SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 50

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P & S 95th Street Associates, LLC

Plaintiff,

Index No.
154511/13

Seq 006

Nilde Realty, Gaetano Sacrselli, Leonilde Scarselli, Phillipos Restaurant, Inc., d/b/a THE BARKING DOG, Kastriot Topalli and Arthur Llanaj

Defendants.

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PETER H. MOULTON:

Defendants Phillipos Restaurant d/b/a THE BARKING DOG, Kastriot Topalli and Arthur Llanaj ("defendants") move under CPLR 5015(a) (1) to vacate this court's decision and order dated March 13, 2014 (the "Decision"). The Decision was issued in connection with an unopposed motion for contempt. In the Decision, the court held that defendants were in contempt for failing to comply with two unambiguous prior orders of Judge Scarpulla to "remove the wooden platform at their restaurant." Alternatively, defendants move to reargue (CPLR 2221 [d]) or renew (CPLR 2221 [e]) the finding of contempt, and to stay or cancel the damages hearing that was proceeding before Justice Schecter, but which has now been completed.[1]

Defendants argue that the motion is timely as to renewal because there is no time limitation for renewal, and that it is timely as to vacatur and reargument because plaintiff did not serve notice of entry of the Decision or file proof of such service. Defendants further contend that they received

[1]This court limited the hearing to damages accruing after Judge Scarpulla's November 6, 2013 decision and order.

inadequate representation. News articles indicated that one of their attorneys, Daniel W. Issacs, had been "freaked out" as a result of being embroiled in a political scandal (but that was in February 2013). Issacs was not charged with any crime, but he testified in July, 2014 in connection with that scandal. Defendants' subsequent attorney, they contend, lacked expertise in litigation. Furthermore, plaintiff failed to comply with its own obligations under a June 12, 2013 order signed by Judge Scarpulla providing that when the sidewalk shed was built, it had to be raised to minimize the obstruction of the restaurant. Defendants point to the Building Code section 3307.6.2 which provides that certain sidewalk sheds must be constructed so as not to unreasonably obstruct the entrances and egresses of adjacent properties. Defendants also assert that the original plans for the sidewalk shed were illegal as the shed would have blocked a fire exit. Additionally, plaintiff could not have done the work in the winter months anyway, as conceded by plaintiff's attorney in his affirmation, submitted in connection with one of the prior motions.[2] Had an attorney appeared on March 13, 2014, submitted opposition papers, brought the relevant Building Code section to the court's attention, and noted plaintiff's non-compliance with its own obligations, the contempt order would not have been granted.[3] Therefore, defendants argue that the Decision should be vacated based on meritorious defenses and the excusable default of law office failure.[4] Further, based on

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[2]While this argument is presumably made to minimize the contempt, it is an argument which is better suited for the damages hearing before Judge Schecter.

[3]My court attorney recalls that an individual connected with the restaurant appeared on March 13, 2014. However, he could not appear for the restaurant which was a corporation required to appear by an attorney.

[4]The court does not condone attorney Issacs' failure to appear or submit papers in opposition to the contempt motion. Even if he no longer represented defendants, he should have filed an Order to Show Cause to withdraw from representation.

renewal or reargument, the court should alter its finding of contempt.

Plaintiff opposes the motion, asserting that it served notice of entry of the Decision by emailing and mailing a letter to attorney Issacs and another attorney on March 17, 2014 which attached the Decision. Plaintiff asserts that notice of entry need not take any particular form citing *Barie v Lavine* (46 AD2d 827 [3d Dept 1974] [letter attaching judgment was sufficient to constitute notice of entry]) and *S Cremona v Dell* (6 AD2d 719 [2d Dept 1958] [letter stating "[e]nclosed herewith please find a copy" of court findings and the judgment roll was sufficient to constitute notice of entry]). Since the motion to vacate was made more than one year after service of notice of entry, and reargument was made more than 30 days after service of notice of entry, the motion should be denied as untimely. Further, plaintiff maintains that there are no grounds for vacatur under CPLR 5015 because there is no "newly discovered evidence" or other requisite grounds cited. Plaintiff also asserts that the argument that defendants were relieved of their obligations, because plaintiff did not minimize obstruction to the restaurant, is speculative; defendants prevented plaintiff from erecting the shed in the first instance, thus making any attempt to minimize obstruction impossible.

In reply, defendants reiterate their arguments. They question whether plaintiff's counsel mailed the March 17, 2014 letter, noting that proof of service was not filed. They further question whether Issacs ever consented to efiling or to service by email. They further assert that the scaffold was eventually constructed without the need to remove the platform (which is supported by plaintiff's papers; apparently holes were drilled into the platform instead), and that the shed was only successfully constructed after defendants hired and paid for their own engineer. In a letter dated August 4, 2015 (NYSCEF Doc 133) unsolicited by the court, defendants stress they did not ignore

court orders. In a new argument, they point to their purported good faith efforts to comply by removing "half of the platform" prior to Judge Scarpulla's November 13, 2013 order. Defendants also raise the new argument that a bankruptcy stay was in effect for a period of time after Judge Scarpulla's June 12, 2013 order directed them to remove its wooden platform before August 1, 2013 (the restaurant filed a bankruptcy proceeding on or about July 30, 2013, one day before Judge Scarpulla's deadline).

Discussion

The motion is denied. Absent circumstances not present here, the sanctity of court orders can not be compromised by the belated arguments/explanations asserted here.

Even assuming that Issacs did not consent to service by efiling or email, the March 17, 2014 letter constituted notice of entry. Although no proof of service was filed, plaintiff's counsel's statement that the letter was mailed is not rebutted. Therefore, the motion is time-barred. Further, the facts mentioned in this motion are not "new facts" which could support vacatur. Nor do defendants present a reasonable justification for their failure to present certain facts to the court on March 13, 2014 sufficient to support renewal, where defendants have waited until now to raise those facts. While the court often excuses defaults based on law office failure, defendants have inexcusably delayed in raising these issues. Moreover, even if the motion was not time-barred, defendants should not be relieved of contempt based on their very belated *assertion* that plaintiff failed to comply with its own obligations under Judge Scarpulla's June 12, 2013 decision and order (*compare White v White*, 265 App Div 942 [2d Dept 1942] [where it appeared "without contradiction" that plaintiff failed to comply with the conditions imposed by the order, defendant should not have been held in contempt for failure to comply with other conditions imposed on it]).

Additionally while Judge Scarpulla's June 12, 2013 decision and order obligated both plaintiff and defendants to take certain actions, the November 6, 2013 decision and order was *solely directed* against defendants. Defendants did not move for relief from Judge Scarpulla's directive to "remove the wooden platform at their restaurant" until over two years later.[5] Even where the prior order is erroneous (so long as the court has jurisdiction), the prior order must be obeyed in the absence of a stay, reversal or modification of the order (*see e.g., Seril v Beinord Tenants Assoc.*, 139 AD2d 401 [1st Dept 1988]; *Marguiles v Marguiles*, 42 AD2d 517 [1st Dept 1973]). Although defendants contend that the bankruptcy filing stayed Judge Scarpulla's August 1, 2013 deadline to remove the wooden platform, the bankruptcy order does not support that argument. Rather, the bankruptcy order states that the stay "does not apply" to the June 12, 2013 order for the reasons stated on the record in the bankruptcy proceeding. Even assuming that defendants could be excused from performance based on their good faith belief that the stay negated any obligation to comply with the August 1, 2013 deadline (*see e.g, Davis-Taylor v Davis-Taylor*, 4 AD3d 726 [3d Dept 2004] [failure to comply based on mistaken belief is a defense to contempt]), the matter did not end there. Judge Scarpulla issued another decision on November 6, 2013 granting a motion for contempt "to the extent set forth in the accompanying order" and directed that defendants "must remove the wooden platform at their restaurant by November 13, 2013."[6] That decision and order was ignored (which defendants now attempt to excuse because plaintiff did not do what it had to do under the Building Code). The

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[5]A notice of appeal was filed in connection with Judge Scarpulla's June 12, 2013 decision and order. However, it appears that defendants went no further than filing a notice of appeal.

[6]In defendants' August 4, 2015 letter, counsel asserts that Judge Scarpulla did not find that his clients were in contempt but rather that she simply ordered compliance. Even if this were the case, it does not negate the fact that defendants were obligated to comply with her order.

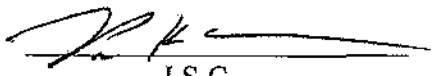
wooden platform was not removed until March 19, 2014 after the court issued the Decision holding defendants in contempt and directing that a proposed order include the potential for imprisonment. As defendants' counsel noted, this court expressed in a September 19, 2014 decision and order that an owner's need to gain access to adjacent buildings to perform improvements or repairs must be balanced with the interests of those adjacent owners or lessees. However, the court's interest in balancing the rights of all parties does not negate the fact that, under the circumstances here, it was incumbent on defendants to either obtain relief from the court orders or comply with them.[7]

It is hereby

ORDERED that defendants' motion is denied.

This constitutes the Decision and Order of the Court.

Dated: August 10, 2015



J.S.C.
HON. PETER H. MOULTON
J.S.C.

[7]The court credits defendants' current counsel, whose papers are of excellent quality.