

**Ruda v Lee**

2012 NY Slip Op 32855(U)

November 26, 2012

Sup Ct, Queens County

Docket Number: 21833/2011

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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PABLO RUDA, as Property Guardian of
EDWIN RUDA, an Incapacitated Person,
Plaintiff,
- against -

Index No.: 21833/2011
Motion Date: 10/04/12
Motion No.: 25
Motion Seq.: 3

KYUNG SOOK LEE,
Defendant.

- - - - - X

The following papers numbered 1 to 23 were read on this motion by
the defendant KYUNG SOOK LEE for an order pursuant to CPLR
5015(a) and 2221 vacating the judgment entered against the
defendant on April 25, 2012 for excusable default in failing to
appear; or in the alternative for an order granting leave to
reargue and renew the underlying motion for summary judgment in
lieu of complaint:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 7
Affirmations in Opposition(2).....8 - 15
Reply Memorandum of Law.....16 - 20
Plaintiff's sur-reply Affirmation in Opposition.....21 - 23

Plaintiff Pablo Ruda, the Property Guardian of his father,
Edwin Ruda, moved in January, 2012, for an order pursuant to CPLR
3213 granting summary judgment in lieu of complaint with regard
to a Promissory Note dated June 25, 1997. Pursuant to the terms
of the note, Kyung Sook Lee agreed to pay to Edwin Ruda, on
demand, the sum of \$50,000 with interest at the rate of 7.2% per
year commencing on the date of issuance of the note and

continuing until payment. As a result of the defendant's refusal to make payment on the note, plaintiff requested an order pursuant to CPLR 3213, granting a money judgment for the full amount of the note plus prejudgment interest. Additional underlying facts regarding the plaintiff's motion are contained in this court's decision dated February 3, 2012.

Defendant opposed the motion and cross-moved to dismiss the application on the ground that the plaintiff's action was barred by CPLR 213 which provides that there is a six year statute of limitations on actions to recover on promissory notes and the cause of action on the demand note accrued on June 25, 1997, the date of execution. Defendant claims that as this action was not commenced until 2011 it is time barred as the six year statute ran out in June 2003. Defendant also argued that the transaction at issue was a gift and not a loan.

This Court found that the plaintiff established his prima facie entitlement to judgment as a matter of law by submitting a copy of the unsecured demand note signed by the defendant and plaintiff's affidavit asserting that the defendant failed to make payment on the note after a demand therefor in accordance with the terms of the note (see Verela v Citrus Lake Dev., Inc., 53 AD3d 574 [2d Dept. 2008]; Hestnar v Schetter, 284 AD2d 499 [2d Dept. 2001]). This Court also found however, that the defendant met her initial burden of establishing, prima facie, that the time to commence an action against her had expired.

As there were questions of fact and law raised in the motion papers regarding whether the plaintiff was entitled to the benefit of the statutory tolling period under CPLR 208 due to incapacity the Court directed the parties to appear and be ready for an evidentiary hearing on March 9, 2012.

The hearing date was adjourned to March 20, 2012 at which time the defendant and her counsel failed to appear. This Court went forward with the hearing in defendant's absence. After hearing evidence from the plaintiff, this Court, by memorandum decision dated March 20, 2012, granted the plaintiff's motion for summary judgment in lieu of complaint and denied the cross-motion by the defendant to dismiss the cause of action as barred by the six year statute of limitations. This Court found that pursuant to CPLR 208 the statute of limitations was tolled due to incapacity. The Court awarded the plaintiff judgment in the sum of \$50,000 with interest at the rate of 7.2 percent per year commencing from the date of June 25th of 1997.

Based upon the court's memorandum decision, a money judgment dated April 25, 2012 in the amount of \$118,311.64 which consisted of the principal sum of \$50,000, interest in the amount of \$67,561.64 and costs and disbursements in the amount of \$750.00 was entered on May 23, 2012.

Defendant's counsel now moves for an order vacating the money judgment pursuant to CPLR 5015(a) on the ground of excusable default. Although the hearing was initially set down for March 9, 2012, because of an ongoing trial the court requested that the parties select a new date for the hearing. Counsel states that he was contacted by the plaintiff's attorney and that after the conversation he made a notation that the new date for the hearing would be March 27, 2012. However, the court was notified that the new date was March 20, 2012 and entered same in the court's calendar. On March 20, 2012 only plaintiff appeared and, as stated above, the court held the hearing in defendant's absence.

In addition counsel asserts that he has a meritorious defense and submits a affirmation from the defendant in which she states that the plaintiff forgave the promissory note and that he was not under a mental disability during the period that the statute of limitations ran. In addition, the defendant submits copies of certain emails from the plaintiff in 2003 which she claims constitute newly discovered evidence which she alleges shows that the defendant was competent to manage his affairs .

In opposition, plaintiff's counsel states that it was at the request of defense counsel that the matter was adjourned to March 20, 2012 and that defendant's counsel was aware of the March 20, 2012 date.

Upon review and consideration of the defendant's motion, plaintiff's affirmation in opposition and defendant's reply thereto, this court finds that defendant's motion to vacate the judgment dated April 25, 2012 and entered in the County Clerk's Office on May 23, 2012 is granted and this matter shall be set down for a new hearing on the plaintiff's motion for summary judgment in lieu of complaint. The judgment shall, however, be vacated on condition that defendant's counsel, J. Benjamin Greene, Esq., pay plaintiff's counsel the sum of \$1500.00 in costs within 30 days of service of a copy of this order. If said condition is not met, the motion to vacate the order shall be denied (see Foster v Jordan, 269 AD2d 152 [1<sup>st</sup> Dept. 2000]).

Pursuant to CPLR 5015 (a) a party may be relieved from a judgment on the ground, among others things, of "excusable

default" (CPLR 5015 [a] [1]). "A defendant seeking to vacate a default under this provision must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action"

The courts have held in this regard that "in making that discretionary determination, the court should consider relevant factors, such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (Moore v Day, 55 AD3d 803 [2d Dept. 2008]; also see Toll Bros., Inc. v Dorsch, 91 AD3d 755 [2d Dept. 2012]; Schmidt v City of New York, 50 AD3d 664 [2d Dept. 2008]; Schonfeld v Blue & White Food Prods. Corp., 29 AD3d 673 [2d Dept. 2006]). Further, law office failure may constitute a reasonable excuse for a default (see Swensen v MV Transp., Inc., 89 AD 924 [2d Dept. 2011]; Henry v Kuveke, 9 AD3d 476 [2d Dept. 2004]).

Here, the defendant established both a reasonable and credible excuse for the default, and the existence of a potentially meritorious defense to the action. Further, there was no showing by the plaintiff that it was prejudiced by the default or that the default was willful, and public policy favors the resolution of cases on their merits (see Dimitriadis v Visiting Nurse Serv. of N.Y., 84 AD3d 1150 [2d Dept. 2011]; Matter of Klein v Persaud, 84 AD3d 959 [2d Dept. 2011]). In addition, there was no showing of prejudice to the plaintiffs, and no evidence of a willful default or intent to abandon any defenses to the action (see Ahmad v Aniolowiski, 28 AD3d 692 [2d Dept. 2006]).

Accordingly, given that plaintiff incurred costs in obtaining the default, vacatur of the default shall be conditioned upon defendant's counsel reimbursing plaintiff's counsel in the amount of \$1500.00.

Therefore, it is hereby,

ORDERED that defendants shall reimburse plaintiff in the amount of \$1500 within 30 days of service of a copy of this order with notice of entry; and it is further,

ORDERED, that defendant's motion to vacate its default is granted upon compliance with the preceding paragraph; and it is further,

ORDERED that upon service of a copy of this order with notice of entry and proof of compliance with the required reimbursement, the Clerk of the Court is directed to vacate the

default entered against defendant and this matter shall be restored to the hearing calendar of this Court on **January 15, 2013**.

Dated: November 26, 2012  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**