Gargano v Morey
2017 NY Slip Op 32967(U)
May 8, 2017
Supreme Court, Nassau County
Docket Number: 608026-15
Judge: Robert A. Bruno
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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SALVATORE GARGANO and COMPASS CONSTRUCTION OF N.Y. CO., INC.,

Plaintiffs,

-against-

MICHAEL MOREY, CHAMPLAIN STONE LTD., EAGLES NEST LLC, GREGORY GRANDE, SEAN CARROLL, GRANDE AGGREGATES, GRANDE AGGREGATES LLC, NORTHEAST AGGREGATES DOCK OPERATOR LLC, NORTHEAST AGGREGATES DOCK OWNERS LLC, NORTHEAST AGGREGATES EQUIPMENT LEASING LLC, NORTHEAST AGGREGATES, LLC, NORTHEAST AGGREGATES QUARRY OWNERS LLC, STONY CREEK SERVICES, LLC, WHITEHALL AGGREGATES, LLC, MONROE TRACTOR & IMPLEMENT CO., INC., CHRISTOPHER BAUM AND BAUM & BAILEY, P.C.,

Defendants.

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Index No.: 608026-15
Submission Date: 4-25-17
Motion Sequence: 016

DECISION & ORDER

Papers Numbered

Sequence #016

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Upon the foregoing papers, the motion by defendants CHRISTOPHER BAUM and BAUM & BAILEY, P.C. (the "BAUM Defendants"), for an Order pursuant to CPLR §5015(a)(1) vacating the default judgment against them, and pursuant to CPLR §§ 2004 and

3012(d) granting the BAUM Defendants an extension of time to answer the plaintiffs' complaint, is determined as set forth below.

This action arises out of an alleged investment by plaintiffs in a mining business that operates in upstate New York. Plaintiff SALVATORE GARGANO, the president of plaintiff COMPASS CONSTRUCTION OF N.Y. CO., INC., claims that he gave certain defendants over $3,000,000.00 based upon representations that he would receive majority ownership of Grande Aggregates LLC and other companies associated with the mining business. He complains that he received nothing for his investment. The Complaint alleges thirty causes of action sounding in, among other things, fraud, deceit, conversion and constructive trust. Plaintiffs' claim against the BAUM Defendants sounds primarily in legal malpractice, predicated upon allegations that the BAUM Defendants provided legal advice to plaintiffs in connection with this investment without disclosing their conflict of interest, and in other respects acted to the detriment of plaintiffs' legal interests.

On May 18, 2016, this Court granted plaintiffs' motion for a default judgment and denied The Baum Defendants' cross-motion for an extension of time to answer (*Mot. Exh. C*). The Court found that the Baum Defendants had offered a reasonable excuse for the brief delay (tantamount to law office failure) and a meritorious defense to plaintiffs' claim. Nonetheless, the Court was compelled to deny the relief sought, because the BAUM Defendants did not submit their proof in admissible form. The BAUM Defendants had submitted CHRISTOPHER BAUM's statement in the form of an affirmation instead of a sworn affidavit, which they are not permitted to do under CPLR §2106.

Based on the technical and non-prejudicial nature of the BAUM Defendants' mistake, and the potential merit of their defense, the Court granted the BAUM Defendants leave to renew their application within twenty (20) days of the date thereof, upon re-submission of papers in proper form, together with a proposed Answer. On June 7, 2016, the BAUM Defendants filed a second application to vacate their default and to extend their time to answer. Again, however, CHRISTOPHER BAUM offered his statement in the form of an affirmation instead of a sworn affidavit. By Short Form Order dated July 21, 2016, the Court denied the relief sought, and again granted leave to renew based upon the same considerations (*Mot. Exh. D*). The language requiring a proposed Answer and setting a deadline for renewal was not repeated in this Order.

The BAUM Defendants filed the instant motion on January 31, 2017. In support of the motion, the BAUM Defendants submit, among other things: (i) the Affirmation of Kevin M. Baum, Esq. (CHRISTOPHER BAUM's brother), who was retained as attorney for the BAUM

Defendants some time after the July Order; and (ii) the sworn Affidavit of CHRISTOPHER BAUM. Essentially, the BAUM Defendants argue that their delay, which was neither lengthy nor wilful, was tantamount to "law office failure" and should be excused. Counsel, who is representing his brother *pro bono*, states:

> "After the Court's July 26, 2016 [sic], Christopher Baum became further overwhelmed with the obligations of his practice. He eventually began the process of winding down Baum & Bailey's practice and has had to seek other employment. The failure of Christopher Baum's law practice took a tremendous emotional toll on him that further distracted him from his obligations in the case at bar." *Affirmation In Support, ¶34.*

This account mirrors that of CHRISTOPHER BAUM in his Affidavit, ¶32. Further, the BAUM Defendants argue that they have a meritorious defense – namely, that the BAUM Defendants never represented plaintiffs, either before, during or after the transactions complained of, and thus cannot be liable for legal malpractice. The BAUM Defendants were retained as counsel for Grande Aggregates, LLC only, and all other participants in the transaction had their own counsel (see *Mot. Exh. A*). Finally, the BAUM Defendants argue that granting the relief sought will not prejudice any party, insofar as the delay was a matter of months and discovery is not yet complete. In their effort to demonstrate that they are ready to join discovery and will not cause further delay, the BAUM Defendants state that they have mailed copies of all of the documents in their possession to all of the parties, and that they will only need one deposition – that of plaintiff SALVATORE GARGANO.

In opposition, plaintiffs note the six-month delay in filing the instant application, as well as the absence of a proposed Answer. Plaintiffs argue that the BAUM Defendants have no reasonable excuse for such delay, particularly insofar as the only work necessary to renew their application was to convert CHRISTOPHER BAUM's affirmation into an affidavit.[1] In their reply, the BAUM Defendants submit their proposed Answer, and refer again to the "unfortunate and unforeseen" series of events that occasioned the delay (*Reply Aff., Exh. A*).

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[1] Plaintiffs also claim that the BAUM Defendants wilfully refused service of the initial motion for a default judgment. This is not borne out by the evidence. The USPS tracking record shows three attempts at delivery: 2/20/16 "Business Closed"; 2/22/16 "Undeliverable as Addressed"; 2/24/16 "Moved, Left no Address" [See NYSCEF Doc. No. 233]. The Federal Express tracking record states: 2/19/16 "Delivered"; 2/22/16 "Returning Package to Sender" [NYSCEF Doc. No. 233]. Plaintiffs' counsel states that the returned Federal Express package had been opened. Even if it is accepted that the package was opened and returned, there is no evidence that this was done by an agent of the BAUM Defendants. Moreover, this issue was previously raised in opposition to the BAUM Defendants' initial motion to vacate, and did not alter the Court's opinion that the initial default was excusable.

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Pursuant to CPLR §5015(a), "[t]he Court which rendered a judgment or order may relieve a party from it upon such terms as may be just." This statute enumerates several grounds for vacatur, which include excusable neglect (CPLR §5015[a][1]) and others not applicable here. The list is not exhaustive, however. As recognized by the Court of Appeals, the drafters of that provision intended that the courts retain their inherent discretionary power to vacate their own judgments "for sufficient reason and in the interests of substantial justice." *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 (2003). The decision to vacate a default judgment "lies within the discretion of the trial court..." *Gurin v Pogge*, 112 AD3d 1028, 1030 (3d Dept. 2013). In exercising its discretion, the court should consider "the facts of the particular case, the equities affecting each party and others affected by the judgment or order, and the grounds for the requested relief." *Nash v Port Authority of New York and New Jersey*, 22 NY3d 220, 225-226 (2013).

At bar, in weighing the equities, the Court considers that: (i) the BAUM Defendants' errors were matters of form and were not prejudicial; (ii) the ultimately proper application was brought within the one year deadline set forth in CPLR §5015(a)(1); (iii) there is no evidence of prejudice to the other parties occasioned by the final delay; (iv) there is no evidence of willfulness on the part of CHRISTOPHER BAUM; and (v) counsel's allusions to the personal and professional difficulties experienced by CHRISTOPHER BAUM in the relevant time frame present, if not a reasonable excuse, at least a plausible one. Moreover, in light of the BAUM Defendants' proof (now admissible) that they did not represent plaintiffs in the subject transactions, the Court has significant concerns with respect to the factual basis for and validity of the judgment against them. Based upon the foregoing, and in recognition of the strong public policy in favor of resolving issues on the merits, the Court finds it an appropriate exercise of discretion to allow the BAUM Defendants a final opportunity to present their defense. See *Harris v City of New York*, 121 AD3d 852 (2d Dept. 2014); *Gurin v Pogge*, 112 AD3d at 1030. Accordingly, it is

ORDERED, that the motion by the "BAUM Defendants for an Order pursuant to CPLR §5015(a)(1) vacating the default judgment against them, and pursuant to CPLR §§ 2004 and 3012(d) granting them an extension of time to answer the plaintiffs' complaint, is *granted.* The Decision and Order dated May 18, 2016 is hereby vacated, solely to the extent that it granted a judgment on default against the BAUM Defendants, and otherwise remains in full force and effect. The BAUM Defendants shall file their Verified Answer, in the form attached as Exhibit A to the Reply Affirmation, in accordance with the rules of the New York State Courts Electronic Filing System, within twenty (20) days of the date hereof; and it is further

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ORDERED, that the parties shall complete the remaining discovery, and all parties shall appear before the undersigned for the previously scheduled Certification Conference to be held on **June 22, 2017**, which date shall not be adjourned without consent of the Court. Failure to appear shall be deemed a default pursuant to 22 N.Y.C.R.R.§202.27, and shall result in appropriate sanctions.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: May 8, 2017
Mineola, New York

ENTER:

Hon. Robert A. Bruno, J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE

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