

Matter of Cachay v Brooks

2013 NY Slip Op 34213(U)

September 4, 2013

Supreme Court, New York County

Docket Number: 113232/11

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

**ANTONIO J. CACHAY, Individually and as
Administrator of the Estate of SYLVIE
CACHAY, Deceased,**
Plaintiffs,
- against -

FILED

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INDEX NO. 113232/11

MOTION SEQ. NO. 002

NICHOLAS BROOKS,
Defendant. **COUNTY CLERK'S OFFICE
NEW YORK**

The following papers numbered 1 to 3 were read on this motion by the petitioner to vacate the default judgment, vacate the note of issue and stay this action pending the resolution of the related criminal proceeding.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits (Memo) _____	<u>2</u>
Replying Affidavits (Reply Memo) _____	<u>3</u>

Cross-Motion: Yes No

In this action sounding in intentional negligence and wrongful death, Nicholas Brooks (defendant), *pro se* and incarcerated, moves to vacate the default judgment entered against him, to vacate the Note of Issue and to stay this proceeding, pursuant to CPLR 2201, pending the resolution of the related criminal action. Antonio J. Cachay, Individually and as Administrator of the Estate of Silvie Cachay, Deceased, (plaintiffs) are in opposition to defendant's motion.

BACKGROUND

Plaintiffs instituted this action by the filing of a Summons and Verified Complaint on or about November 22, 2011. Subsequently, by a Decision and Order of this Court dated June 4, 2012, plaintiffs were granted a default judgment as against the defendant for his failure to answer, move or otherwise respond to the Summons and Verified Complaint. Pursuant to the directives in this Order, plaintiffs filed the Note of Issue on or about July 20, 2012, and the case

is presently on the trial calendar for an inquest. On or about September 6, 2012, defendant made the herein motion to stay the instant proceeding and to vacate the default judgment and Note of Issue. Defendant states that the reason for the delay in bringing this motion is because he is incarcerated and proceeding *pro se*. Furthermore, defendant maintains that he wrote a letter to plaintiff's counsel as well as his multiple attempts with the clerk to file this motion properly. As such, it took him four attempts before properly filing the instant motion.

Furthermore, defendant alleges that he sent a letter to plaintiffs' counsel after discovering that the plaintiffs were bringing a civil action against him, to which he received no response. He also proffers that after learning about plaintiff' motion for a default judgment against him, he went to the law library at the correctional facility, where he is incarcerated for assistance. After doing so defendant maintains that his first attempt to seek a stay was rejected by the Clerk of the Court as it was not notarized, and then it was rejected on a second attempt because he did not attach the requisite fee for the motion. This pattern continued for approximately eight months, according to the defendant, until he was able to properly file the herein motion.

In support of his motion defendant maintains that he intends to assert his Fifth Amendment right during this proceeding, which he proffers is an important consideration for the Court in deciding a case for a discretionary stay. In his Affidavit of Merit, dated October 19, 2012, defendant states that once the facts are heard and the related criminal action is completed, these facts will provide ample evidence to contradict the allegations in the herein civil proceeding. To that end he requests that the default entered against him be vacated and this matter stayed so that he can, after the resolution of the criminal matter, represent himself properly and argue the facts.

In opposition, plaintiffs proffer that the defendant's motion must be denied and this matter set down for an inquest on the basis that there is an uncontested default judgment which has been entered against him, and on the basis that the defendant has no standing to seek a

stay of this action. Plaintiffs also proffer that a copy of the motion papers have yet to be served upon them, and plaintiffs did not see the motion papers until the initial return date of the motion rendering this motion procedurally defective.

DISCUSSION

The Supreme Court may grant a stay of a proceeding, pursuant to CPLR 2201, in a proper case and upon such terms as may be just. Granting a stay of a civil court action pending the resolution of a related criminal action rests with the sound discretion of the trial court (see *Matter of Kopf*, 169 AD2d 428 [1st Dept 1991]; *Britt v International Bus Servs*, 255 AD2d 143, 144 [1st Dept 1998]). In considering whether to grant a discretionary stay "pending the resolution of a related criminal matter, a court should weigh "the risk of inconsistent adjudications, application of proof and potential waste of judicial resources" (*Access Capital, Inc. v DeCicco*, 302 AD2d 48, 51 [1st Dept 2002], citing *Britt v International Bus Services, Inc.*, 255 AD2d 143 [1st Dept 1998]).

By letter dated July 11, 2013, plaintiffs' counsel informed the Court that after a month long criminal trial before the Honorable Bonnie Wittner, defendant was convicted of murder in the second degree of Sylvie Cachay. As such the portion of defendant's motion seeking to stay the herein civil action pending the resolution of the criminal matter is denied as moot.

In turning to the portion of defendant's motion which seeks to vacate the default judgment rendered against him, "[a] defendant seeking to vacate a default under this provision must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action" (*Eugene Di Lorenzo, Inc. v. A. C. Dutton Lumber Co.*, 67 NY2d 138, 141 [1986]; *Goldman v Cotter*, 781 NYS2d 28 [1 Dept 2004]). Here, defendant proffers the reasonable excuse for the delay in that he is incarcerated and proceeding *pro se*. However, defendant does not proffer a meritorious defense as he merely maintains that he intends to plead the fifth in this action. As such defendant's motion is denied in its entirety and

the matter shall proceed to an inquest.

CONCLUSION

Accordingly it is hereby,

ORDERED that the portion of the motion by defendant Nicholas Brooks, seeking an order staying the herein action pending the resolution of the related criminal action is denied as moot; and it is further,

ORDERED that the portion of the motion by defendant Nicholas Brooks, seeking an order vacating the default entered against him as well as the Note of Issue is denied; and it is further,

ORDERED that plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendant.

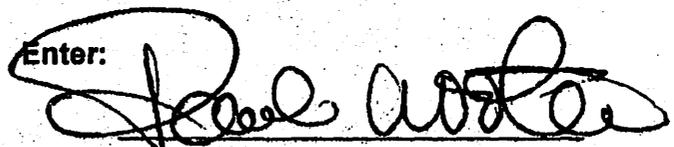
This constitutes the Decision and Order of the Court.

FILED

SEP 09 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: *Sept. 4, 2013*

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PAUL WOOTEN J.S.C.

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