Chen v R & K 51 Realty Inc.
2015 NY Slip Op 31526(U)
August 13, 2015
Supreme Court, Kings County
Docket Number: 509507/2014
Judge: Carolyn E. Demarest
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At an IAS Term, Com 1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13th day of August 2015.

PRESENT:
HON. CAROLYN E. DEMAREST, JSC.

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JING SHAN CHEN

Plaintiff,

-against-

R & K 51 REALTY INC.

Defendant,

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DECISION AND ORDER

Index No. 0509507/2014

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The plaintiff moves for a default judgment against the defendant pursuant to CPLR § 3215 for failure to answer the summons and verified complaint. The defendant opposes the motion.[1]

BACKGROUND

This action arises out of a signed Purchase Agreement contract entered into between the plaintiff, Jing Shan Chen, and the defendant, R & K 51 Realty, Inc., for the purchase of a condo apartment unit in a building the defendant planned to construct.

[1]Although the defendant filed a "cross-motion," the only relief sought is to deny the default motion and compel the plaintiff to accept the defendant's late answer.

The Condo Plan and Agreement

The complaint alleges that on May 1, 2013, the defendant agreed to sell the plaintiff a condo apartment in the building it planned to develop at 774 51st Street, Brooklyn, New York 11220 for $210,000. The contract was fully executed and the plaintiff paid the defendant a 10% down payment of $21,000, which was accepted and deposited by the defendant's former attorney, Chiu Kong Cheung. On September 3, 2013, the Defendant's Condo Plan was declared effective, as per filing information from the Office of the Attorney General.

On July 21, 2014, the defendant unilaterally terminated the contract of sale and returned the $21,000 down payment to the plaintiff. The defendant claimed that it had abandoned the project because it was having difficulty obtaining a Certificate of Occupancy from the New York City Department of Buildings. Three days later, on July 24, 2014, the New York City Department of Buildings issued a Certificate of Occupancy for the condominium project. On July 28, 2014, the plaintiff's attorney sent a letter to the defendant's attorney protesting the cancellation of the agreement. On July 31, 2014, the defendant filed for recording a formal Condo Declaration establishing a plan of condo ownership at the office of the New York City Department of Finance Office for the City Register.

On September 3, 2014, the plaintiff's attorney sent a second letter to the defendant's attorney questioning the factual basis for the cancellation of the contract and demanded a remedy. On September 29, 2014, the plaintiff's attorney sent a third letter to the defendant's attorney alleging fabrication of facts and a breach of contract by the defendant. The defendant and his representatives did not respond to any of the letters sent by the plaintiff's attorney.

[* 3]

On October 15, 2014, the plaintiff's attorney filed the present complaint for breach of contract and misrepresentation. The plaintiff seeks to recover specific performance of the Purchase Agreement or, in the alternative, damages[2] plus interest, costs and disbursements, reasonable attorney fees to the plaintiff's attorney, together with any other relief the Court finds to be just and proper.

The Service

The plaintiff served a copy of the summons and complaint on the defendant through the secretary of state pursuant to Business Corporations Law (BCL) 306(b) on October 15, 2014. On November 28, 2014 the Secretary of State served the summons and verified complaint with notice regarding availability of electronic filing of Supreme Court cases on the defendant.

The plaintiff also served upon each attorney known by the plaintiff to have represented the defendant the verified complaint, along with an accompanying letter dated January 13, 2015.[3] In a signed Affidavit of Mailing dated March 4, 2015, Jocelyn Meiling Liu, the secretary to plaintiff's attorney, swore that a copy of the summons and verified complaint was mailed to the defendant at its last-known address at 5110 7th Avenue, Brooklyn, NY 11220 by first-class mail. According to the United States Postal Service return receipt tracking system, the envelope was delivered to the defendant on March 7, 2015.

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[2]The damages alleged represent the difference between the market value of the condominium unit and the purchase price under the Purchase Agreement.

[3] Plaintiff provided an affidavit of service that, on January 15, 2015, the following attorneys received a copy of the summons and complaint: (1) defendant's former attorney Chiu Kong Cheung; (2) defendant's new attorney Jonathan Chen; and (3) defendant's attorney D. Feldman, who represented the defendant in filing the condominium plan before the Real Estate Finance Bureau, Office of the Attorney General of the State of New York.

DISCUSSION

Courts have the power to use their discretion in deciding to enter a default judgment. (*Bishop v Galasso*, 67 AD2d 753 [3d Dept 1979]; *see Capellino Abattoir, Inc. v Lieberman*, 59 AD2d 986 [3d Dept 1977]). The law and public policy favor "resolving disputes on their merits, and toward that end a liberal policy has been adopted with respect to opening default judgments in furtherance of justice so that parties may have their day in court." (*Picnic v Seatrain Lines, Inc.*, 117 AD2d 504, 508 [1st Dept 1986]; *see also Cappel v RKO Stanley Warner Theaters*, 61 AD2d 936 [1st Dept 1978]).

Under CPLR § 3215, default judgment may be entered when the moving party submits "proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing." (*Green Tree Servicing, LLC v Cary*, 106 AD3d 691, 692 [2d Dept 2013]; *citing Dupps v Betancourt*, 99 AD3d 855 [2d Dept 2012]; *quoting Atlantic Cas. Ins. Co. v RJNJ Servs.; Inc.*, 89 AD3d 649, 651 [2d Dept 2011]). Here, the plaintiff served the summons and complaint on the Secretary of State on November 28, 2014, effecting proper service pursuant to BCL 306(b)[4]. The plaintiff submitted a complete explanation of the facts and supporting documents in the complaint detailing the breach of contract and misrepresentation claims, including a copy of the service, a copy of the signed contract and rider, and the letters sent by the plaintiff's attorney to the defendant's attorneys. The plaintiff is seeking specific performance of the signed contract or damages if specific performance is unavailable. The defendant failed to respond to the complaint dated October 15, 2014 and did not provide a reasonable excuse for its default. The

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[4]Under NY Business Corporation Law Section 306(b), service of process on a corporation is complete when the Secretary of State or an authorized deputy personally receives the service.

defendant first appeared in this action with an Affirmation in Opposition to the default motion dated April 27, 2015. Upon the return of plaintiff's motion on April 29, 2015, the defendant acknowledged the jurisdiction of the Court[5] and the Court adjourned the motion to permit the defendant to file a cross-motion, which was filed on May 4, 2015. The Cross-Motion seeks to compel the plaintiff to accept defendant's late Verified Answer of April 29, 2015, but does not include the proposed answer. However, the plaintiff has supplied the answer that was proffered in his opposition. The defendant offers no excuse for failing to timely answer or make a motion to the court, and admits in his affidavit to having knowledge of this action in January 2015.

In written opposition to the default judgment motion, defendant argues that it did not receive proper service under CPLR §§ 308 and 311(a)(1), because the CEO, Mr. Qi Wang Huang, did not personally receive service of the summons and complaint. Furthermore, in its written opposition to the default motion, the defendant argues "It is also well established that service on a corporation through delivery of process to the Secretary of State is not personal delivery to the corporation or to an agent designated under CPLR 318," citing *Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co.* (67 NY2d 138, 142 [1986]) (Affirmation in Opposition of C. Jonathan Chen, Esq. at paragraph 14). However, under BCL 306(b), service on a corporation authorized to do business in New York is complete when the Secretary of State is served, and there is an affidavit from the plaintiff alleging that this occurred on November 28, 2014. "The affidavit of service constituted prima facie evidence that the defendant was validly served pursuant to CPLR 308(2)" (*Cavalry Portfolio Servs., LLC v*

[5]Despite its initial claims of lack of jurisdiction at oral argument, defendant acknowledged jurisdiction in court on April 29, 2015.

[* 6]

Reisman, 55 AD3d 524, 525 [2d Dept 2008]; *see also Wieck v Halpern*, 255 AD2d 438 [2d Dept 1998]).

CPLR § 3215(g)(4)(i) requires additional service by first class mail upon the defendant corporation at its last known address at least twenty days before the entry of judgment when a party is seeking a default judgment. The plaintiff provided an affidavit of mailing, signed by the plaintiff attorney's secretary, stating that the defendant was provided with additional service on March 4, 2015, pursuant to CPLR § 3215(g)(4)(ii). Under CPLR § 3215(g)(4)(ii), "Where there has been compliance with requirements of this paragraph, failure of the defendant corporation to receive the additional service of summons and notice provided for by this paragraph shall not preclude the entry of default judgment." The Appellate Division, Second Department has held, "the defendant's allegations that she did not personally receive notice of the summons in time to defend the action did not overcome the presumption of proper mailing." (*Cavalry Portfolio Servs., LLC,* 55 AD3d at 525; *see also De La Barrera v Hadnler,* 290 AD2d 476, 477 [2d Dept 2002]; *Udell v Alcamo Supply & Contr. Corp.*, 275 AD2d 453 [2d Dept 2000]; *Facey v Heyward*, 244 AD2d 452 [2d Dept 1997]). Furthermore, the court held that "the affidavit of service attesting that the summons and complaint were mailed to the defendant's correct residence address created a presumption of proper mailing and of receipt." (*Cavalry Portfolio Servs., LLC,* 55 AD3d at 525; *see also Engel v Lichterman*, 62 NY2d 943, 944-945 [1984]).

In his Affidavit in Opposition to the default motion, Qi Wang Huang, the CEO of R & K 51 Realty, Inc., states he was informed by his former attorney that the contract was cancelled pursuant to its terms and that the contract deposit was returned to, and accepted by, the plaintiff. In a letter to the plaintiff's attorney dated July 21, 2014, the defendant returned the plaintiff's down payment

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because there was a "problem in obtaining the Certificate of Occupancy for the subject premises and difficulties for the approval of the Condominium Offering Plan which is hereby abandoned by the seller." While the plaintiff did receive and deposit the check returned by the defendant, the plaintiff contends that depositing the down payment check is not indicative of an acceptance of the defendant's unilateral termination of the contract. The contract, signed by both parties, states in paragraph 14 that "The Purchase Agreement is contingent upon the Plan being declared effective. The Plan may be abandoned by the Seller at any time prior to its being declared effective and shall be abandoned and deemed abandoned if its has not been declared effective within the time prescribed by the plan." The plan was declared effective on September 3, 2013 by the Attorney General. The Certificate of Occupancy was granted by the NYC Department of Buildings three days after the letter was sent, on July 24, 2014, effectively showing that the plan was not abandoned by the defendant, and establishing the defendant's misrepresentation. The defendant has not offered a meritorious defense to the alleged breach of contract.

The defendant's answer, e-filed at 9:06 A.M. on April 29, 2015, the morning of the Court's motion return date, was not included in the defendant's cross-motion, but the plaintiff included it in its Affirmation in Opposition to defendant's cross-motion in order to thoroughly refute the claims made. The plaintiff notes that, pursuant to BCL 306(b), the answer should have been filed within 30 days of the completion of service. However, the defendant filed the answer, verified only by counsel, four months late with denials that strongly contradict the defendant's Affidavit in Opposition to the default motion. In paragraph 6 of the Affidavit in Opposition, defendant admits there was a contract of sale signed by both parties, that the defendant is a corporation formed in Brooklyn and that it is the owner of the Condominium Project. On the other hand, in paragraph 4 of the proposed Verified

Answer, defendant denies having filed the condominium plan and developed the property into a condominium project. In paragraph 5 of the proposed answer, defendant denies having knowledge that it filed applications with the NYC Buildings Department and denies having knowledge that the NYC Buildings Department issued a certificate of occupancy to the Condominium Project. As noted in the plaintiff's Affirmation in Opposition to defendant's cross-motion, "the defendant proposes that the Court should believe that the defendant built the Condominium Project without knowledge of any filing with NYC Buildings Department, yet somehow obtained a certificate of occupancy just three days after representing to the plaintiff that it was having problems obtaining the COO." Likewise, in paragraph 7 of the proposed answer, defendant denied filing a statement with the Office of the Attorney General to declare the Condominium Plan effective. However, according to the documentary evidence proffered by the plaintiff, the plan was declared effective by the Attorney General on September 3, 2013.

In the answer, the defendant offers five boilerplate affirmative defenses which are conclusory and fail to plead any supporting facts. Conclusory affirmative defenses that merely plead conclusions of law without any supporting facts are properly dismissed. (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2d Dept 2008]). The defendant claims that the complaint fails to join one or more parties indispensable for the just adjudication of the action, yet the defendant does not state who such parties are or provide any facts showing that there is an indispensable party. The defendant, without factual allegations in support, claims that the plaintiff's claims are barred by the doctrine of estoppel and the doctrine of laches, yet the plaintiff has demonstrated that the defendant was promptly notified of its objections to the defendant's actions and that the plaintiff promptly brought the action against the defendant. The defendant claims that the plaintiff's claims are barred by the doctrine of

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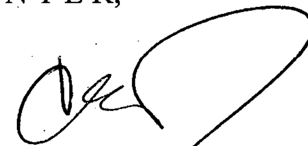
unclean hands, yet the defendant has not provided any supporting facts or documentation that would constitute unclean hands. The defendant's fifth affirmative defense is the "defendant reserves the right to assert additional affirmative defenses based on further investigation and/or discovery," but does not assert any defense to the plaintiff's claims.

The plaintiff has submitted proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering. The defendant has neither provided a reasonable excuse for default, nor a meritorious defense. The cross-motion to compel acceptance of the proposed Verified Answer is denied and plaintiff's motion for default judgment is granted.

CONCLUSION

The plaintiff's motion for default judgment is granted and the defendant's cross-motion is denied. The defendant is directed to forthwith transfer title to condominium unit 3A in the building located at 774 51st Street, Brooklyn, NY11220 to the plaintiff upon tender by plaintiff of the balance of the purchase price. The foregoing constitutes the decision and order of the court.

ENTER,



Carolyn E. Demarest
J. S. C.