ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

FILED
SEP 26 2013
COUNTY CLERK
QUEENS COUNTY

Present: HONORABLE BERNICE D. SIEGAL IA Part 19
Justice

Ada Oparaji, Maurice Oparaji, x

Plaintiffs,

245-02 Merrick Blvd., LLC; ESH Management, Robin Eshaghpour, Elena Eshaghpour, Sutphin Management Corp., Sutphin Tiana Realty LLC; Sutphin Hampton Realty LLC; Sutphin Moriches Realty LLC; Sutphin Hollis Realty LLC; ESH Acquisitions LLC; 90-57 Sutphin Realty LLC; 90-59 Sutphin Realty LLC; Superior Concrete & Masonry Corp.; Steven B. Rabinoff Architect, P.C., et al.,

Defendants.
x

Index Number 19294 2012

Motion Date June 27, 2013

Motion Cal. Number 123

Motion Seq. No. 8

The following papers numbered 1 to 9 read on this motion for an order vacating the default judgment entered against defendant Superior Concrete & Masonry Corp., on the grounds that defendant Superior & Masonry Corp., has a reasonable excuse and meritorious defense and vacating the Note of issue on the grounds that same was filed in violation of a stay.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1- 4
Memorandum of Law in Opposition	5 - 9

Upon the foregoing papers it is ordered that the Order to Show Cause is determined as follows:

Defendant, Superior Concrete & Masonry Corp. ("Superior") moves by Order to Show Cause for an Order vacate the default judgment. In opposition, Plaintiff seeks sanctions

against Superior and its "cohorts."[1] The court notes that a prior application to vacate its default was marked off due to Superior's failure to appear at the calendar call.

Facts

Maurice Oparaji is the owner of property located at 245-11 133 Road, Rosedale, NY 11422, Block 13209 and Lot 80 ("plaintiff's property"). Defendant 245-02 Merrick Blvd, LLC ("Merrick") is the owner of premises known as 245-02 Merrick Boulevard, Rosedale NY Block 13209 and lots 50 and 60 ("Merrick property"). Merrick purchased the property with the intention to construct a CVS drug store. The New York City Building Department issued a directive requiring defendants to erect a perimeter construction fence on the Merrick property. Merrick constructed an 8 foot wooden fence based upon a survey of Merrick's property dated August 13, 2012.

The complaint alleges that on September 15, 2012, defendants trespassed on Oparaji's property, removed the fence and damaged and destroyed two vehicles "loaded with electronics, machines, appliances, and books destined for export; destroyed plantings and other property."

Superior contends that it first learned of the within action one and a half months ago when it received an Order to Show Cause to be relieved as counsel. Superior contends that it was originally assured by Robin Eshaghpour, the owner of Merrick, that he had engaged an attorney to defend all of the Defendants. However, Superior now questions Merrick's statement. Subsequently, Superior received a copy of the March 28, 2012 decision wherein the Plaintiff obtained a default judgment as against Superior.

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[1] The court notes that Plaintiff fails to label its Memorandum of Law as a cross-motion, however, the pro se Plaintiff submitted a cross-motion to the original motion to vacate the default judgment and so the court will nonetheless handle Plaintiff's opposition as if it were a properly filed cross-motion for the purposes of this decision.

The affidavit of service upon Superior states that on October 22, 2012, Prince Oparaji personally delivered the Summons and Complaint to Camille Torregrossa ("Torregrossa"), known to Prince as the office manager of Superior.

Kenneth Ferst ("Ferst"), the President of Superior, states that he was never served.

Discussion

At the outset, the court notes that plaintiff Ada Oparaji is not an attorney and cannot appear on behalf of co-plaintiff Maurice Oparaji (*see Whitehead v Town House Equities, Ltd.*, 8 AD3d 369 [2d Dept 2004]).

Motion to Vacate Default

Pursuant to CPLR 311(a)(1), personal service upon a corporation shall be made by delivering the summons "to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service." Plaintiff's affidavit of service indicates that service was made on an office manager in compliance with CPLR 311(a)(1).

In support of Superior's motion, Ferst merely states he was never served and that he as an "experienced businessman" he would have sought counsel if he was served with a summons and complaint.

The mere conclusory denial by Ferst of the Summons and Complaint is insufficient to rebut the presumption of proper service created by the affidavit of service. (*Rosario v. Beverly Road Realty Co.*, 38 A.D.3d 875[2nd Dept 2007]; *General Motors Acceptance Corp. v. Grade A Auto Body, Inc.*, 21 A.D.3d 447 [2nd Dept 2005]; *Household Finance Realty Corp. of New*

York v. Brown, 13 A.D.3d 340 [2nd Dept 2004].) Superior also fails to submit the affidavit of Torregrossa, the person allegedly served, rebutting the affidavit of service upon her.

Accordingly, Superior's Order to Show Cause is denied.

Sanctions Pursuant to 22 NYCRR 130-1.1

Plaintiff moves for an order imposing sanctions upon Superior due to the "meritless and factually false and misleading" motion to vacate their default. Plaintiff contends that service of the summons and complaint was proper and that Superior's denial of service warrants the imposition of sanctions.

The granting of sanctions for frivolous conduct is within the discretion of the court. 22 N.Y.C.R.R. §130-1.1(a) provides, in pertinent part, that:

> [t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart . . . .

22 N.Y.C.R.R. §130-1.1(c) provides that "conduct is frivolous if: . . . (3) it asserts material factual statements that are false." 22 N.Y.C.R.R. §130-1.1(c)(3) further provides, in pertinent part, that:

> [i]n determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the

time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

Sanctions are appropriate under 22 N.Y.C.R.R. §130-1.1 where frivolous conduct involved "material factual statements that [were] false." (*Stein v. McDowell*, 74 A.D.3d 1323, 1326 [2d Dep't 2010], quoting 22 N.Y.C.R.R. §130-1.1; *see also Sakow v. Columbia Bagel, Inc.*, 6 Misc. 3d 939 [Sup. Ct. N.Y. County 2004].) In fact, "the court must consider whether the attorney adhered to the standards of a reasonable attorney" when determining whether to award sanctions. (*Sakow*, 6. Misc. 3d at 943, citing *Principe v. Assay Partners*, 154 Misc. 2d 702 [Sup. Ct. N.Y. County 1992]; *see also Curcio v. J.P. Hogan Coring & Sawing Corp.*, 303 A.D.2d 357, 358 [2d Dep't 2003]; *HSBC Bank USA, N.A. v. Taher*, 34 Misc. 3d 1201(A) [Sup. Ct. Kings County 2011].) In addition, the court "must look at the broad pattern of conduct by the offending attorneys or parties." (*HSBC Bank USA, N.A.*, 34 Misc. 3d 1201(A), citing *Levy v. Carol Management Corp.*, 260 A.D.2d 27 [1st Dep't 1999].)

Here, there has been no showing that would warrant the imposition of sanctions as against Superior.

Conclusion

For the reasons set forth above, Superior's Order to Show Cause to vacate its default judgment is denied and Plaintiff's application for the imposition of sanctions is denied.

Dated: September 20, 2013

Bernice D. Siegal, J.S.C.

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