

Valiotis v Bekas

2017 NY Slip Op 32906(U)

July 16, 2017

Supreme Court, Queens County

Docket Number: 23426/10

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

EFSTATHIOS VALIOTIS,

Index No. 23426/10

Plaintiff,

Motion

Date April 4, 2018

- against-

Motion

DEMETRIOS BEKAS, VAIA BEKAS, MARATHON
NATIONAL BANK OF NEW YORK, ZELOUF
INTERNATIONAL CORP., NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, GEORGE
KOUVARAS, and PIROS,

Cal. No. 107

Motion

Seq. No. 23

Defendants.

The following papers read on this motion by defendant, Vaia Bekas, appearing in a self-represented capacity, pursuant to CPLR 2221 and CPLR 5015, to set aside and vacate the order dated February 9, 2012, and entered on February 10, 2012, insofar as it granted the branches of the motion by plaintiff for summary judgment on the complaint against her, and to strike her answer and counterclaims, and upon vacatur, to dismiss the complaint insofar as asserted against defendant, Vaia Bekas, pursuant to CPLR 3212, or to dismiss the complaint pursuant to CPLR 3215(c), 3216, 3404 and 22 NYCRR 202.27, to vacate the judgment entered upon the filing of an affidavit of confession of judgment, and to direct an accounting and an inquest on the issue of liability and damages, pursuant to CPLR 3017(a), or in the alternative, pursuant to CPLR 3001, for a judgment declaring the rights and other legal relations of the parties to a justiciable controversy.

Papers
Numbered

Notice of Motion - Affirmation - Exhibits..... 1-3
Affirmation in Opposition - Exhibits..... 4-6

Upon the foregoing papers, it is ordered that the motion is determined as follows:

In August 2004, Demetrios Bekas and his wife, Vaia Bekas, executed a promissory note in favor of Efstathios Valiotis in the principal amount of \$400,000.00, plus interest. As security for the note, Demetrios Bekas and Vaia Bekas gave a mortgage on their real property known as

25-36/25-38 31st Avenue, Astoria, New York (comprised of two tax lots, i.e. Block 598, Lots 40 and 41). Demetrios Bekas thereafter transferred his ownership interest in the property to Vaia Bekas by deed dated March 1, 2005 and recorded on March 23, 2005.

Plaintiff commenced this action on September 15, 2010, alleging that defendants, Demetrios Bekas and Vaia Bekas, defaulted in payment under the terms of the mortgage and note by failing to make the payment of interest on moneys advanced which became due and payable since January 1, 2005. In the complaint, plaintiff alleges that as a consequence, it elects to accelerate the amount due under the mortgage. Plaintiff seeks foreclosure of the mortgage and to adjudge defendants, Demetrios Bekas and Vaia Bekas, to be liable for any deficiency remaining after foreclosure sale of the mortgaged premises.

Defendant, Demetrios Bekas, and his wife, defendant, Vaia Bekas, each appearing in a self-represented capacity, served answers, asserting various affirmative defenses and interposing counterclaims. Plaintiff moved for summary judgment against defendants, Demetrios Bekas and Vaia Bekas, pursuant to CPLR 3212, to strike the answers and counterclaims of defendants, Demetrios Bekas and Vaia Bekas, for leave to amend the caption and for leave to appoint a referee. Defendant, Demetrios Bekas, appearing in a self-represented capacity, submitted papers in opposition, on behalf of himself and purportedly on behalf of defendant, Vaia Bekas. Defendant, Vaia Bekas, failed to submit any opposition papers herself, or otherwise appear in relation to the motion. By memorandum decision dated June 2, 2011, the Hon. David Elliot rejected Demetrios Bekas's submission of opposition papers on behalf of defendant, Vaia Bekas, by noting the absence of proof that defendant, Demetrios Bekas, was an attorney admitted in good standing and licensed to practice law in New York, or was acting as attorney-in-fact for Vaia Bekas pursuant to an executed power of attorney. By order dated February 9, 2012, and entered on February 10, 2012, Justice Elliot granted the motion by plaintiff.

Defendant, Demetrios Bekas, appealed, as limited by his brief, from so much of the order of Justice Elliot entered on February 10, 2012, as granted those branches of plaintiff's motion which were for summary judgment on the complaint insofar as asserted against him and to strike his answer. By order of the Appellant Division, Second Department, the order entered on February 10, 2012, was reversed insofar as appealed from, on the law, and those branches of plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant, Demetrios Bekas, and to strike that defendant's answer were denied (*Valiotis v Bekas*, 106 AD3d 992 [2d Dept 2013]). The Appellate Division determined that plaintiff had established his *prima facie* entitlement to summary judgment on the complaint insofar as asserted against defendant, Demetrios Bekas, but that in opposition, Demetrios Bekas, raised a triable issue of fact regarding his affirmative defense that he was fraudulently induced into executing the note and mortgage by plaintiff's misrepresentations, upon which Demetrios allegedly relied because of his relationship of trust and confidence with plaintiff (*see id.* at 993).

Defendant, Demetrios Bekas, subsequently commenced a third-party action against Valiotis, his wife Stamatiki Valiotis, Rivercity, LLC, and Top Cove Associates, Inc. (Top Cove) (the Valiotis defendants), asserting numerous claims sounding in fraud and breach of fiduciary duty and seeking to impose a constructive trust on real property to which Stamatiki holds title.¹ The Valiotis defendants moved, pursuant to CPLR 3211(a), to dismiss the third-party complaint insofar as asserted against them. By order of the Hon. David Elliot, entered on June 5, 2014, that branch of the motion of the Valiotis defendants which was, pursuant to CPLR 3211(a), to dismiss the third-party complaint insofar as asserted against each of them, was granted. Defendant, Demetrios Bekas, appealed. By order of the Appellate Division, Second Department, the order entered on June 5, 2014, insofar as was appealed from, was affirmed (*see Valiotis v Bekas*, 145 AD3d 707 [2d Dept 2016]). The Appellate Division determined that Demetrios Bekas's third-party claims, alleging fraud and breach of fiduciary duty with regard to the judgment of confession and the sale of Top Cove stock were barred by the doctrines of *res judicata* and collateral estoppel. (The claims by Demetrios Bekas alleging fraud and breach of fiduciary duty with regard to the judgment by confession and the sale of Top Cove stock were raised and summarily dismissed in *Zelouf Int. Corp. v Rivercity, LLC*, [Supreme Court, Queens County, Index No. 18790/2010] [123 AD3d 1114 (2d Dept 2014)]). The Appellate Division additionally determined that Demetrios Bekas, third-party plaintiff, lacked standing to pursue a derivative action on behalf of Top Cove and that the third-party complaint failed to state a cause of action for a constructive trust.

The case was assigned for trial, and on the scheduled trial date of November 27, 2017, both defendants, Demetrios Bekas and Vaia Bekas, appeared in court, each acting in a self-representative capacity. The other named defendants did not appear. At such time, plaintiff's counsel orally moved for an order of reference and judgment of foreclosure and sale, asserting that the answer of defendant, Vaia Bekas, had been stricken by order entered on February 10, 2012, that defendant, Demetrios Bekas had transferred his ownership interest in the property to defendant, Vaia Bekas (prior to the institution of the action), and the Appellate Division, Second Department had ruled against defendant, Demetrios Bekas, in his appeal relative to his fraud claims (in his third-party complaint) (*Valiotis v Bekas*, 145 AD3d 707). Defendants, Demetrios Bekas and Vaia Bekas, opposed the motion. The court orally granted plaintiff's motion, so ordered the minutes and instructed plaintiff's counsel to settle judgment on notice. Plaintiff and defendants, Demetrios Bekas and Vaia Bekas, have served notices of settlement of proposed orders/judgment.²

¹ Bekas also asserted claims against Valiotis's attorney, Michael Papagiannopoulos, for aiding and abetting the alleged fraud with regard to the judgment by confession and the sale of stock. Such claims were dismissed (*see Valiotis v Bekas*, 145 AD3d 707).

² No judgment or order of reference has been signed as of this date.

Defendant, Vaia Bekas, now moves to vacate the order entered on February 10, 2012. Plaintiff opposes the motion. The remaining defendants have not appeared in relation to the motion.

To vacate a default in opposing a motion, pursuant to CPLR 5015(a)(1), the moving party is required to demonstrate a reasonable excuse for his or her default and a potentially meritorious opposition to the motion (*see Chase Home Finance, LLC v Weinfeld*, 159 AD3d 867 [2d Dept 2018]; *New Century Mtge. Corp. v Chimmiri*, 146 AD3d 893, 894 [2d Dept 2017]).³ Defendant, Vaia Bekas, has failed to offer any reasonable excuse for her failure to respond to plaintiff's summary judgment motion (*see OCI Mortg. Corp. v Murphy*, 258 AD2d 633 [2d Dept 1999]). Under such circumstances, the court need not address whether defendant, Vaia Bekas, has set forth a potentially meritorious opposition to the motion by plaintiff (*see Desuze v Johnson*, 154 AD3d 736, 737 [2d Dept 2017]).

That branch of the motion by defendant, Vaia Bekas, to vacate so much of the order entered on February 10, 2012, as granted plaintiff's motion for summary judgment on the complaint against her and to strike her answer, is denied. To the extent defendant, Vaia Bekas, moves, pursuant to CPLR 3212, to dismiss the complaint asserted against her for failure to properly serve the notices required, pursuant to RPAPL 1303 or 1304, and based upon fraud in the inducement, oral modification, waiver, estoppel and laches, summary judgment has already been granted against her and her answer has been stricken pursuant to the subject order and vacatur of that order has been denied herein (*see Flagstar Bank, FSB v Damaro*, 145 AD3d 858 [2d Dept 2016]; *Pritchard v Curtis*, 101 AD3d 1502, n 2 [3d Dept 2012]).

With respect to that branch of the motion to dismiss the complaint insofar as asserted against defendant, Vaia Bekas, pursuant to CPLR 3215(c), that subdivision does not apply where, as here, the defendant served an answer and summary judgment was granted against her (*see Myers v Slutsky*, 139 AD2d 709, 710 [2d Dept 1988]).

That branch of the motion by defendant, Vaia Bekas, to dismiss the complaint insofar as asserted against her, pursuant to CPLR 3216 and 22 NYCRR 202.27, is denied. Defendant, Vaia Bekas, makes no claim she, or the court, served a 90-day notice, pursuant to CPLR 3216. Plaintiff served and filed a note of issue. Nor has defendant, Vaia Bekas, shown that she

³ Such a motion must be "made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party" (CPLR 5015[a][1]; *see New Century Mtge. Corp. v Chimmiri*, 146 AD3d at 894). To the extent defendant Vaia Bekas did not make her motion within the one-year time frame contemplated by CPLR 5015(a)(1), plaintiff has failed to demonstrate service of a copy of the order with written notice of its entry upon her (*see* CPLR 5015[a][1]).

appeared at a scheduled call of a calendar or conference where plaintiff failed to appear (*see* 22 NYCRR 202.27[b]).

That branch of the motion by defendant, Vaia Bekas, to dismiss the complaint insofar as asserted against her, pursuant to CPLR 3404, is denied. The case is not marked “off” and has not been struck from the calendar within the meaning of CPLR 3404.

That branch of the motion by defendant, Vaia Bekas, to vacate the judgment pursuant to CPLR 3218 and in the interest of substantial justice, is denied. It appears that defendant, Vaia Bekas, contends the judgment entered against defendant, Demetrios Bekas, in the action entitled *Valiotis v Bekas*, (Supreme Court, Index No. 13048/2004), upon the filing of an affidavit of confession of judgment, is a product of fraud and was entered and docketed in violation of its terms. Defendant, Vaia Bekas, however, lacks standing to vacate the judgment insofar as she did not sign the affidavit of confession of judgment and is not the judgment debtor. She also does not offer proof that the judgment was improperly docketed against the subject property.

That branch of the motion by defendant, Vaia Bekas, pursuant to CPLR 3017(a), for an accounting, an inquest “for liability and damages,” and a declaratory judgment, is denied. Defendant, Vaia Bekas, did not assert a counterclaim seeking an accounting, declaratory relief or damages in her answer, and the counterclaim for rescission was dismissed pursuant to the order dated February 9, 2012, and entered on February 10, 2012. Although the court has the discretion to “grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just” (CPLR 3017[a]; *see Rock v Rock*, 100 AD3d 614, 617 [2d Dept 2012]), defendant, Vaia Bekas, has failed to demonstrate an accounting, a declaration, or an award of damages is appropriate. To the extent a dispute may exist as to the amount due and owing to plaintiff pursuant to the mortgage, it may resolved after a reference, pursuant to RPAPL 1321 (*see Crest/Good Mfg. Co. v Baumann*, 160 AD2d 831, 832 [2d Dept 1990]).

Dated: July 16, 2018

DARRELL L. GAVRIN, J.S.C.