

All Points Capital Corp. v 60 Greenwich LLC

2014 NY Slip Op 30249(U)

January 27, 2014

Supreme Court, New York County

Docket Number: 651882/2010

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

BARBARA R. KAPNICK

PART 39

PRESENT: _____
Justice

Index Number : 651882/2010
ALL POINTS CAPITAL CORP.
vs.
60 GREENWICH LLC
SEQUENCE NUMBER : 002
VACATE DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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


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

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 1/27/14


_____, J.S.C.
BARBARA R. KAPNICK

- 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: IA PART 39**

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ALL POINTS CAPITAL CORP.,

Plaintiff,

- against -

DECISION/ORDER
Index No. 651882/10
Mot. Seq. No. 002

60 GREENWICH LLC, SASHA MUNIAK,
SERVICES MANGIA, INC., 74 SEVENTH, LLC,
MANGIA 23RD STREET LLC, MANGIA WALL LLC
and MANGIA 57, INC.,

Defendants.

-----x

BARBARA R. KAPNICK, J.:

Defendants move by Order to Show Cause:

- 1) pursuant to CPLR 2004, granting them an extension of time in which to make payment in the sum of \$11,922 which was due on October 10, 2013 under the Stipulation of Settlement, so-ordered by this Court on April 22, 2011, and reinstating the said Stipulation; and
- 2) pursuant to CPLR 5015(a)(1), vacating and discharging the judgment entered herein on November 7, 2013, reinstating the Stipulation of Settlement, and allowing defendants one business day in which to make the aforementioned payment of \$11,922.

The Court signed the Order to Show Cause on November 14, 2013 containing a Temporary Restraining Order ("TRO") pending the hearing of the motion, staying plaintiff from taking any action to enforce or collect upon the judgment, on condition that defendants post an undertaking in the amount of \$60,000. The Order to Show Cause was argued on December 4, 2013, and the TRO was continued pending a decision on the motion.

The Stipulation of Settlement entered into by the parties in this action on April 22, 2011 provides for 59 monthly payments of \$11,922 each, payable on the 10th day of each month commencing May 10, 2011, plus a balloon payment due on April 10, 2016. There is no dispute that the defendants made the first 29 payments, totaling \$345,738.

Defendants admit that they failed to make the payment due on October 10, 2013, and were then served with a Notice of Default dated October 15, 2013 and given 10 days to cure. Defendant Sasha Muniak ("Muniak") says he asked his attorney on October 21, 2013 to contact plaintiff's attorney to request an extra few days to make the payment based on a serious cash flow problem, but "got nowhere," so he hand-delivered a check to plaintiff's counsel on Friday, October 25, 2013, which was returned for insufficient funds, allegedly due to a bank error. The official bank check which was delivered to plaintiff's counsel as a replacement check on November 8, 2013 was rejected and returned on November 12, 2013, a judgment having already been entered on November 7, 2013 in the sum of \$1,113,880.88.

Defendant Muniak states that he believes they "complied with the letter and spirit of the stipulation by tendering payment during the cure period and promptly offering to substitute an official bank check for the returned check once [they] found out that [their] bank had returned the check in error. In any event

[he] believe[s] that the interests of justice should prevail."

(Muniak Aff. ¶ 14.)

In opposition, plaintiff argues that this is not the first time defendants have been late in making payment, but rather that this is defendants' ninth default in making timely payment in the past year.

In paragraph 10 of the Stipulation of Settlement, defendants expressly waived "any and all rights to take an appeal [or] to make an application to the court whether by motion, letter or otherwise" and also waived "any and all rights to object to the entry of judgment in the event of a default as provided at paragraph '5''¹ of the Stipulation.

¹ Paragraph 5 provides as follows:

In the event Defendants fail to make any of the aforesaid payments by the dates provided herein, (or should any of said payments be returned for insufficient funds) and should said Defendants fail to cure the default upon written notice as set forth in paragraph "4" above, or should there be a third default in any twelve month period, then pursuant to CPLR § 3215(i), Plaintiff shall have the following rights:

- (a) to enter judgment against the Defendants, 60 GREENWICH LLC, SASHA MUNIAK, SERVICES MANGIA, INC., 74 SEVENTH, LLC, MANGIA 23RD STREET LLC, MANGIA WALL LLC, and MANGIA 57, INC., pursuant to CPLR 3215 (i) for the principal amount of **\$805,182.34**, plus interest at the default rate of 18% per annum from November 6, 2009, plus attorneys' fees in the sum of \$70,316.50, and costs and disbursements of \$3,986.16, and statutory costs and fees giving credit for any payments received under this Stipulation of Settlement; and to take all steps permitted by law to enforce said judgment; and
- (b) to enforce its rights as a secured creditor.

Moreover, paragraph 4(b) of the Stipulation provides that defendants "shall be allowed only two events of default in any of the payments . . . in any twelve month period and be entitled to an opportunity to cure only two defaults in any twelve month period."

Since this was at least defendants' ninth default in the past twelve months, defendants were not entitled to an opportunity to cure. Thus, whether or not defendants' check was returned for insufficient funds in error, is to no avail.

Moreover, paragraph 5, quoted *supra*, provides that the plaintiff had the right to enter judgment "should there be a third default in any twelve month period."

It is well established that "[s]tipulations of settlement are favored by the courts and not lightly cast aside." *Hallock v State of New York*, 64 NY2d 224, 230 (1984). Thus, it is not for this Court to rewrite the settlement terms or to give defendants an additional opportunity to cure their defaults in violation of the express terms of the Stipulation of Settlement.

Accordingly, based on the facts and circumstances presented herein, this Court is compelled to deny defendants' motion to

vacate the judgment entered on November 7, 2013. Plaintiff shall give defendants credit for any additional payments made since November 7, 2013.

The temporary restraining order is hereby vacated.

This constitutes the decision and order of this Court.

Dated: January 27, 2014



BARBARA R. KAPNICK
J.S.C.

**BARBARA R. KAPNICK
J.S.C.**