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SHORT FORM ORDER

INDEX NO.: 0010864/2010
SUBMIT SEQ 3: 10-24-2012
SUBMIT SEQ 4: 12-12-2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 1-9-2013
MOTION NO.: 003-MD; 004-MD

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ROBERT KELLY,

Plaintiff,

VITO LEONE, STEVEN ANDERSON, MARY LEONE, RALPH LEONE, AND US BANK, NA D/B/A MERS D/B/A US BANK HOME MORTGAGE,

Defendants.

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Upon the following papers numbered 1 to 91 read on this application for an order vacating the prior Order of the court dated September 23, 2011 and reinstating the defendants' Verified Answer and Counterclaims, and the cross-motion granting summary judgment in favor of the plaintiff; Notice of Motion/Order to Show Cause and supporting papers 1-28 ; Notice of Cross Motion and supporting papers 29-75 ; Answering Affidavits and supporting papers 76-85; Replying Affidavits and supporting papers 86-91 ; Other ___; it is

ORDERED that the application by the defendants Vito Leone, Steven Anderson, Mary Leone and Ralph Leone [collectively "Leone" or "the defendants"], for an order vacating the order of the court dated September 23, 2011, which conditionally struck the defendants' Answer unless the defendants provided responses to the plaintiff's discovery demands dated July 7, 2010, within thirty days from service of a copy of the order upon their counsel, and to reinstate their Answer, (motion sequence 003), and the cross motion by the plaintiff, Robert Kelly ["the plaintiff" or "Kelly"], for summary judgment on liability (motion sequence 004), are decided together; and it is further

ORDERED that the application by the defendants for an order vacating the order of the court dated September 23, 2011, and to reinstate their Answer is denied; and it is further

ORDERED that the application by the plaintiff for an order granting summary judgment on liability is denied.

Kelly brought this action seeking ownership of fifty per cent (50%) of the equity in premises located at 4 Wiltshire Court, Center Moriches, County of Suffolk, State of New York ["the subject premises"], and for partition, an order vacating a life estate granted to defendants Mary Leone and Ralph Leone, and a money judgment. The action was commenced on March 23, 2010, and the defendants joined issue by the service of an Answer with counterclaims dated May 13, 2010.

The Plaintiff's discovery demands were served on July 8, 2010. The plaintiff contends, and the defendants' attorney does not dispute, that notwithstanding letters written to her by the plaintiff's counsel dated August 17, 2010, and February 17, 2011, responses were not served. In the interim, a preliminary conference was scheduled for October 25, 2010; defense counsel failed to appear. The preliminary conference was rescheduled for November 11, 2010, at which time the defendants agreed to provide responses to the outstanding discovery request. The end date for all disclosure was set for October 1, 2011. The defendants still did not provide the sought-after discovery.

On March 3, 2011, plaintiff's counsel requested that the court schedule a conference to resolve the outstanding discovery issues. In response, defense counsel replied she would provide responses to the July, 2010 demands within thirty days. She failed to do so.

A conference was scheduled before the court for May 11, 2011. Defense counsel failed to appear at the court conference and did not communicate with the court or counsel regarding her inability to appear at the conference. Plaintiff's counsel then moved to strike the defendants' Answer. Notably, the application to strike the defendants' Answer which was submitted on June 8, 2011, was unopposed.

On September 23, 2011, the court granted the plaintiff's unopposed application to strike the defendants' Answer unless the defendants provided complete responses to all outstanding disclosure requests within thirty days from service of the order upon their counsel. The order was served on October 11, 2011, by first class mail. The last day for the defendants to provide responses was November 15, 2011. The defendants did not serve their responses by November 15, 2011.

On November 16, 2011, the matter appeared on the court's calendar for a conference. There is some dispute between counsel for the parties regarding defense counsel's purported offer to provide, and plaintiff counsel's rejection of, at least part of the demanded discovery at the conference. There is no dispute, however, that on November 16, 2011, defense counsel had failed to comply with the conditional order dated September 23, 2011, and that the Judge's Principal Law Clerk advised defense counsel that in order to vacate the default counsel would have to make a formal motion, relying on ***Wei Hong Hu v Sadiqi***, 83 A.D.3d 820, 921 N.Y.S.2d 133 (2d Dept. 2011).

Eleven (11) months after defense counsel was advised that the defendants would have to move to vacate their default, by notice of motion dated October 19, 2012, the defendants moved to vacate the court's conditional order dated September 23, 2011, to reinstate their Answer and Counterclaims, and to direct the plaintiff to accept Discovery Responses to the July, 2010 demands submitted with the moving papers. Defense counsel specifically denied that her motion was based on CPLR 5015, but rather, was based on the inherent authority of the court, in the interests of equity and fairness, to vacate a default.

An affidavit by the defendant, Vito Leone, dated October 18, 2012, was submitted in support of the defendants' motion. Mr. Leone's affidavit attested that he had provided defense counsel with all the documents requested in the plaintiff's July 2010, discovery demands, beginning in April of 2010 when he first consulted counsel, and in the several months thereafter. Mr. Leone was under the mis-impression that these documents had previously been provided to plaintiff's counsel. Although Mr. Leone was aware that his attorney had been recovering from a second breast cancer diagnosis and was under a doctor's care, he did not become aware that the documents he had provided in 2010 had never been turned over to plaintiff's counsel until some time in September of 2012. It was not until this time that Mr. Leone first learned of the conditional striking his Answer from one year earlier.

The excuse proffered by defense counsel for the defendants' default in not complying with the conditional order was counsel's health condition, mainly a second breast cancer diagnosis and resulting health complications and setbacks. She affirms that on the thirty-sixth day after the service of the conditional order, she was in possession of the requested documents at the court conference and offered them to plaintiff's counsel who rejected them. Counsel admits that she was advised at the conference that she would have to make a motion to vacate the default as the conditional order became self-executing after the expiration of the thirty-day period. Other than defense counsel's continued health issues, there is no further explanation why counsel waited eleven additional months to finally provide the requested documents and move to vacate the defendants' default.

A conditional order of preclusion requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order (*see* ***Gibbs v St. Barnabas Hosp.***, 16 N.Y.3d 74, 917 N.Y.S.2d 68, 942 N.E.2d 277 [2010]; ***Zouev v City of New York***, 32 A.D.3d 850, 821 N.Y.S.2d 620 [2d Dept. 2006]). If the party fails to produce the discovery by the specified date, the conditional order becomes absolute (*see* ***Wei Hong Hu v Sadiqi***, 83 A.D.3d 820, 921 N.Y.S.2d 133 (2d Dept. 2011), *citing* ***Zouev v City of New York***, *supra*). To be relieved of the adverse impact of the order, the defaulting party must demonstrate a reasonable excuse for its failure to produce the requested items by the court-ordered deadline and the existence of a potentially meritorious defense or claim (*id.; see also* ***Gutman v. A To Z Holding Corp.***, 91 A.D.3d 718, 936 N.Y.S.2d 316 [2d Dept. 2012]).

Defense counsel, until recently a solo practitioner, accepts full responsibility for the default and recognizes in hindsight that she should have enlisted the help of another attorney or law firm to assist her in meeting her litigation obligations during her illness. She requests that the court not visit on the innocent clients the harsh penalty of striking their Answer due to counsel's failures on account of serious and prolonged health issues.

As unfortunate as these situations are, the court is not without guidance in these all too familiar circumstances. Counsel's failure to seek assistance or substitution of other counsel during the period of an extended illness constitutes law office failure (*see* ***Chery v. Anthony***, 156 A.D.2d 414, 548 N.Y.S.2d 535 [2d Dept. 1989], *citing* ***Gregory v. Gibb***, 88 A.D.2d 988, 451 N.Y.S.2d 827).

When a default results not from an isolated, inadvertent mistake, but from repeated neglect, as here, there is no requirement that the court grant the requested relief (*see,* ***McCarthy v. Chef Italia***, 105 A.D.2d 992, 482 N.Y.S.2d 143). The court is constrained to reject Mr. Leone's contention that the repeated neglect of his attorney should not be imputed to him (*see,* ***Gutman v. A To Z Holding Corp.,*** 91 A.D.3d at 719, *citing* ***Greenwald v. Zyvith***, 23 A.D.2d 201, 259 N.Y.S.2d 387). Defense counsel's acknowledged failure to enlist the help of substitute counsel during her illness constitutes law office failure and will not relieve her clients of the default for failure to provide discovery in accordance with a conditional order of preclusion (***Glukhman v. Bay 49th St. Condominium, LLC***, 100 A.D.3d 594, 953 N.Y.S.2d 304 [2d Dept. 2012]).

In view of the absence of a reasonable excuse, it is unnecessary to consider whether the defendants sufficiently demonstrated the existence of a meritorious defense (*see* ***Segovia v. Delcon Constr. Corp.***, 43 A.D.3d 1143, 842 N.Y.S.2d 536; ***Mjahdi v. Maguire***, 21 A.D.3d 1067, 1068, 802 N.Y.S.2d 700; ***American Shoring, Inc. v. D.C.A. Constr., Ltd.***, 15 A.D.3d 431, 789 N.Y.S.2d 722).

On the cross motion the plaintiff seeks summary judgment on a theory of constructive trust on 50 % of the equity in the subject premises based on the fact that the parties, Kelly and Vito Leone, lived together in a confidential, same sex relationship between 1995 and 2004 when Vito Leone apparently ousted Kelly from the subject premises. Kelly's Verified Complaint alleges that when the house was purchased in 1996 it was understood between Kelly and Vito Leone that Kelly would always be treated as a fifty per cent (50%) owner notwithstanding that he was not named on the deed transferring title to the subject premises. Kelly attests that he contributed a Workers Compensation award in his favor in the amount of $8,000 to $10,000 toward the purchase of the house.

Kelly maintains that the only reason his name was not on the deed was because at the time the house was purchased, Kelly had serious credit problems that Leone said would impair their ability to obtain financing. Rather, the names of Vito's parents, defendants Mary Leone and Ralph Leone, in addition to Vito Leone's name, were put on the deed and the mortgage application to enhance the ability to obtain a mortgage.

Kelly's cross moving papers contain a hand-written document signed by Vito, Mary and Ralph Leone dated July 21, 2002, acknowledging that Mary and Ralph spent $125,000 to build an accessory apartment in the subject premises, and that although their names appear on the mortgage, Mary and Ralph Leone are not responsible to contribute toward the mortgage payments. The Verified Complaint alleges that Mary and Ralph Leone have a life tenancy in the subject premises deeded to them on May 10, 2009, approximately one year before the action was commenced. The complaint also seeks to vacate the life tenancy.

Kelly urges that the fair market value of the subject premises has been admitted by Leone because of the defendants' failure to respond to a Notice to Admit stating that the fair market value is equivalent to the current assessed value of $319,200.00 as determined by the Tax Assessor's Office of the Town of Brookhaven. The Notice to Admit attached a one page document dated May 15, 2012, entitled "TOWN OF BROOKHAVEN-TENTATIVE ASSESSMENT ROLL 2012/2013". No expert affidavit explaining the distinction, if any, between fair market value and assessed value accompanies the cross moving papers.

Because the defendants' Answer has been stricken does not mean that the plaintiff has automatically established his claim. This situation is analogous to a default proceeding where the defendant has failed to appear and the plaintiff does not have the benefit of discovery. In that situation, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists (*see* ***Woodson v. Mendon Leasing Corp.***, 100 N.Y.2d 62, 760 N.Y.S.2d 727, 790 N.E.2d 1156 [2003], citing 7 *Weinstein–Korn–Miller, N.Y. Civ. Prac.* ¶ 3215.24, at 32–326). Indeed, defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them (*Id.*, *citing* ***Rokina Opt. Co. v. Camera King***, 63 N.Y.2d 728, 730, 480 N.Y.S.2d 197, 469 N.E.2d 518 [1984]).

The necessary elements for the imposition of a constructive trust are: (1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance on that promise; and (4) unjust enrichment (***Maiorino v. Galindo***, 65 A.D.3d 525, 526, 883 N.Y.S.2d 589 [2d Dept. 2009]; *see* ***Sharp v. Kosmalski***, 40 N.Y.2d 119, 121, 386 N.Y.S.2d 72, 351 N.E.2d 721 [1976]; ***Pereira v. Glicker***, 61 AD3d 948, 949, 876 N.Y.S.2d 910 [2d Dept. 2009]; ***Nastasi v. Nastasi***, 26 A.D.3d 32, 37, 805 N.Y.S.2d 585 [2d Dept. 2005]). Notwithstanding the defendants' default and the striking of their Answer, neither the Verified Complaint nor Kelly's affidavit has established three of the essential elements of a claim for the imposition of a constructive trust. First, there is an issue of fact on the nature of the alleged promise. There is a distinction between being treated as a fifty per cent owner, and being the owner of a fifty per cent interest in the subject premises.

Second, the plaintiff has not established a transfer in reliance on the promise. The plaintiff hasn't demonstrated that he would not have contributed his workers compensation award in the amount of $8,000 to $10,000 toward the purchase of the house but for the promise to give him a fifty per cent interest in the subject premises. Finally, in light of all the proof on the cross motion, including proof that the two life tenants, Mary and Ralph, contributed $125,000 to add an accessory apartment, Kelly has not established that the defendants have been unjustly enriched.

Regarding the Notice to Admit the fair market value of the subject premises and the effect of the defendants' failure to respond to it, a Notice to Admit may only be used when the seeking party reasonably believes there can be no substantial dispute about the matter and when it is within the knowledge of the other party or ascertainable by him upon reasonable inquiry. David D. Siegel, **NEW YORK PRACTICE** § 364, at 602 (4th ed.). Even if the Notice is ignored, there will be no sanction if the matter as to which admission is sought is not attuned to any reasonable belief that the matter is free from substantial dispute. *Id.*

It is far from clear that the subject premises, albeit enhanced by an accessory apartment, has a fair market value of $319,200 merely because there is an assessed value in that amount listed in a one page document described as a "tentative assessment roll" and dated almost one year ago. For all these reasons the cross motion for summary judgment is denied.

DATED: 19 March 2013

HON. JOHN J.J. JONES, JR.
J.S.C.

CHECK ONE: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION