

Jean v Csencsits

2018 NY Slip Op 33856(U)

June 5, 2018

Supreme Court, Orange County

Docket Number: 2154/2016

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X

MICHAEL JEAN,
Plaintiff,

-against-

WILLIAM AUGUST CSENCISITS a/k/a WILLIAM A. CSENCISITS,
Defendant.

-----X

SCIORTINO, J.

DECISION AND ORDER
INDEX NO.: 2154/2016
Motion Date: 04/09/2018
Sequence No. 2

ORIGINAL

The following papers numbered 1 to 35 were read on defendant's application, by Order to Show Cause, for an order vacating the prior Orders entered in this matter; enjoining the Court-appointed Receiver from conveying the subject parcel of real property; dismissing the Verified Complaint, and directing the Orange County Clerk to cancel the Notice of Pendency:

<u>PAPERS</u>	<u>NUMBERED</u>
Order to Show Cause / Affirmation (Treybich) / Affidavit (Csencsits) / Affirmation (Goldberg) / Exhibits A - V	1 - 26
Affirmation in Opposition (Bramante) / Affidavit (Vinci) / Affidavit (Jean) / Exhibits 1 - 5	27 - 34
Reply Affirmation (Treybich)	35

Upon the foregoing papers, defendant's application is denied.

This is an action to compel defendant to perform on a contract for the sale of a certain parcel of real property situated in Greenwood Lake, Town of Warwick, New York (the premises). By Order dated August 26, 2016, plaintiff's *ex parte* application to extend the time for service, and for leave to effectuate service via alternative means pursuant to Civil Practice Law and Rules § 308(5), was granted. By the terms thereof, plaintiff was directed to serve defendant by leave and mail at the

address supplied by defendant on the contract and by e-mail. By further Order dated July 27, 2017, plaintiff's affidavit of service was deemed filed *nunc pro tunc* as of September 29, 2017,¹ and service of any future motions was directed by e-mail to the address indicated in the August 26, 2016 Order.

Having received no response to the Summons and Verified Complaint, plaintiff filed a motion for default judgment on or about September 20, 2017. By Decision and Order dated November 28, 2017, plaintiff's motion was granted. A receiver was appointed for the purpose of executing a deed conveying the premises to plaintiff in accordance with the terms of the Court's Decision and Order. Defendant's former attorney was directed to transfer to the receiver the \$6,300.00 deposit held by him.

Plaintiff additionally sought a determination of damages and attorneys' fees upon submission of affidavits and affirmations. That part of plaintiff's application was granted as to plaintiff's entitlement to recover provable damages, and denied insofar as plaintiff sought to prove such damages by affidavit. The matter thus was scheduled for inquest on January 26, 2018.

Order to Show Cause

On January 24, 2018, defendant filed the instant application, by Order to Show Cause, seeking an order vacating the prior Orders in this matter; excusing defendant's default in pleading; enjoining the Receiver from conveying the premises to plaintiff; dismissing the complaint, and canceling the notice of pendency.

¹As indicated in the Court's Decision and Order dated November 28, 2017, this date should have read September 29, 2016.

Discussion

Alternative Service

Defendant first argues that the Court improvidently exercised its discretion in granting plaintiff's application for alternative service. Defendant contends that plaintiff did not sufficiently show that service pursuant to Civil Practice Law and Rules § 308(1), (2), and (4) was impracticable, as plaintiff did not diligently attempt to locate defendant at several potential addresses contained within a skip trace appended to plaintiff's application. Notably, none of those addresses are within the State of New York, and thus service at such addresses pursuant to sections 308(1), (2) or (4), all of which require service within the State, is impossible.

Defendant's attorney also omits any reference to the fact that plaintiff's skip trace revealed that defendant resided in Dubai at that time, and was a pilot for Emirates Airlines (*see* Exhibit S to Moving Papers). Defendant in his Affidavit admits same (Csensits Aff. at ¶ 23). Plaintiff thus showed that it was not just impracticable, but virtually impossible, to serve defendant pursuant to section 308(1), (2), and (4). Further, defense counsel's reference to improper service of an order to show cause is puzzling, as plaintiff never sought an order to show cause, and thus never attempted to serve one. The application to vacate the Order dated August 26, 2016 is denied.

Lack of Notice

Defendant next contends that his default should be vacated pursuant to Civil Practice Law and Rules § 317. That section reads, in relevant part, "A person served with a summons other than by personal delivery... who does not appear may be allowed to defend the action... upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense."

Defendant in his Affidavit admits that he received the summons and complaint via e-mail in September 2016 (Csencsits Aff. at ¶ 16), approximately one year prior to the filing of plaintiff's motion for default judgment. Defendant's admission that he personally received not only notice of the summons, but copies of the summons and complaint in 2016 is fatal to that part of his application which seeks relief pursuant to section 317.

Excusable Default

Defendant further seeks vacatur of his default pursuant to Civil Practice Law and Rules Section 5015(a)(1), which permits a court which rendered a judgment or order to relieve a party from the order's terms upon a finding of excusable default. A party moving for relief under this section "must demonstrate a reasonable excuse for the default and the existence of a potentially meritorious defense to the action" (*Dimitriadis v. Visiting Nurse Service of New York*, 84 AD3d 1150 [2d Dept 2011]).

In the matter at bar, defendant's proffered excuse is tenuous at best. Defendant avers that, upon receipt of the summons and complaint by e-mail, he contacted the office of his former attorney, Martin R. Goldberg, Esq., and that Mr. Goldberg's assistant told him that he could ignore the summons and complaint (Csencsits Aff. at ¶ 17). Mr. Goldberg's Affirmation in support of defendant's application makes no mention of this alleged conversation. However, given the strong public policy in favor of resolving cases on their merits, the Court accepts defendant's excuse for the purpose of the within application.

As a defense to the action, defendant asserts that his former attorney, Mr. Goldberg, properly cancelled the contract pursuant to paragraph 21(b)(i) thereof. That paragraph reads, in relevant part, "If at the date of Closing Seller is unable to transfer title to Purchaser in accordance with this

contract... then, ... Seller shall have the right... to cancel this contract.”

The parties do not dispute that, at the time of defendant’s cancellation of the contract, the sole issue relating to defendant’s ability to convey clear title to the premises was plaintiff’s title insurer’s request for a copy of Letters of Administration issued to defendant’s father on the estate of defendant’s grandmother. The record contains no evidence that defendant ever made any effort to resolve this issue.

As noted in the Court’s November 28, 2017 Decision and Order, defendant’s former attorney asserted that he was unable to obtain the required file from the Surrogate’s Court of Queens County, but plaintiff’s attorney obtained the file, and the title issue was cleared. In opposition to the instant motion, plaintiff further submits the Affidavit of Maria Vinci, Clearance Officer of plaintiff’s title insurer, who avers that she gave defendant’s former counsel specific instructions on how to retrieve the required file, and that plaintiff’s attorney in fact obtained the file and provided it to the insurer on April 8, 2016, four days prior to the closing (Vinci Aff. at ¶¶ 10-12).

The subject contract permits the Seller (defendant) to cancel same in the event that the Seller is “unable” to transfer title in accordance therewith at the date of closing (Exh. B at ¶ 21[b][i]). Such language “contemplates the existence of a situation beyond the control of the parties and implicitly requires the seller to act in good faith” (*Sevilla v. Valiotis*, 29 AD3d 775, 776 [2d Dept 2006]). In the absence of a showing that clearance of the sole remaining title issue was beyond the control of the parties, the proffered defense to the action fails. The fact that plaintiff’s attorney was able to provide the requested file to the title insurer and clear the last remaining title issue prior to the closing date demonstrates that defendant was able to convey title on that date, and thus defendant’s attempt to cancel the contract pursuant to paragraph 21(b)(i) was improper.

Defendant's argument that plaintiff failed to properly serve an order to show cause, made in connection with his application to vacate the August 26, 2016 Order permitting alternative service, may have intended to claim that plaintiff failed to properly serve the Summons and Verified Complaint in accordance with the terms of that Order. This argument, if intended by defendant, likewise fails to demonstrate a potentially meritorious defense to the action.

Defendant contends that service at the California address supplied by him on the contract was not made in accordance with Civil Practice Law and Rules § 308(2). The Order did not direct service pursuant to section 308(2), specifically because directing service pursuant to that section, the plain terms of which require service within the State of New York, at an address in California, would be nonsensical. Plaintiff was directed to leave a copy of the Summons and Complaint at that address, and to mail an additional copy to that address. As the Court determined on the default motion, plaintiff's Affidavit of Service sufficiently establishes that the terms of the August 26, 2016 were complied with. Defendant thus has failed to establish a potentially meritorious defense to the action.

On the basis of the foregoing, it is hereby ORDERED as follows:

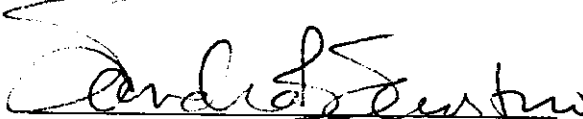
1. Defendant's application to vacate his default is in all respects denied..
2. The Temporary Restraining Order contained within the Order to Show Cause signed on January 24, 2018, by which the Receiver was restrained from conveying the premises, is hereby vacated.
3. Within thirty (30) days of the date hereof, the Receiver, Randall V. Coffill, Esq., shall schedule a closing on the subject premises, at which closing the Receiver shall execute all papers necessary or advisable in order to convey the subject premises to

[* 7]
plaintiff, in accordance with the Court's Decision and Order dated November 28,
2017.

4. Inquest on damages shall be held on August 10, 2018 at 10:00 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: June 5, 2018
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

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