Lin Shi v Alexandratos
2016 NY Slip Op 32387(U)
December 5, 2016
Supreme Court, New York County
Docket Number: 160529/2013
Judge: Lawrence K. Marks
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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LIN SHI, :

Plaintiff, :

-against- : Index No. 160529/2013

PANGIS ALEXANDRATOS, et al., :

Defendants. :

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LAWRENCE K. MARKS, J.

Plaintiff Lin Shi moves, pursuant to CPLR 5015(a)(1) to vacate a default judgment, entered against plaintiff and in favor of defendant Terry S. Triades, Esq.

BACKGROUND

This case involves a contract of sale for real estate that included a termination date. The underlying action originally sought the return of the down payment from the escrow agent, defendant Triades.

Defendants moved, in motion sequence #1, to dismiss the complaint, which was granted. Also granted were those portions of defendants' motion that sought a declaration that the down payment did not need to be returned, as well as certain attorneys' fees and costs of the escrow agent which were not yet determined. Plaintiff also cross-moved for summary judgment, which was denied. *See* Howard Aff, Exh C (Decision and Order entered May 13, 2014).

At the motion argument, following receipt of the Court's decision, counsel were directed to meet and confer with regard to the outstanding fees and costs, to see if a stipulation was possible. At the next court conference, where it was apparent that the attorneys' discussions on this issue were not progressing, a schedule for a defendant's application to the Court for relief was set with all counsel.[1] This schedule included deadlines for: a moving submission, opposition, reply, a return date for submission of the papers to the submission Part and an argument date.

A motion, motion sequence #2, was made by defendant Triades for a determination of the specific amount of those costs and fees, already awarded, with supporting papers regarding the sums sought. No opposition papers were submitted by plaintiff. Plaintiff also failed to seek an extension, from either the trial or the submission Parts.

At the motion argument – counsel for defendant stated on the record that he had been notified the day before that counsel for plaintiff did not intend to appear, but then had received an email from the individual who did appear at the argument that she would be in court on behalf of plaintiff. 8/11/14 Tr at 3. Defendant Triades sought to have his motion taken on default. A Rachael Schulman, Esq., stated she was in court on behalf of plaintiff, was not counsel of record, but was "of counsel" and had been contacted to assist. At that time, she stated that the "application is all brand-new to this [sic], and we

[1] Counsel were still encouraged to try to resolve the issues themselves.

don't know the history. We don't have the facts to explain why there was not an appearance." *Id.* at 4. An extension of time was requested. However, no information was provided as to why the extension was requested or why counsel more familiar with the case had not appeared. Appearing counsel again reiterated that she did not know. *Id.*

The Court granted defendants' motion for costs and fees on default. *Id.*; Howard Aff, Exh E (Decision and Order entered August 19, 2014). A judgment, based on that Decision and Order, was entered by the County Clerk on October 17, 2014. Howard Aff, Exh F.

Plaintiff had appealed the Decision and Order in connection with motion sequence #1. *See* efiled doc #22. The Appellate Division unanimously affirmed that decision. *Shi v. Alexandratos*, 137 A.D.3d 451, 451 (1st Dep't 2016), *lv. denied* 2016 N.Y. Slip Op 89660 (N.Y. Oct 27, 2016). That portion of the trial court order that addressed the fees and costs awarded was "deemed appealed from judgment . . . entered October 17, 2014," and was also unanimously affirmed. *Id.*

In the instant motion, motion sequence #3, plaintiff moves this Court to vacate and/or void the default judgment, entered October 17, 2014. Mov Br at 1.

DISCUSSION

The Court notes that motion sequence #3 was made prior to the issuance of the Appellate Division's decision, which affirmed the judgment that plaintiff seeks to vacate or void. A review of the electronic and paper record for this motion, however, shows no

indication that plaintiff has withdrawn this application.

It is the determination of this Court that this motion is moot, as the Appellate Division has already affirmed the judgment at issue. However, inasmuch as this is the third motion to touch on this issue, and in an abundance of caution, the Court will briefly address the merits of the instant motion.

Plaintiff argues that the judgment entered October 17, 2014 should be vacated, pursuant to CPLR 5015(a)(1), which provides relief from a judgment or order where there is an excusable basis for the default. Plaintiff states that a party seeking to vacate a default judgment must demonstrate a reasonable excuse for the default and a potentially meritorious defense. Mov Br at 1. Plaintiff further states that New York has a strong public policy in favor of deciding cases on the merits. Mov Br at 2.

Both of these are true. A party seeking relief under CPLR 50515(a)(1) must establish both a reasonable excuse for the failure to appear, and demonstrate the merit of the cause of action or defense. *Goldman v. Cotter*, 10 A.D.3d 289, 291 (1st Dep't 2004). *See also Coretto v Extell W. 57th St., LLC*, 137 A.D.3d 677, 677-78 (1st Dep't 2016). The determination of the sufficiency of the proffered excuse and the statement of merits ultimately rests within the sound discretion of the court. *Navarro v. A. Trenkman Estate, Inc.*, 279 A.D.2d 257, 258 (1st Dep't 2001). There is also a "strong public policy in this State to dispose of cases on their merits." *Chelli v. Kelly Group, P.C.*, 63 A.D.3d 632, 633 (1st Dep't 2009).

Defendant Triades argues, *inter alia*, that the motion should be denied because plaintiff has proffered no excuse for the default, much less a reasonable excuse. Howard Aff, ¶ 4. Defendant argues that plaintiff had refused to attempt to try to reach agreement on the fees and costs issue, necessitating the second motion. Howard Aff, ¶ 10. Defendant contends that the time the default at issue occurred was prior to the appearance attended by plaintiff's of counsel, when plaintiff failed to file opposition papers, made no attempt to request an adjournment prior to the return date and made no application for an adjournment to the submission Part. Howard Aff, ¶ 27.

The Court agrees with defendant. In addition to the above points, the Court notes that plaintiff was at the conference when the deadlines were set with the participation of all counsel. Further, Rule 1 of the Commercial Division of the Supreme Court requires the appearance of counsel who have knowledge and authority; the failure "to comply with this rule may be regarded as a default." 22 NYCRR 202.70. [2]

Defendant correctly argued that in order for a default to be "excusable," the defaulting party must take diligent action to vacate the default. However, a "default is considered *intentional* when a party takes no steps to vacate it until after judgment has

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[2] Plaintiff argues in his motion that the attorney who appeared was fully prepared to argue the motion. Mov Br at 2. Plaintiff avers that she "also requested for [sic] an adjournment." *Id.* at 3. However, this is incorrect. The transcript of the motion appearance does not reflect a single attempt or request by that counsel to address the merits of the motion, or indicate that she was prepared to do so. What is in that record are statements regarding the matter being brand new to counsel, not knowing the history and not having facts to support even the request for an adjournment. 8/11/14 Tr at 4.

been entered against him." *Melnick v. Khoroushi*, 57 A.D.3d 414, 414 (1st Dep't 2008) (emphasis added). Thus, the time to have made this motion, if at all, was after entry of the Decision and Order on August 19, 2014 but before entry of the judgment on October 17, 2014.[3]

Moreover, defendant argues that this motion is jurisdictionally defective and must be denied because the judgment has already been paid and satisfied. He argues that once the judgment has been paid and satisfied, it is extinguished and ceases to have any existence and the court is "without jurisdiction to vacate the judgment." *HDI Diamonds, Inc. v. Frederick Modell, Inc.*, 86 A.D.2d 561, 561 (1st Dep't 1982). *See also Platinum Funding Corp. v. Blue Ocean Lines, Inc.*, 249 A.D.2d 19 (1st Dep't 1998) (affirming the denial of the motion to vacate, and holding that "having been paid and satisfied, the judgment was extinguished, and that there was therefore nothing to vacate"). This, too, is correct.

For all of the above reasons, the motion is denied.

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[3] Defendant also argues that plaintiff was relying on having filed an appeal, of motion sequence #1, as his purported reason for defaulting on motion sequence # 2, and that plaintiff, in effect, admits that he made an intentional decision to default. Howard Aff, ¶ 29. It is certainly true that plaintiff argues that, having filed an appeal of motion sequence #1, specifically, the notice of appeal and pre-argument statement of that appeal, it should "be deemed as opposition" to motion sequence #2. Mov Br at 4. Subsequent to defendant's argument, in the opposition papers, plaintiff does not address or deny that he intentionally decided not to file opposition to the specific calculations of sums submitted and at issue in motion sequence #2. *See generally* Reply Br.

The Court has considered the parties' other arguments, and finds them to be unavailing.

Accordingly, it is

ORDERED that the motion to vacate is denied.

Dated: December 5, 2016

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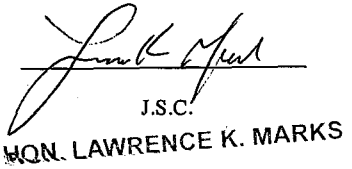

J.S.C.
HON. LAWRENCE K. MARKS