Reussi 125 Partners, LLC v Gethsemane Revival Holiness Ctr.

2015 NY Slip Op 31806(U)

September 26, 2015

Supreme Court, New York County

Docket Number: 110164/10

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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REUSSI 125 PARTNERS, LLC,

Plaintiff,

-against-

GETHSEMANE REVIVAL HOLINESS CENTER,

Defendant.

---x

Index No. 110164/10

Mot. seq. no. 006

DECISION AND ORDER

BARBARA JAFFE, J.:

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I. BACKGROUND

On April 27, 1996, defendant, formed under Article 10 of the Religious Corporation Law as a type B corporation, and as a not-for-profit corporation (NYSCEF 81), purchased the premises at 463 West 125th Street in Manhattan, and used it as a church. (NYSCEF 61). In October 2006, defendant's certificate of incorporation was amended to provide that Patricia Stephens, her daughter Audra, and one of her sisters, Catherine McNeil, were elected officers. (NYSCEF 81).

Some years later, finding itself in debt for prior unpaid real estate taxes in the amount of $36,474.73, including penalties and interest, and unable to obtain financing to pay the debt,

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defendant was faced with foreclosure. Although turned down by several prospective lenders, by letter dated October 25, 2006, Stepping Stone Capital Corporation committed to lending defendant $600,000 for a one-year term at an interest rate of 14 percent per annum, secured by a first mortgage on the premises. (NYSCEF 1, 81). According to plaintiff, the construction loan agreement, dated August 17, 2007, provided for the advancement of the initial sum of $187,735.83 to defendant. (NYSCEF 5).

Pursuant to the mortgage note, dated August 17, 2007, commencing 30 days after the date of the note, defendant agreed to pay monthly installments of $7,000 through August 17, 2008, at which time the balance of the principal, interest, and other remaining charges would become due and payable. It also provided that upon defendant's default, defendant would pay interest at the rate of 24 percent per annum from the date of the default until the debt is satisfied. The note was signed by Audra as defendant's Treasurer. (NYSCEF 6).

On May 27, 2007, at a special meeting of defendant's Trustees, Patricia Stephens, Audra, and McNeil, comprising more than two-thirds of the Board of Trustees, and a majority of the congregation's membership, a resolution was unanimously adopted to obtain financing to pay the taxes and to perform necessary repairs and renovations. The resolution is reflected in minutes containing the notarized signature of McNeil in her capacity as defendant's secretary. McNeil and Patricia Stephens also executed affidavits attesting to the discussion and vote of the financing obtained from Stepping Stone Capital Corp. (NYSCEF 81).

By petition dated June 28, 2007, and signed by Patricia Stephens as defendant's president, and with legal representation by the attorney who notarized the signatures of McNeil and Stephens accompanying the resolution, judicial approval of the financing was sought. The petition contains a representation that "[d]ue to a misunderstanding regarding the exemption

status of the church for real estate taxes, prior year real estate taxes remains [sic] unpaid." By order dated August 7, 2007, judicial approval was obtained without objection of the Office of the Attorney General (NYSCEF 81), and on August 17, 2007, the mortgage note was executed and delivered (NYSCEF 74). The fair value of the property was $1.5 million. (NYSCEF 82).

Also on August 17, 2007, Stepping Stone assigned the mortgage to Norma Vigo. (NYSCEF 6). On August 30, 2007, the mortgage was recorded with the City of New York. (*Id.*). On June 14, 2010, Vigo assigned the mortgage to plaintiff's immediate predecessor in interest, Brick 125 Capital LLC, for consideration of $187,736.83. (NYSCEF 6).

Based on defendant's failure to pay an installment of interest due on September 17, 2007 in the amount of $2,190.26 and continuing thereafter, and by failing to pay the principal balance of $187,736.83 which became due on August 17, 2008, along with other charges, by summons and complaint efiled on August 4, 2010, Brick 125 brought an action to foreclose on the mortgage obligation. (*Id.*).

By affidavit dated October 1, 2010, process server Aaron J. Clark stated that on September 29, 2010, he served the summons and complaint on defendant by delivering them to "Walter Reid - Manager," whom he described and knew to be the managing agent of the corporation and authorized to accept service on its behalf. (NYSCEF 10).

On November 12, 2010, the mortgage was assigned to plaintiff by Brick 125 (NYSCEF 78, 79, 80), and was filed with the City of New York on November 23, 2010 (NYSCEF 8).

By order dated November 1, 2011, the justice previously presiding in this part granted plaintiff's ex parte motion for the appointment of a temporary receiver, and referred the matter for the computation of amounts due and owing. (NYSCEF 19).

By decision and order dated September 30, 2013, I denied a motion, efiled on April 9,

2013, by Patricia Stephens for a declaratory judgment determining the actual amount owed by defendant, as it had "defaulted in answering in this action" and thus "has no standing to bring the instant motion." (NYSCEF 30, 37). By order dated July 21, 2014, I granted plaintiff a judgment of foreclosure and sale on defendant's default. (NYSCEF 48).

II. CONTENTIONS

By order to show cause, three of Patricia Stephens's siblings, Sean Ashton, McNeil, and James Jenkins, move for an order vacating the default and the judgment of foreclosure and sale, for leave to file a late answer, and to stay the foreclosure sale of the premises. (NYSCEF 68). They claim that they are defendant's custodians and principal officers and directors, and that defendant was founded by their mother, intending it be used for the financial care and support of her children. Seeking to sell the premises, the siblings learned from their attorney that a title search revealed the pendency of this action and the default. (NYSCEF 51).

Ashton, speaking for her siblings, denies any knowledge of Walter Reid, the individual allegedly served with the pleadings, and that he was ever a manager of the building or designated to accept service of process on defendant's behalf. She also denies that Stephens and her daughter had authority to mortgage the premises without advising the other siblings, claiming that they alone are defendant's officers and directors. She also argues that the mortgage is a nullity absent court approval of it pursuant to the Religious Corporation Law and the Not for Profit Corporation Law, and otherwise takes issue with the disbursements, including the taxes paid, given defendant's status as a church. (NYSCEF 51-54).

Ashton submits a copy of her mother's funeral service on which the names of the siblings are listed (NYSCEF 62), and a copy of the HPD Building Information page from 2006 reflecting that Stephens was head officer, that McNeil was an officer, and that a deceased brother was the

managing agent (NYSCEF 64), along with obituaries that reflect that deceased siblings are members of defendant. Ashton further attests that meetings of defendant were regularly held, that Stephens kept the records, that business was conducted by majority vote of the siblings (NYSCEF 65, 66), and that she and her siblings are stymied by Stephens's refusal to provide them with access to the minutes or records (NYSCEF 60). The lawyer who represented Stephens in her application for a declaratory judgment affirms that Stephens never informed him that she had siblings. (NYSCEF 67). McNeil submits an affidavit in which she agrees with Ashton's statements. (NYSCEF 52).

In opposition, plaintiff submits evidence, as indicated above, that contrary to defendant's contention, the mortgage was approved by a New York State Supreme Court justice in August 2007, and is therefore enforceable. Thus, it claims that there is no meritorious defense to the action. It also argues that Ashton's denial that Reid was authorized to accept service is insufficient to warrant a hearing. In any event, as Patricia Stephens filed the application for a declaratory judgment, the issue of personal jurisdiction is waived. (NYSCEF 74).

At oral argument, counsel for movants acknowledged that judicial approval of the loan and mortgage had been duly obtained, but denied that personal jurisdiction was obtained based on Ashton's denial that Reid was authorized to accept service. In response to plaintiff's claim that personal jurisdiction was waived by virtue of Stephens's appearance in connection with her application for a declaratory judgment, he argues that because the application was denied for lack of standing, there is no waiver. As a meritorious defenses, he argued that as Stepping Stone was not plaintiff's immediate guarantor, it cannot be protected in its title, and that the mortgage is tainted by predatory lending practices, as evidenced by the disbursal of only $187,000 of $600,000 at the loan closing and that only $25,000 went to defendant, whereas the charges

against defendant, at 24 percent interest based on defendant's default, ended up being some $900,000 in 2012. Counsel also represented that although McNeil signed some of the pertinent loan documents, it is likely that she did not understand what she was signing, and requested a hearing to allow McNeil to testify as to why she gave her consent to the mortgage and whether it was informed consent. (NYSCEF 84).

III. ANALYSIS

Pursuant to CPLR 5015(a)(1), an order granted on default may be vacated upon a showing of both a reasonable excuse for the default and a meritorious claim. (*Youni Gems Corp. v Bassco Creations, Inc.*, 70 AD3d 454 [1st Dept 2010], *lv denied* 15 NY3d 863; *Cato v City of New York*, 70 AD3d 471 [1st Dept 2010]; *Campos v New York City Health & Hosps. Corp.*, 307 AD2d 785 [1st Dept 2003]). Relief from a default judgment rests within the sound discretion of the motion court. (*Frenchy's Bar & Grill v United Intern. Ins. Co.*, 251 AD2d 177, 177 [1st Dept 1998]).

The party seeking to vacate a default must provide facts to explain the default (*Ogunmoyin v 1515 Broadway Fee Owner, LLC*, 85 AD3d 991 [2d Dept 2011]; *Matter of Esposito v Esposito*, 57 AD3d 894 [2d Dept 2008]), and an affidavit of merit from someone with personal knowledge of the facts underlying the claim (*Rugieri v Bannister*, 22 AD3d 305 [1st Dept 2005]; *Katz v Robinson Silverman Pearce Aronsohn & Berman, LLP*, 277 AD2d 70, 74 [1st Dept 2000]; *City of New York v Elghanayan*, 214 AD2d 329 [1st Dept 1995]).

Absent any evidence even tending to demonstrate that Ashton and James Jenkins had any authority with respect to managing defendant, they do not establish standing to move for an order vacating defendant's default, much less prevail thereon. Rather, defendant's evidence establishes otherwise. To the extent that movants are excused from making any evidentiary

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showing by virtue of Stephens's alleged refusal to turn over documentation to them, their remedy lies elsewhere. (*Congregation Yetev Lev D'Satmar v 26 Adar NB Corp.*, 219 AD2d 186 [2d Dept], *lv denied*, 88 NY2d 808 [congregation could not, years after consummation of transfers of church and mortgages, render transactions void by submitting self-serving affidavits contending that transactions were never properly authorized by trustees and congregants; congregation's remedy was to sue misbehaving corporate officers]).

In light of the extensive documentation evidencing the unanimous approval of the loan and mortgage by two-thirds of defendant's trustees and a majority of the congregation's membership, to the extent that McNeil joins Ashton's claim that the mortgage was not authorized, she fails to offer a sufficient factual or legal basis for doing so. (*See eg Rubens v UBS AG*, 126 AD3d 421 [1st Dept 2015] [party presumed to know contents of instrument she signed and to have assented to its contents]; *Cash v Titan Fin. Svces., Inc.*, 58 AD3d 785 [2d Dept 2009] [party generally cannot avoid effect of document on ground that he or she did not read it or know its contents]). Rather, the petition for judicial approval reflects a conscientious attention to detail, guided by an attorney's participation, the same individual who notarized McNeil's affidavit. McNeil has thus failed to establish a meritorious defense to the action. (*See Congregation Beth Hamedrash Hagodel of Mapleton Park Jewish Center, Inc. v Perr*, 16 Misc 3d 1103[A] [Sup Ct, Kings County 2007] [denying motion by congregation members to invalidate transfer of property based on arguments that members were not given notice of sale and did not approve it as transfer was valid on its face and sale was approved by court order and signed by Attorney General]).

Given this result, I need not consider McNeil's contentions, to the extent they are cognizable, concerning service. In any event, Stephens conceded service of the complaint on

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behalf of defendant by taking affirmative action on it, notwithstanding the result.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, movants' motion is denied in its entirety.

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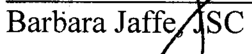

Barbara Jaffe, JSC

DATED: September 26, 2015
New York, New York