Francois v Damore
2019 NY Slip Op 33546(U)
November 27, 2019
Supreme Court, Kings County
Docket Number: 508057/2019
Judge: Richard J. Montelione
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART DJMP

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JOSEPH ELIE FRANCOIS,

Plaintiff,

-against-

SUZE DAMORE,

Defendants.

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Decision and Order

Index No. 508057/2019

Submitted: 11/12/2019
Mot. Seq.: 001 & 002

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Plaintiff's Notice of Motion dated September 11, 2019; Plaintiff's Attorney Affirmation of Dennis McGrath, Esq., affirmed on September 11, 2019; and Exhibits A-E.....	1
Defendant's Notice of Cross-Motion dated October 20, 2019; Defendant's Attorney Affirmation of Alex Klein, Esq., affirmed on October 20, 2019; and Exhibits A-I.....	2
Plaintiff's Attorney Affirmation in Opposition of Dennis McGrath, Esq., affirmed on November 11, 2019; and Exhibits A-C.....	3

MONTELIONE, RICHARD J., J.

In this action to set aside deed transfers on two properties[1], plaintiff Joseph Elie Francois moves to enter a default judgment against defendant Suze Damor. Plaintiff's summons and complaint was filed on April 10, 2019. Defendant was served pursuant to CPLR 308(2). Plaintiff contends, *inter alia*, that after stipulating with defendant's counsel to extend defendant's time to answer by 30 days (to July 30, 2019), defendant still failed to interpose an answer. As such, plaintiff moves for default judgment.

[1] One property is located at 1160 East 105th Street, Brooklyn NY ("Property 1") and the second property is located at 1452 East 84th Street, Brooklyn NY ("Property 2").

Defendant opposes and cross-moves for an Order extending her time to interpose an answer. Defendant contends, *inter alia*, counsels for respective parties were in communication to discuss settlement or resolution of the matter and by the time defendant and defendant's counsel had discussions as to the course of action, the extended time to interpose an answer had expired and plaintiff's counsel was unwilling to consent to a further extension. Further, defendant's counsel asserts that although he had completed the Verified Answer, Affirmative Defenses and Counter Claims on October 3, 2019, he had inadvertently failed to file it until November. Lastly, defendant contends that she has meritorious defenses, namely and among others, that plaintiff had executed a release pertaining to the property located at 1160 East 105th Street, Brooklyn NY and that with respect to the property located at 1452 East 84th Street, Brooklyn NY, she does not deny that both plaintiff and defendant equally own the property.

Plaintiff opposes defendant's cross-motion and argues that defendant and defendant's counsel failed to demonstrate a reasonable excuse as negotiations were an attempt to delay and stall and the answer had never been received or filed. Moreover, plaintiff alleges that one of the deed transfers contained a forged signature and that the release purportedly signed by plaintiff is a forgery.

A defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense to the action, when opposing a motion for leave to enter judgment upon its failure to appear or answer and moving to extend the time to answer or to compel the acceptance of an untimely answer (*see Fried v. Jacob Holding, Inc.*, 110 A.D.3d 56, 58, 970 N.Y.S.2d 260, 262; *Ennis v. Lema,* 305 A.D.2d 632, 633, 760 N.Y.S.2d 197). The determination of what constitutes a reasonable excuse lies within the sound discretion of the trial court (*see Mid–Hudson Props.,*

Inc. v. Klein, 167 A.D.3d 862, 864, 90 N.Y.S.3d 264; *White v. Inc. Vill. of Hempstead*, 41 A.D.3d 709, 710, 838 N.Y.S.2d 607, 608). "Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (*Harcztark v. Drive Variety, Inc.,* 21 A.D.3d 876, 876–877, 800 N.Y.S.2d 613).

In the instant case, the facts and circumstances herein are similar to that of *Classie v Stratton Oakmont, Inc.*, 236 A.D.2d 505 (2nd Dept. 1997), where the Court held that vacatur of defendant's default was warranted in light of the fact that the parties were engaged in negotiations and that the affidavits presented "sharp factual disputes which could only be resolved after a trial." Likewise, plaintiff and defendant presented two different recollections regarding the dispositions of the two properties and disparate allegations regarding the transfers and plaintiff's release. Although in the instant case, defendant's delay in filing an answer was inarguably approximately four months rather than two weeks as in *Classie v Stratton*, plaintiff has not demonstrated any prejudice. Under these circumstances and mindful of the public policy in favor of resolving cases on the merits, defendant's default is vacated.

Therefore, based on the foregoing, plaintiff's motion for default judgment is DENIED and defendant's cross-motion for leave to extend time to serve a verified answer and/or compel plaintiff to accept verified answer is GRANTED TO THE EXTENT that defendant's verified answer is deemed timely served and filed, nunc pro tunc.

It is further ORDERED that vacatur of defendant's default is conditioned upon defendant paying plaintiff the sum of $1,000.00 for the costs of plaintiff's motion within 60 days hereof (*Classie v. Stratton Oakmont, Inc.*, 236 A.D.2d 505, 653 N.Y.S.2d 377 [2nd Dept. 1997]; *Hunter*

v. Enquirer/Star Inc., 210 A.D.2d 32, 619 N.Y.S.2d 268 [1st Dept. 1994]). Plaintiff may refile its motion for default judgment if this condition is not met.

This matter shall be assigned to a random IAS part. Parties shall appear for a preliminary conference in the intake part on January 29, 2020.

A copy of this order shall be served by the movant within fifteen (15) days of the date hereof with notice of entry.

This constitutes the decision and order of the court.

Dated: NOV 27 2019

Richard J. Montelione, A.J.S.C.

KINGS COUNTY CLERK'S OFFICE
FILED
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