

Stein v Doukas

2010 NY Slip Op 34062(U)

December 22, 2010

Supreme Court, Suffolk County

Docket Number: 08-9909

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 11/15/10
ADJ. DATES 11/19/10
Mot. Seq. # 009 - MG
Mot. Seq. # 010 - MG
Mot. Seq. # 011 - XMD

-----X		
DOUGLAS STEIN, as Executor of the Estate of	:	KEVIN T. GRENNAN, PLLC
his mother, CLAIRE STEIN, deceased, Estate of	:	Atty. For Plaintiffs
CLAIRE STEIN, DOUGLAS STEIN and WANDER:	:	1000 Franklin Ave.
NELSON REALTY, LLC,	:	Garden City, NY 11530
	:	
Plaintiffs,	:	RICHMAN & LEVINE, PC
	:	Attys. For Defs. Shapiro & Commander Ent.
-against-	:	666 Old Country Rd.
	:	Garden City, NY 11530
	:	
TED DOUKAS, TELCOR CO., LLC, JAY	:	ROBERT J. DEL COL, ESQ.
REALTY ENTERPRISES, INC., ALL ISLAND	:	Attys. For Defs Doukas & TelCor
ABSTRACT, LTD., JOSEPH SHAPIRO and	:	34 Dewey St.
COMMANDER ENTERPRISES, LLC,	:	Huntington, NY 11743
	:	
Defendants.	:	RIVKIN RADLER, LLP
	:	Attys. For Def. Jay Realty
	:	926 RXR Plaza
	:	Uniondale, NY 11556
-----X		

Upon the following papers numbered 1 to 24 read on these motions by certain defendants to renew and reargue and cross motion by plaintiffs for a default judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; 5-7; Notice of Cross Motion and supporting papers 8-10; Answering Affidavits and supporting papers 11-12; 13-14; 15-16; 17-18; Replying Affidavits and supporting papers 19-20; 21-22; Other 23-24 (memorandum); (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (#009) by defendants, Ted Doukas and Telcor, Co., LLC, for relief from two orders dated August 31, 2010, which granted the separate motion by defendant, Jay Realty Enterprises, Inc. and the plaintiffs' motion to dismiss the answer served by these defendants, is considered under CPLR 5015 and 2005 and is granted; and it is further

ORDERED that the separate motion (#010) by defendant, Jay Realty Enterprises, Inc., for leave to reargue those portions of a prior motion (#006) by the plaintiffs for consolidation of this action with a related action is granted; and it is further

ORDERED that the cross motion (#011) by the plaintiffs for, among other things, a default judgment on its claims against the defendants, Ted Doukas and Telcor Co., LLC, are denied as academic, as the answer of these defendants has been reinstated by the terms of this order.

Applications for leave to reargue, renew and other similar relief are governed by the provisions of CPLR 2221. Upon a reading of this rule, it is clear that neither renewal nor reargument is a remedy available to a party who has defaulted in opposing a motion (*see Parine v Country Arms Equestrian Ctr.*, 11 AD3d 440, 782 NYS2d 369 [2d Dept 2004]; *Santiago v Allstate Ins. Co.*, 2002 WL 1837893 [App. Term 2002]). Rather, relief from such a default is obtainable only upon an application to vacate the default that includes a reasonable excuse for said default and proof of a meritorious claim or defense (*see Legaretta v Ekhsior*, 74 AD3d 899, 902 NYS2d 375 [2d Dept 2008]; *Parine v Country Arms Equestrian Ctr.*, 11 AD3d 440, *supra*; *see also Energy Brands, Inc. v Utica Mut. Ins. Co.*, 38 AD3d 591, 831 NYS2d 504 [2d Dept 2007]; *Diamond v Vittucci*, 36 AD3d 650, 828 NY2d 214 [2d Dept 2007]; *Brooks v Sunben Realty, Inc.*, 6 AD3d 740, 829 NYS2d 171 [2d Dept 2007]).

While the determination of that which constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (*see Hodges v Sidual*, 48 AD3d 663, 852 NYS2d 340 [2d Dept 2008]; *Savino v ABC Corp.*, 44 AD3d 1026, 845 NYS2d 789 [2d Dept 2007]; *Juesinoski v Board of Educ. of the City of NY*, 15 AD3d 353, 790 NYS2d 162 [2d Dept 2005]), a disposition on the merits is favored (*see Gerdes v Canales*, 74 AD3d 1017, 903 NYS2d 499 [2d Dept 2010]). In the exercise of its discretion, the court may accept law office failure as a reasonable excuse (*see CPLR 2005; Campbell-Jarvis v Alves*, 68 AD3d 701, 889 NYS2d 257 [2009]).

Here, the record reflects that defendants, Ted Doukas and Telcor Co., LLC, failed to oppose those portions of the prior motions by defendant, Jay Realty Enterprises, Inc., and the plaintiffs wherein each sought dismissal of the answer of these moving defendants pursuant to CPLR 3126 by reason of their failure to provide responses to discovery demands and stipulations. The record adduced on this motion by defendants, Ted Doukas and Telcor Co., LLC, reflects that they have advanced a reasonable and justifiable excuse for their prior defaults that is predicated upon law office failure. The moving papers included detailed and credible explanations of the default by reason of law office failure on the part of the moving defendants' counsel (*see Winthrop Univ. Hosp. v Metropolitan Suburban Bus Auth.*, ___ AD3d ___, 910 NYS2d 159 [2d Dept 2010]). Among the circumstances that contributed to their defaults were the existence of a myriad

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of lawsuits by and between the plaintiff and the moving defendants and the pendency in this action of motions for summary judgment which effected a statutory stay of discovery (*see* CPLR 3214). The court thus finds that under these circumstances and the others described in the moving papers, that the default is excusable pursuant to CPLR 2005.

Moreover, the moving papers contained sufficient proof of a potentially meritorious defense to the plaintiffs' claims. Accordingly, the motion (#009) by the defendants, Ted Doukas and Telcor Co., LLC, to vacate their defaults in opposing the prior motions of the defendant, Jay Realty Enterprises, Inc. and the plaintiffs for dismissal of the answer of the moving defendants, is granted. Those portions of the two separate orders of August 31, 2010 wherein the court dismissed the answer of defendants, Ted Doukas and Telcor Co., LLC, upon the granting of the motions by Jay Realty Enterprises, Inc. and the plaintiffs pursuant to CPLR 3126 are thus vacated. All issues regarding the adequacy of the discovery provided by defendants, Ted Doukas and Telcor Co., LLC, on this motion are referred to the upcoming compliance conference now scheduled for **January 4, 2011**.

Also granted is the separate motion (#010) by defendant, Jay Realty Enterprises, Inc., for leave to reargue those portions of a third order issued by this court on August 31, 2010, which conditionally granted the plaintiffs' motion (#006) to consolidate this action with a related action to the extent of directing a joint trial if both actions were ready when called. The moving papers established that the court's determination to grant a joint trial was arrived at mistakenly due to an overlook or misapprehension of the facts presented by Jay Realty Enterprises, Inc. in its opposing papers and the law applied by the court thereto (*see* CPLR 2221; *Cuomo v Ferran*, 77 AD2d 698, 908 NYS2d 521 [2d Dept 2010]; *Singleton v Lenox Hill Hosp.*, 61 AD3d 956, 876 NYS2d 909 [2d Dept 2010]; *Beverage Mkt. USA, Inc. v South Beach Beverage Co.*, 58 AD3d 657, 873 NYS2d 84 [2d Dept 2009]). Those portions of the August 31, 2010 order of this court wherein the plaintiffs' motion (#006) for consolidation was granted conditionally to the extent it directed a joint trial are thus vacated.

The plaintiffs' cross motion (#011) which by the notice thereof, demands affirmative relief, that a default judgment only against defendants, Ted Doukas and Telcor Co., LLC, be granted to the plaintiffs and that the claims against, by and between the remaining defendants be severed, is denied. The application for a default judgment is premised upon the dismissal of the answer of defendants, Ted Doukas and Telcor Co., LLC, which dismissal, has been vacated by the terms of this order. Accordingly, the plaintiffs' demands for such relief and the severance of the remaining claims are now academic. All other relief demanded by the plaintiffs, either in their notice of cross motion or supporting papers, is denied.

DATED: 12/22/10



THOMAS F. WHELAN, J.S.C.