

Mateo v Vargas

2013 NY Slip Op 30503(U)

March 7, 2013

Supreme Court, New York County

Docket Number: 602043/2009

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE Justice

PART 61

Index Number : 602043/2009
MATEO, FERNANDO
vs.
VARGAS, HENRY
SEQUENCE NUMBER : 013
STAY PROCEEDINGS

INDEX NO. 602043/09
MOTION DATE _____
MOTION SEQ. NO. 013

The following papers, numbered 1 to 2, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed memorandum opinion.*

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

MAR 13 2013

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/7/2013

ROC
HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X
FERNANDO MATEO and STELLA MATEO,

Plaintiffs,

-against-

HENRY VARGAS, AKERMAN SENTERFITT and
MADISON REALTY INC.,

Defendants.

-----X
HENRY VARGAS,

Third-Party Plaintiff,

-against-

PETER SKYLLAS,

Third-Party Defendant.
-----X

HON. ANIL C. SINGH, J.:

Motion sequence numbers 013, 014, and 015 are consolidated for
disposition.

In motion sequence 013, defendant Henry Vargas, pro se, moves for an
order pursuant to CPLR 2201 staying further proceedings in this action or, in the
alternative, staying the damages trial in this action. Plaintiffs oppose the motion.

In motion sequence 014, Vargas moves, as third-party plaintiff, for an order

DECISION AND
ORDER

Index No.
602043/2009

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NEW YORK
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pursuant to CPLR 3215 entering a default judgment against third-party defendant Peter Skyllas.

In motion sequence 015, defendant moves for an order either: 1) pursuant to CPLR 2221, granting defendant leave to renew his prior motion to dismiss the sole cause of action against him and plaintiffs' cross-motion for summary judgment and, upon renewal, dismissing the cause of action against him and denying plaintiffs' cross-motion for summary judgment in its entirety; or 2) pursuant to CPLR 5015, vacating the decision and order of Hon. Paul G. Feinman dated February 1, 2012, which denied Vargas' motion to dismiss and granted (as to liability only) plaintiffs' cross-motion for summary judgment; or 3) pursuant to the Court's "general powers," vacating Judge Feinman's order. Plaintiffs oppose the motion.

The facts of this matter are set forth fully in Judge Feinman's memorandum opinion dated February 1, 2012.

I. Motion for Stay

Defendant contends that a stay is appropriate because he is "extremely confident" that his appeal will be successful; that a stay fosters judicial economy; and that a stay would avoid unnecessary time and expense being incurred by the parties since, if his appeal is ultimately successful, any discovery proceedings and

damages trial “would be for naught.”

CPLR 2201 provides that the court “may grant a stay of proceedings in a proper case, upon such terms as may be just.”

Contrary to defendant’s contention, it appears highly unlikely that defendant’s appeal will be successful. In this regard, the Court notes that defendant pleaded guilty to attempted grand larceny in the first degree and forgery in the second degree (Mateo v. Vargas, 34 Misc.3d 1222(A) [Sup. Ct., N.Y. Cty., 2012]). “He admitted that he had fraudulently passed himself off as the majority owner of the Lenox Avenue building and made false statements and forged documents to trick investors into believing he was the majority owner of the LLC that owned the building” (Id.).

In light of defendant’s criminal conviction, the likelihood of defendant succeeding in his appeal in this civil action, which arises from the same conduct as the criminal case, is virtually nil. Accordingly, the application for a stay is denied.

II. Motion for Default Judgment

Third-party plaintiff Henry Vargas is moving for a default judgment against third-party defendant Peter Skyllas.

Henry Vargas states in a sworn affidavit that the third-party defendant was served with the third-party summons and complaint in August or September 2009.

He contends that “an affidavit of service was duly filed with respect to such service upon Skyllas, the exact dates being unavailable to movant due to his current incarceration however this Court has access to such documentation.”

The Court has reviewed all of the documents filed in this case on the Supreme Court Records Online Library (“SCROLL”) website and the County Clerk’s file. The third document listed on SCROLL is plaintiff’s third-party summons and complaint. There is no affidavit of service on SCROLL stating that the third-party defendant was served, nor is there such an affidavit in the County Clerk’s file.

Because there is no documentary evidence that movant ever served the third-party defendant with the third-party summons and complaint, movant is not entitled to a default judgment.

III. Motion to Renew or Vacate Order

The rule that “a motion for renewal be based upon newly discovered evidence is a flexible one, and a court, in its discretion, may grant renewal even where the additional facts were known to the party seeking renewal at the time of the original motion, provided the moving party offers a reasonable justification for the failure to submit the additional facts on the original motion” (Grantat v. Walbaum’s Inc., 289 AD2d 289, 290 [2nd Dept. 2001] (other citations omitted)).

The Court in its discretion finds that the motion to renew has no merit.

Accordingly, it is

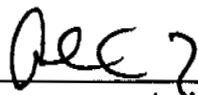
ORDERED that the motion of defendant to stay proceedings (013) is denied; and it is further

ORDERED that the motion of defendant for default judgment (014) is denied; and it is further

ORDERED that the motion of defendant for leave to renew his motion to dismiss and plaintiffs' cross-motion for summary judgment (015) is denied.

The foregoing constitutes the decision and order of the court.

Date: 3/7/13
New York, New York



Anil C. Singh
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

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