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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 2

DAVID HEFTER,

Plaintiff,

-against-

CITI HABITATS, INC., NRT, LLC, THE CORCORAN GROUP, INC., CHRISTINE TOES, ORSID REALTY CORP., JONATHAN E. GREEN, SAMANTHA A. GREEN, JAMES M. MORRISSEY, FELIX NIHAMIN, and GRAUBARD & NIHAMIN, P.C.,

Defendants.

INDEX NO. 117014/2009
Motion Sequence 012
INTERIM DECISION & ORDER

LOUIS B. YORK, J.:

Plaintiff David Hefter (Hefter) moves to vacate, pursuant to CPLR 5015, the default judgment granted defendants Citi Habitats, Inc. (Citi Habitats), NRT, LLC (NRT), The Corcoran Group, Inc. (Corcoran), and Christine Toes (Toes) (together as the Broker Defendants) on April 12, 2010. The Broker Defendants oppose.

Factual Background

On May 30, 2008, Hefter closed on the purchase of apartment 5B (the Apartment) in the residential cooperative building located at 301 East 63rd Street, New York County (the Building). He used Toes, a resident of the Building, employed by Citi Habitats, to find the Apartment. Corcoran bought Citi Habitats in 2004; Corcoran, in turn, is owned by NRT, a nationwide collection of real estate firms. He purchased the Apartment for $650,000 from Jonathan E. Green and Samantha A. Green (the Greens), who listed the Apartment with Corcoran. James M. Morrissey (Morrissey) was the Greens' attorney for the sale of the apartment. Hefter engaged Felix Nihamin (Nihamin) and his firm Graubard & Nihamin, P.C. to represent him in this real

estate transaction.

The cooperative corporation that owned the Building, Toost Control Corp. (Toost), had a long-term ground lease from Ruffy Corp. (Ruffy), owner of the underlying land. The first 25-year term, of three under the lease, expired on December 31, 2008. During the first renewal term, Toost's rent would be reset every 10 years, commencing January 1, 2009; the second renewal term would proceed similarly. The new rent would be calculated as 8% of the then-market value of the land, as if it were vacant and unimproved property. If Toost and Ruffy could not agree on the new rent amount, they would go to arbitration.

On February 26, 2007, Toost held a shareholders' meeting dealing with the ground lease renewal and its financial implications. Grubb & Ellis Company (G&E), a commercial real estate firm, made a presentation on the prospective lease negotiations.[1] Orsid Realty Corp. (Orsid), Toost's property management firm, attended the meeting, as did its legal counsel. G&E offered several economic scenarios, with the 108,960 square feet of land appraised from $100 to $500 per square foot. It narrowed the possibilities down to $200 to $400 per square foot based on then-current market conditions. G&E suggested a strategy of purchasing the land from Ruffy, if it were amenable, in order to avoid the uncertainties of the real estate market in the future. Otherwise, the negotiations would have to proceed by establishing a market value for the land as defined in the lease. G&E advised the shareholders that their maintenance charges would increase, probably in the range of 46% to 110% if the appraisal were in the $200 to $400 per square foot range.

When Hefter purchased the Apartment in May 2008, the monthly maintenance charge was $1,429.64 and there was a $145 monthly assessment through July 2010. On December 4,

[1]Copies of the slides used in the presentation are attached to the complaint. Ex. A attached to motion.

2008, Toost held a shareholders' meeting, announcing its renewal agreement with Ruffy. Hefter's monthly maintenance charge was increased to $3,071.89 for 2009, mostly due to the change in value of the ground lease rent.

On December 3, 2009, Hefter commenced the instant action asserting causes of action against (1) the Greens for rescission of the sales contract, (2) the Greens and Morrissey for fraud, (3) the Broker Defendants for fraud, (4) the Broker Defendants for negligence, (5) Orsid for fraud, (6) Orsid for negligence, and (7) Nihamin and his firm for legal malpractice. Ex. A attached to motion.

On January 25, 2010, the Broker Defendants moved to dismiss the complaint as against them, returnable on February 17, 2010. When Hefter served no opposition papers by the return date, the court granted the motion on default on April 12, 2010. Ex. B attached to motion. On August 11, 2010, Ralph Gerstein, Esq., then Hefter's counsel, moved to vacate the default, deny the Broker Defendants' motion, and reinstate the complaint. Ex. C attached to motion. However, on September 22, 2010, Gerstein failed to appear for oral argument on the motion, which was then denied. Ex. D attached to motion. On or about February 18, 2011, Hefter, who had moved to California in March 2010, replaced Gerstein as his counsel.

Legal Standards

CPLR 5015 (a) (1) provides that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of: excusable default." The motion must be made within one year after service or entry of the challenged judgment or order. "A request to vacate a default affords the defaulting party an opportunity to develop a factual record setting forth the reasons for the nonappearance and any meritorious defenses that would justify

re-opening the default." *Matter of Yarbough v Franco*, 95 NY2d 342, 347 (2000). "While it is generally preferable to have cases determined on their merits, a party seeking to vacate a default must demonstrate a reasonable excuse (CPLR 5015 [a] [1]) and a meritorious claim." *Brown v Suggs*, 38 AD3d 329, 330 (1st Dept 2007) (citations omitted).

Discussion

Hefter argues that vacating a default judgment is appropriate under the circumstances here. *Leary v Pou Poune, Inc.*, 273 AD2d 8 (1st Dept 2000) (where the "failure to file an answer was clearly due to the derelictions of [defendant's] attorney . . . [defendant] should not be deprived of its day in court by its attorney's neglect"); *Martinez v New York City Transit Authority*, 183 AD2d 587 (1st Dept 1992) ("the plaintiffs should be afforded their day in court despite the egregious law office failure of their attorneys"); *Paoli v Sullcraft Mfg. Co.*, 104 AD2d 333, 334 (1st Dept 1984) ("A client should not be deprived of his day in court by his attorney's neglect or inadvertent error, especially where the other party cannot show prejudice").

Hefter requests that the court "not penalize me for the unconscionable misconduct and apparently chronic neglect of my former lawyer." Hefter Aff., ¶ 14. He claims that "Mr. Gerstein did not inform me that he failed to oppose the Broker Defendants' motion to dismiss, nor did he inform me of the filing of a motion to vacate the default or his failure to attend oral argument on that motion." *Id.*, ¶ 6. He states that his own move to California inhibited communication with Gerstein, who "almost never returned my phone calls and rarely responded to e-mails. On those few occasions when he did, he rarely included any details about the case." *Id.*, ¶ 7. Hefter contends that Gerstein first offered a medical excuse for allowing the default, but then gave him false assurances of timely and proper steps to correct the situation. *Id.*, ¶¶ 9-11. He offers no explanation for Gerstein's failure to appear for oral argument on September 22,

2010.

Hefter's current account does not comport with Gerstein's affirmation submitted with the motion to vacate on August 11, 2010. Ex. C attached to motion, ¶ 3. Gerstein stated that "due to a high volume of cases around that time, I missed the deadline" to oppose the Broker Defendants' motion to dismiss returnable on February 17, 2010. He said that this "can be characterized as law office failure." *Id.*, ¶ 4. While Hefter had moved to California six months earlier, Gerstein makes no mention of any communications problems between them.

The Broker Defendants argue that Hefter's failure to keep himself informed of the progress of his action does not constitute a reasonable excuse to justify vacating the default. *Dayton Towers Corp. v Katz*, 208 AD2d 494, 495 (2d Dept 1994) ("The defendant's 'excuse' for his default amounted to no more than his own failure to keep himself apprised of his court dates. Under the circumstances of this case, the Supreme Court did not improvidently exercise its discretion in concluding that this was not a reasonable excuse"). They note that Hefter and his counsel missed several important deadlines. *Roussodimou v Zafiriadis*, 238 AD2d 568, 569 (2d Dept 1997) ("While the defendant's explanation of law-office failure was a reasonable excuse for the initial failure to answer the complaint, the conduct of the attorney with whom the defendant made arrangements to defend him constituted repeated neglect"); *Gannon v Johnson Scale Co.*, 189 AD2d 1052 (3d Dept 1993) ("defendant's excuse, that local counsel it retained failed to appear at the trial scheduled for May 17, 1990 without notice to defendant or its counsel, [is] insufficient. Contrary to defendant's contention, this was not an isolated occurrence but rather followed a pattern of willful default and neglect") (citations omitted).

Gerstein's conduct was inexcusable and his client undoubtedly bears some responsibility. However, following *Leary, Martinez* and *Paoli*, the court will proceed to the merits of Hefter's

defense.

To warrant vacating the default judgment, Hefter must provide a meritorious defense to the Broker Defendants' motion to dismiss the complaint as against them. The basis of Hefter's complaint against the Broker Defendants is that "Toes knew, but failed to advise Plaintiff truthfully, that because of ongoing negotiations by the Coop concerning an expiring ground lease, maintenance in future years was expected to increase significantly." Memorandum of Law in Support, at 7. It is undisputed that Toes, a resident of the Building, as well as Hefter's eventual real estate agent, attended the shareholders' meeting on February 26, 2007 where G&E predicted increases in maintenance charges ranging from 14% to 142%, according to the increase in ground rent negotiated by Toost and Ruffy. G&E estimated that the increases in maintenance charges would more likely range from 46% to 110%, based on early 2007 market values.

Because of Toes's "detailed knowledge concerning the expected increase in maintenance," which she did not convey to Hefter, he argues that she was negligent in her representation of him and knowingly made material misrepresentations to him, constituting fraud. *Id.*, at 8-9. The only cases cited in support are *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009) ("The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages") and *Grammar v Turits* (271 AD2d 644, 645 [2d Dept 2000]) ("To recover on a theory of negligent misrepresentation, a plaintiff must establish that the defendant had a duty to use reasonable care to impart correct information because of some special relationship between the parties, that the information was incorrect or false, and that the plaintiff reasonably relied upon the information provided").

The Broker Defendants maintain that the negligence and fraud claims against them lack

merit under New York's doctrine of caveat emptor, which imposes upon the buyer "the duty to satisfy himself as to the quality of his bargain." *Ercole v McGay*, 13 Misc 3d 144A, 2006 NY Slip Op 52321(U), *2 (App Term, 9th & 10th Jud Dists 2006). However, when the Broker Defendants claim that "there is no affirmative duty to disclose information" (Memorandum of Law in Opposition at 6), they are relying on cases that insulate sellers on that basis. *See e.g. Glazer v LoPreste*, 278 AD2d 198 (2d Dept 2000) (" New York imposes no duty on either the seller or the seller's agent to disclose any information concerning the premises unless there is a confidential or fiduciary relationship between the parties or some conduct on the part of the seller which constitutes active concealment"); *London v Courduff*, 141 AD2d 803, 804 (2d Dept 1988) ("It is settled law in New York State that the seller of real property is under no duty to speak when the parties deal at arm's length"). They offer no law regarding the duty of buyer's agent to buyer, that is, Toes to Hefter.

"In New York, it is well settled that a real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal." *Dubbs v Stribling & Assocs.*, 96 NY2d 337, 340 (2001); *Douglas Elliman LLC v Tretter*, 84 AD3d 446, 448 (1st Dept 2011) ("During the process of facilitating a real estate transaction, the broker owes a duty of undivided loyalty to its principal").

Toes failure to advise Hefter of G&E's predictions, supplies Haber with the colorable claim necessary to establish a meritorious defense.

In all, Hefter has a meritorious defense to the Broker Defendants' motion to dismiss. The court, therefore, shall vacate Hefter's default on the condition that he pays to the brokers' attorney the sum of $750.00 within 30 days of receipt of this order, in recognition of his prior counsel's irresponsible conduct. Upon submission to the court of proof of Hefter's payment, the

Memorandum of Law in Opposition to the Motion to Dismiss, attached as exhibit F to the instant motion, shall be deemed served as of the date of the submission of proof of Hefter's payment.

Accordingly, it is

ORDERED that the motion by David Hefter, pursuant to CPLR 5015, to vacate the default judgment granted the Broker Defendants, on April 12, 2010, is granted on condition that David Hefter pay the total amount of $750 to the attorney for The Corcoran Group, Inc., and Christine Toes within 30 days of service of a copy of this order; and it is further

ORDERED that the Broker Defendants shall serve their reply papers to plaintiff within seven days of receipt of payment of the total amount of $750 from David Hefter; and it is further

ORDERED that both attorneys on this motion shall appear in Part 2, 71 Thomas Street, Room 205 with copies of all papers in support of and in opposition to the motion to dismiss and to schedule a date for oral argument by making an appointment with the Clerk of the part after the above is completed..

FILED

AUG 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

DATED: August 18, 2011

ENTER:

LOUIS B. YORK
J.S.C.