 Mass. App. Ct. 764, 775 (2006).

Here, the defendants' manager, Mark McManus, Jr., averred that he believed that the previous owner of the business, Robert Orley, and his attorney, Steven Ribiat, would handle the claims against the defendants because Orley advised McManus that Attorney Ribiat "would address Ortiz's claim." McManus averred that he maintained that belief even after Orley informed him that the previous entity was bankrupt. McManus did not communicate with Attorney Ribiat,[4] even though the asset purchase agreement required written confirmation for Orley to assume defense of a lawsuit, and McManus continued to receive documents from the plaintiff's attorney. McManus averred that the basis for his belief that Attorney Ribiat represented the defendants was simply the fact that Orley said that would happen and then nobody told him explicitly that "Mr. Ribiat was not representing NH Boston or NHNE." On this record, the judge was well within his discretion to find that it was patently unreasonable for McManus to believe that the defendants were represented by

[4] The record contains only one direct communication between the defendants and Attorney Ribiat. Prior to the entry of the default judgment, Ribiat sent an e-mail to McManus stating that "NH Boston will need to address [this matter] independent of NH Northeast." McManus averred that he did not see this e-mail until after the default had entered.

Attorney Ribiat. See Scannell v. Ed. Ferreirinha & Irmao, Lda, 401 Mass. 155, 158-159 (1987) (no abuse of discretion in denying rule 60 [b] motion upon finding that reliance on insurer to defend claim was unreasonable in absence of any reassurances or confirmation).

Moreover, the record reveals that McManus consciously chose to risk a default based on his lay assessment of the likely damages. He explained that, "[f]or a $4,000 claim, the cost of counsel to monitor the case would have been cost-prohibitive." "[W]here the defendant acted wilfully and deliberately in failing to respond to process [although possibly relying on erroneous legal advice regarding the potential consequences of such action], the judge could reasonably conclude that his rule 60(b)(1) motion for relief from judgment should be denied." Christian Book Distribs., Inc., 53 Mass. App. Ct. at 906-907 (no abuse of discretion in denying relief when party followed counsel's advice not to respond to filings).

Even if "certain of the Berube factors may provide limited support for the plaintiff's argument,[] an appellate court will not reverse a motion judge's decision 'except upon a showing of a clear abuse of discretion.'" McIsaac, 54 Mass. App. Ct. at 612, quoting Tai v. Boston, 45 Mass. App. Ct. 220, 224 (1998). Here, where the manager's belief that the defendants were represented was patently unreasonable and partially based on his

decision that the case was not worth defending, the motion judge acted within his discretion in determining that the defendants had failed to show excusable neglect.

2. Successor liability. "Under Mass.R.Civ.P. 55(b), the factual allegations of a complaint are accepted as true for the purposes of establishing the liability of the defaulted party." Eagle Fund, Ltd. v. Sarkans, 63 Mass. App. Ct. 79, 82 n.8 (2005). Here, those admitted facts are sufficient to establish successor liability. See Premier Capital, LLC v. KMZ, Inc., 464 Mass. 467, 475 (2013). After the defendants acquired the business, several employees continued to work for the defendants, and the business continued at the same location. As part of the sale, Orley received a two percent ownership interest in the defendants.[5] The seller ceased all operations after the transfer of assets. Taken together, these facts demonstrate that successor liability is appropriate under either the "de facto merger" theory or the "mere continuation" theory. See Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 557 (2008).[6]

[5] Orley returned the stock on January 1, 2015.

[6] At the risk of belaboring the matter, we note that the defendants' executive vice president of sales assumed liability by referring to the 2012 voucher agreement as "our original agreement" and confirming its validity in writing to the plaintiff and his counsel in December 2014. See Premier Capital, LLC, 464 Mass. at 475.

3. Compensatory damages. The defendants argue that the damages should be reduced to zero, because "(a) [the plaintiff] still has the coupons, and (b) he offered no evidence as to the value of the coupons on the date of breach." "The measure of damages is a question of law reviewed de novo on appeal." Reading Co-op. Bank v. Suffolk Constr. Co., 464 Mass. 543, 547 (2013), quoting Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co., 445 Mass. 411, 424 (2005). "[T]he usual rule . . . is that the injured party receives benefit of the bargain damages." Passatempo v. McMenimen, 461 Mass. 279, 299 (2012), quoting Twin Fires Inv., LLC, 445 Mass. at 425. "This rule is particularly appropriate where, as here, 'the person who was the target of the misrepresentation has actually acquired something in a transaction that is of less value than he was led to believe it was worth when he bargained for it.'" Id.

It was reasonable for the second judge not to assign value to the plaintiff's vouchers at the time of the damages assessment hearing, as the defendants disavowed any obligation to him at the hearing and consistently refused to honor the vouchers before the hearing. Similarly, the lack of a precise valuation at the exact moment of the breach is not a basis for awarding no damages. Rather, damages need be proved only with "reasonable certainty by sufficient or substantial evidence."

Pierce v. Clark, 66 Mass. App. Ct. 912, 914 (2006). Accordingly, we affirm the award of compensatory damages.

4. Chapter 93A damages. "[A]ny individual injured by the 'unfair or deceptive acts or practices' of a business operating in the consumer marketplace" may seek multiple damages under G. L. c. 93A. UBS Fin. Servs., Inc. v. Aliberti, 483 Mass. 396, 410 (2019). "[T]he entitlement of a plaintiff to double or triple damages because of the wilfulness of a defendant is treated as a question relating to damages and, therefore, is not precluded by a default." Marshall v. Stratus Pharms., Inc., 51 Mass. App. Ct. 667, 677 (2001).

Default entered only as to liability, and the judge held an evidentiary hearing on damages. "Generally, we review factual findings for clear error. . . . However, where factual findings are based solely on documentary evidence, they receive no special deference." Board of Registration in Med. v. Doe, 457 Mass. 738, 742 (2010). In addition, "the factual allegations of a complaint are accepted as true." Eagle Fund, Ltd., 63 Mass. App. Ct. at 82 n.8.

For the most part, the second judge relied upon the defendants' conduct after the 2014 asset purchase agreement in making findings supporting damages under G. L. c. 93A.[7] In

[7] To the extent the defendants argue that the 2012 settlement agreement, which they never honored, precluded the judge from

November 2014, the defendants' general manager told the plaintiff that he would follow up on the plaintiff's request to enroll in a course and then never did so. In 2015, the defendants offered shifting excuses for why the plaintiff could not sign up for a course. The defendants first stated that the course was full, then that the course was only "sold" and not "offered" by the defendants, and finally that the defendants were not bound by the vouchers. Furthermore, the defendants' executive vice president of sales testified that, after two years, he "typically" dishonored vouchers by charging customers for the difference between the present cost of the class and what they had paid for the vouchers. There was sufficient conduct after the 2014 purchase for the second judge to determine that the defendants willfully engaged in unfair or deceptive acts or practices. See Gore v. Arbella Mut. Ins. Co.,

considering the defendants' postagreement conduct in the light of their preagreement conduct, the defendants provide no support for this theory, and we see no reason why this would be so.

77 Mass. App. Ct. 518, 531-533 (2010).[8]

Amended judgment dated
December 5, 2018,
affirmed.

By the Court (Milkey,
Sullivan & Ditkoff, JJ.[9]),

Joseph F. Stanton

Clerk

Entered: January 21, 2020.

[8] The plaintiff's request for appellate attorney's fees and costs pursuant to G. L. c. 93A, § 9 (4), is allowed. He may submit a petition for fees and costs, together with supporting materials, within fourteen days of the date of this decision. The defendants shall have fourteen days thereafter to respond. See Fabre v. Walton, 441 Mass. 9, 10-11 (2004).

[9] The panelists are listed in order of seniority.