Mid-Hudson Props., Inc. v Klein
2016 NY Slip Op 32974(U)
September 19, 2016
Supreme Court, Dutchess County
Docket Number: 50818/2015
Judge: James W. Hubert
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS
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MID-HUDSON PROPERTIES, INC.,

Plaintiff,

-against-

DECISION & ORDER

STEVEN KLEIN, MICHAEL VARBLE, KLEIN VARBLE & GRECO, P.C., KLEIN VARBLE & ASSOCIATES, P.C. and JOHN DOES 1-3,

Index No. 50818/2015
Motion Seq. No. 3

Defendants.
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Hubert, J.S.C.

Before the Court is a motion by the defendant Michael Varble (the Defendant) pursuant to CPLR § 5015 for an order of the Court vacating a decision and order dated April 6, 2016 (Hon. James Brands, JSC) wherein the adjudicating court rendered judgment in default against the Defendant for "fail[ing] to proceed with discovery as per the preliminary conference order and subsequent court order, fail[ing] to oppose the prior motion filed by plaintiff, and fail[ing] to appear at the last court conference on April 5, 2016."[1] The motion, accompanied by Attorney Affirmation and Affidavit of the Defendant, is opposed by the Plaintiff by Affidavit in Opposition and Memorandum of Law. The Defendant has replied by Attorney Affirmation. The Court has reviewed the submissions of the parties, including exhibits and legal argument. Upon due deliberation, the Court grants the motion of the Defendant and vacates the prior Decision and Order dated April 6, 2016.

The underlying cause of action involves allegations of breach of the terms and conditions of a five year lease between the Plaintiff, as landlord, and the above captioned defendants

[1] On April 19, 2016, Justice Brands recused himself from the case, and the matter was subsequently transferred to this Court. The instant motion was filed on or about May 26, 2016.

(herafter, the Defendants, including the Defendant Varble) as tenants. The action also pleads a cause of action under New York Debtor and Creditor Law § 276-a alleging fraudulent transfer and collection of fees with the intent to hinder, delay and defraud the Plaintiff.

Originally commenced in Supreme Court, New York County, venue of the case was transferred to Dutchess County by order dated January 23, 2015. The order arose from a motion by the Plaintiff to compel discovery and a cross motion by the Defendants to change venue.[2]

Following transfer, the matter first appeared before Justice Brands for preliminary conference on June 22, 2015 following a Request for Judicial Intervention filed by the Plaintiff a month earlier. At the preliminary conference, all of the above captioned Defendants were represented by defendant Klein Varble and Associates, P.C. (KVA), the defendant Steven Klein appearing on their behalf. A preliminary conference order was issued by Justice Brands setting forth dates for discovery demands, responses and depositions. Discovery was to be completed by October 15, 2015.

However, prior to the October completion date, the Plaintiffs filed a motion on August 28, 2015 (returnable September 25, 2015) which essentially renewed the application previously made before the Supreme Court, New York County (the application which had been denied with leave to renew before Supreme Court, Dutchess County in the afore stated January 23, 2015 Order).[3] The motion eventually went unanswered by all Defendants (including defendant Klein).

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[2] While resolving the cross motion, the Supreme Court, New York County decision on Plaintiff's motion was denied with leave to renew before the Supreme Court, Dutchess County.

[3] In Justice Brands' Decision and Order dated April 6, 2016, the date of the Plaintiff's motion is stated as October 16, 2015. This appears to be an error in as much as the filing date of the motion is recorded in e-Courts as August 28, 2015, and the motion papers reflect that date as well.

Contained within the June 20, 2016 Attorney Affirmation filed on behalf of the Defendant (Ex. H.) are copies of correspondence from the Defendant Varble directed to Justice Brands. The letters seek extensions of time to answer the August 28, 2015 motion. The Defendant's letter to the court dated October 8, 2015, for example, recites the extended dissolution of the defendant law firm Klein Varble and Associates, P.C., which had been representing the Defendant, as one of the reasons for the request. In addition, office relocation complications, resulting from the Defendants' now dissolved and severed practices, had imposed further impediments to a timely response to the motion by the Defendant. This situation apparently carried on for quite some months and it is averred by the Defendant that the dissolution was acrimonious, further impeding coordinated response among the Defendants.

On February 10, 2016, Justice Brands rendered a decision on the unopposed August 28, 2015 motion of the Plaintiff. He ordered that the answer of the Defendants would be stricken "unless within thirty (30) days hereof defendants serve discovery responses and thirty (30) days thereafter the individually named defendants appear for depositions at a mutually-agreed date, time, and location." A status conference was ordered for March 1, 2016.

By letter order dated March 10, 2016, the March 1st conference was adjourned by Justice Brands at the request of defendant Klein. On April 5, 2016, the status conference before Judge Brands was held and the defendant Steven Klein appeared.[4] The Defendant Varble did not. Discovery documents responsive, at least in part, to the February 10, 2016 order were delivered to the Plaintiff at the conference by defendant Klein, however Klein informed the court that he

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[4] At different times in the record before the Court, the conference date is alternately stated to have occurred on April 5, 2016 or April 4, 2016. Whichever date it was is of no significance as to the issues to be determined in the motion.

was appearing solely on his own behalf. Responding to "an oral application [by the Plaintiff] in court to strike the defendants' answer . . . and [to the] court's prior order" Justice Brands granted the Plaintiff's oral application striking so much of the answer to the instant complaint as applied to Defendant Varble. The court denied the Plaintiff's motion as to defendant Klein, permitting Klein to file an amended answer and assert counter and/or cross claims within fifteen (15) days.

Regarding the failure of all Defendants to present written opposition to the Plaintiff's motion (as recited in the prior court's decision and order dated April 6, 2016), "[Klein] stated on the record in open court [on April 5, 2016] that he relied on a written agreement between himself and Varble which arose during the 'winding down' phase of their partnership wherein it was agreed that Varble would litigate this matter." Justice Brands thereby ruled that Klein had presented a reasonable excuse for his default based upon his (Klein's) reliance on the orally averred written agreement wherein Defendant Klein would "prosecute this matter." As far as this Court can determine, the "written agreement" was not actually produced before the court at the April 5th conference, however acknowledgment of the agreement by Varble does appear in his Affidavit submitted on the instant motion (see, Affidavit of Michael A. Varble dated April 18, 2016, Ex. B, annexed to Affidavit of Michael A. Varble dated May 23, 2016).

Justice Brands, in his April 6th decision and order, further stated that "Klein also has a potentially meritorious defense as to his personal liability for the debt, since it is undisputed that there is no personal guaranty on the lease and Klein stated that the dissolution of [defendant Klein Varble & Greco, P.C., hereinafter KVG,] and establishment of KVA was not intended to

circumvent debtor-creditor laws but instead resulted from former partner Greco leaving KVG."[5]

The instant motion by the Defendant, while premised on CPLR § 5015 on its Notice page, is equally, if not more properly, governed by CPLR § 3126, which addresses discovery non-compliance sanctions. It is entitled "Penalties for refusal to comply with order or to disclose." Indeed, the motion by Plaintiff to strike the answer of the Defendants, which Justice Brands granted as to Defendant Varble but not as to defendant Klein, was premised on the alleged refusal of all Defendants to comply with the discovery demands of the Plaintiff, and discovery orders of the court, over an extended period of time. Judge Brands' decision and order dated April 6, 2016 striking Defendant Varble's answer was specifically addressed to ". . . Varble['s] fail[ure] to proceed with discovery as per the preliminary conference order and subsequent court order . . ."[6] However, in that same decision, Justice Brands declined to strike the answer as to the defendant Klein in no small part because: 1) Klein appeared on April 5, 2016 and produced discovery documents; 2) Klein proffered a reasonable excuse (Defendant Varble, was to "prosecute this matter"); and, 3) Klein put forward a potentially meritorious defense as to liability under the lease terms as well as under New York Debtor and Creditor Law § 276-a. In any event, both sides have argued the matter under the case law and standards applicable to both CPLR § 3126 and CPLR § 5015, so neither side is prejudiced by this Court's reference to or

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[5] On or about December 11, 2015, Kevin Greco tendered his resignation as an attorney pursuant to 22 NYCRR 691.9, and was subsequently disbarred and ordered to "desist and refrain from . . . practicing law in any form . . ." by order of the Appellate Division, Second Department. See, Ex. O, annexed to June 20, 2016 Attorney Affirmation filed on behalf of the Defendant.

[6] This is not to say that failure of the Defendant to oppose the August 28, 2015 motion of the Plaintiff, and failure to appear at the April 5, 2016 conference were not factors. Justice Brands noted these factors in his decision. However it is non-disclosure that is the central issue underpinning the judgment the Defendant seeks to vacate.

analysis under the two sections.

It is well settled that a party seeking to vacate a judgment entered against them must establish two criteria under CPLR § 5015: a reasonable excuse for the default and a meritorious defense. *See, e.g., HSBC Bank v. Rotimi*, 121 A.D.3d 855, 995 N.Y.S.2d 81 (2d Dep't 2014). Indeed, the Plaintiff's Memorandum of Law cites no fewer than twenty (20) cases reciting this long standing principle. Interestingly, virtually all of the cited cases involve actions (foreclosure for the most part) where the defendant failed to timely answer the complaint and sought permission to file a late answer. As stated above the dispute in the instant matter involves not a failure to appear in the action *ab initio*, but a failure to respond to discovery demands, file written opposition to a motion, and appear at a scheduled court conference. This may be regarded as a distinction without a difference (after all, a judgment is a judgment) but the analysis under CPLR 3126 has different elements.

The principal case relied upon by the Defendant is *Harris v. City of New York*, 211 A.D.2d 663, 622 N.Y.S.2d 289 (2d Dep't 1995), a case which has been cited favorably (and many times) over the years as setting forth what must be shown before a court may render a judgment striking a party's pleadings under CPLR § 3126. The elements are stated clearly therein: "It is well settled that the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious or in bad faith." *Supra*, at 664. Willful and contumacious conduct can be inferred from repeated failures to comply with court orders directing disclosure and inadequate excuses offered to justify the defaults. *Harris, supra,* citing *Espinal v. City of New York*, 264 A.D.2d 806 (citation omitted); *Porreco v. Selway*, 225 A.D.2d 752, 753 (citation omitted); *DeGennaro v. Robinson*

Textiles, 224 A.D.2d 574 (citation omitted).

The relevant court orders in the instant matter are two: 1) the preliminary conference order on June 22, 2015, setting October 10, 2016 as the date for conclusion of discovery between the parties; and, 2) the February 10, 2016 order following Plaintiff's unopposed motion to strike the Defendants' answer. Noncompliance with the first order (by itself) would not appear to satisfy the "clear showing requirement," especially since the Plaintiff's motion was filed in advance of the close of discovery. The Plaintiff's August 28, 2015 motion to strike pre-dated the October, 2015 discovery cut-off date by nearly two months.

The Defendants' failure to abide by the February 10, 2016 order, on the other hand, could certainly qualify as contumacious conduct, especially since the order specifically stated that the answer of the Defendants would be stricken "unless within thirty (30) days hereof defendants serve discovery responses and thirty (30) days thereafter the individually named defendants appear for depositions at a mutually-agreed date, time, and location." However, it is clear from Justice Brands April 6, 2016 decision that substantial document discovery was provided at the ordered April 5, 2016 status conference, so much so that Justice Brands denied Plaintiff's request to strike the answer as to defendant Klein and permitted amendment of the answer by Klein so as to include defenses, counter-claims and cross-claims. It appears, then, that what must have tipped the scales against Defendant Varble was his failure to appear at the April 5th status conference.

This is an important point in resolving the instant motion as it pertains to CPLR § 3126. It appears on the record before this Court that significant relevant evidence, in the form of an e-mail chain between the Defendant and Klein, shows that the document discovery given to the

Plaintiff by Klein at the April 5th conference was substantially, though not entirely, compiled by Defendant Varble (see, Ex. I, annexed to June 20, 2016 Attorney Affirmation filed on behalf of the Defendant; see, Ex. A annexed to Affidavit of Michael A. Varble dated May 23, 2016). Though not complete, the discovery provided to Plaintiff by defendant Klein at the conference must have been enough to satisfy the court that the delay in production did not constitute a "clear showing" of contumacious non-compliance. Thus, if it can be stated that the document production handed over by defendant Klein was enough to spare him the axe, it is difficult to for this Court to comprehend why it should not spare Defendant Varble as well.

Of course there is the fact that the Defendant did not appear at the April 5th conference. By his own admission the Defendant "agreed to be the shareholder [of KVA] responsible for the litigation between Plaintiff and Defendants" (*see*, Affidavit of Michael A. Varble dated April 18, 2016, Ex. B, annexed to Affidavit of Michael A. Varble dated May 23, 2016). Nonetheless, the Defendant avers in his Affidavit that "Klein advised me he would . . . handle [the] upcoming court appearance on behalf of all Defendants." While that statement supports the Defendant's own contention, it could well be regarded as self serving testimony given the judgment levied against the Defendant on April 6, 2016.

On the other hand, defendant KVA was still the attorney of record. Klein had appeared on behalf of KVA at the preliminary conference on June 22, 2015. The March 9, 2016 letter from defendant Klein to Justice Brands makes no mention of non-representation by Klein of the other Defendants, and Defendant Varble's name does not appear on the "CC" portion of the correspondence to indicate notice to him. Klein's April 5, 2016 court appearance, wherein he stated that he no longer represented KVA, appears to be the first time this issue was presented to

the court. While, the e-mail chains previously referenced do not explicitly state that Klein would appear for all Defendants, Varble's assertion that he believed Klein was appearing at the conference "on behalf of all Defendants" is not without foundation.[7] Was Defendant Varble's failure to appear at the conference the product of mis-communication, or was it "willful, contumacious or in bad faith." In this Court's view, the record on this point is ambiguous and falls short of "a clear showing." *Harris, supra.* Accordingly, this Court is unwilling to deny the Defendant's motion on the "reasonable excuse" point alone.

Turning to consideration of the motion under CPLR § 5015, the same question - i.e. has the Defendant posited a reasonable excuse for failing to provide discovery and/or failing to appear at the April 5th conference - must be answered.[8] The foregoing analysis under CPLR § 3126 essentially answers that question. Without rehashing the particulars, discovery was provided to the Plaintiff by defendant Klein at the April 5, 2016 conference. Compiled by both Klein and the Defendant, the discovery turned over to the Plaintiff proved sufficient to forestall judgment against Klein. As to Defendant Varble's failure to appear at the conference, this Court concludes that Defendant Varble's belief that Klein was appearing on Varble's behalf was reasonable under the circumstances.

As to the second question - does the Defendant have a meritorious defense - the Court can

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[7] An e-mail from Klein to Varble dated February 11, 2016 (the day after Justice Brands' order) asks: "Would you mind if I do the [discovery] response?" Varble responds: "Go right ahead. Just give me a copy of the responses please." Klein then asks for the file, Varble responds that "Loretta is copying the file and will drop it off when she is done." It then appears the file was delivered the following day.

[8] As far as can be determined from the submissions before the Court, depositions were not scheduled by any of the parties prior to the April 5, 2016 conference.

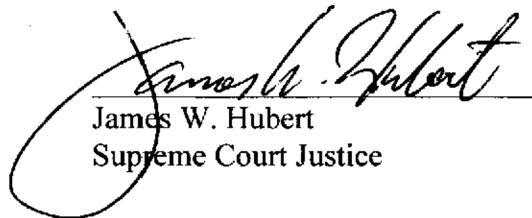
find no reason in the record before it to depart from Justice Brands' assessment, to wit: that the individual defendants have "a potentially meritorious defense as to . . .personal liability for the debt, since it is undisputed that there is no personal guaranty on the lease and . . . the dissolution of KVG and establishment of KVA was not intended to circumvent debtor-creditor laws but instead resulted from former partner Greco leaving KVG" (Attorney Affirmation dated June 20, 2016 filed on behalf of the Defendant at ¶¶ 48 - 51). Given the factual underpinning for Kevin Greco's departure from the firm (which culminated in his disbarment), the dissolution of KVG was inevitable and formation of KVA a predictable outcome. Under the circumstances, it would be difficult to regard dissolution of KVG and formation of KVA as evidence of fraudulent intent as a matter of law. The Defendant also avers, without opposition, that "the dissolution occurred prior to any alleged debt being owed to Plaintiff and prior to any litigation being commenced." If true, and undisputed, this would constitute strong evidence against the allegation of fraudulent intent (Attorney Affirmation dated June 20, 2016 filed on behalf of the Defendant at ¶¶ 52 - 57). Under CPLR § 5015 the requisite elements, a reasonable excuse for the default and a meritorious defense, have been made out in the papers before the Court. Accordingly, the Defendant's motion to vacate the default is granted, and it is hereby,

ORDERED, that the Defendant Varble's Answer, as struck, shall be reinstated, and it is further

ORDERED, that the parties shall appear before the Court on October 14, 2016 at 10:00 in the forenoon of that day for a status conference.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
September 19, 2016



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