

Petion-St. Robert v Louis
2020 NY Slip Op 31651(U)
May 28, 2020
Supreme Court, Kings County
Docket Number: 524137/2017
Judge: Wavny Toussaint
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 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 28th day of May, 2020.

P R E S E N T:

HON. WAVNY TOUSSAINT

Justice.

-----X

MARY LOU PETION-ST. ROBERT AND JOSEPH PETION,

Petitioners,

Index No. 524137/2017

DECISION AND ORDER

- against -

SERGE LOUIS,

Respondent.

-----X

The following papers numbered 1-6 read herein:
Motion/Order to Show Cause/Petition/Cross Motion and Affidavits (Affirmations) Annexed
Opposing Affidavits (Affirmations)
Reply Affidavits (Affirmations)

Papers Numbered
1-2, 3-4
4, 5
6

Upon the foregoing papers, plaintiffs Mary Lou Petion-St. Robert and Joseph Petion (“petitioners”) move (motion sequence 005) for an order granting summary judgment as against respondent Serge Louis (“respondent”); directing the sale of the premises by the New York City Sheriff of the respondent’s 100% interest in the real property known as and located at 1063 East 35th Street, Brooklyn, NY, Block 7599, Lot 25 (“premises”); determining and declaring that respondent does not maintain a homestead exemption in and to the subject premises, as the same is not occupied as

his principal residence; and granting such other and further relief as this Court deems just and proper.

Respondent cross-moves (motion sequence 006), in opposition to petitioners' motion for summary judgment, for an order vacating the August 1, 2019 preclusion order; and reinstating respondent's Answer and permitting respondent to offer evidence at trial with respect to his affirmative defenses, conditioned upon respondent complying with petitioners' discovery demands.

Background

On May 17, 2013, a Judgment in the action entitled "Mary Lou Petion-St. Robert and Joseph Petion v. Serge Louis" (Supreme Court, Kings County, Index No. 15943/2011), was duly entered in the Office of the County Clerk of Kings County, in favor of petitioners as against respondent herein, in the amount of \$313,705.00. No payment has been made towards the judgment, and the balance due remains \$313,705.00, with interest from May 17, 2013.

Procedural History

On January 12, 2018, by Order to Show Cause (motion sequence 001), petitioners served upon the respondent their petition to have the New York City Sheriff levy upon and sell the subject premises towards satisfaction of the petitioners' judgment, without any homestead exemption running in favor of the judgment debtor. On January 24, 2018, this Court directed petitioners to serve a copy of the Order to Show Cause and Petition with its exhibits, upon the mortgagor and lienor. On April 11, 2018, petitioner's Order to Show Cause directing the Sheriff's sale was granted on

default and without opposition, and counsel was directed to submit a long form order which was subsequently signed on April 17, 2018.

On September 6, 2018, respondent filed a proposed Order to Show Cause seeking to vacate the April 17, 2018 Order and dismissing the proceeding in its entirety, upon the grounds that the Court lacks personal jurisdiction over respondent due to insufficient service of process. On that same day, the parties entered into a stipulation whereby respondent consented to the jurisdiction of this Court. Petitioners consented to vacate the April 17, 2018 Order, and to allow respondent to serve and file an Answer within 20 days of the stipulation, and cancel and withdraw the Sheriff's Sale of the subject property scheduled for September 12, 2018. Respondent served his Answer on October 1, 2018, 25 days after the parties entered into the stipulation.

On November 15, 2018, petitioners filed a motion (motion sequence 002) seeking, among other things, leave to conduct discovery proceedings on the issue of respondent's claim of a homestead exemption. On February 6, 2019, this Court granted petitioners' motion and set the matter down for a Preliminary Conference on February 27, 2019. On February 6, 2019, petitioners served Interrogatories and Notice to Produce ("Interrogatories and Notice") upon respondent's counsel. Pursuant to CPLR 3133, respondent had 20 days to serve his responses. At the February 27, 2019 Preliminary Conference, respondent was ordered to respond to petitioner's Interrogatories and Notice by April 4, 2019, 57 days after respondent was served. Respondent failed to comply with the February 27, 2019 order.

On April 16, 2019, petitioners filed a motion (motion sequence 003) to strike respondent's Answer and to preclude respondent from asserting any of his defenses to

this special proceeding, including his claimed homestead exemption in the subject property. Respondent failed to oppose the motion. On May 1, 2019, by order of Hon. Lizette Colon in the Centralized Compliance Part (“CCP”), respondent was given until July 9, 2019, to respond to petitioners’ discovery demands. On June 19, 2019, CCP issued another order giving respondent until July 9, 2019, to provide discovery as per the Court’s May 1, 2019 Order. Respondent failed to comply with both CCP Orders. On July 16, 2019, petitioners re-filed their motion (motion sequence 004) to strike respondent’s Answer and to preclude respondent from asserting any of his defenses to this special proceeding, including his claimed homestead exemption in the subject property. Respondent again failed to oppose the motion. On August 1, 2019, Hon. Lizette Colon granted petitioners’ motion to strike and preclude respondent on default. As such, respondent’s Answer dated October 1, 2018 was stricken, and respondent was precluded from asserting affirmative defenses, including his claimed homestead exemption in the subject property.

On August 12, 2019, petitioners filed the herein motion (motion sequence 005) seeking an order granting summary judgement, directing the Sheriff’s sale of the subject property, and determining and declaring that respondent does not maintain a homestead exemption in the subject property. Petitioners allege that respondent has a one hundred percent (100%) interest in the subject premises. Petitioners further allege that respondent does not occupy the subject property as his principal residence; respondent’s principal residence is 55 Schlegel Boulevard, Farmingdale, New York; and as such, respondent does not have a homestead in the subject real property. In

support, petitioners attach a copy of a title search which includes a copy of the Deed to the subject property and the open mortgages, liens, judgments and disclosed items.

On October 30, 2019, Douglas Emanuel, Esq. filed a Consent to Change Attorney dated October 28, 2019, substituting the Law Offices of Michael M. Youssef with The Emanuel Law Firm as counsel for the respondent. On October 30, 2019, respondent's new counsel filed the herein cross-motion (motion sequence 006) to, among other things, vacate the August 1, 2019 Preclusion Order and reinstate respondent's Answer. Counsel argues that upon vacatur of the Preclusion Order, and reinstatement of respondent's defenses establishing triable issues of fact, petitioners would not be entitled to summary judgment as a matter of law.

Mr. Emanuel argues that respondent's default was a result of prior counsel's preoccupation with his physical and mental health, and that "but for Mr. Youssef's mental and physical illnesses, respondent would have timely supplied discovery –rendering the preclusion motion unnecessary– and/or timely oppose the motion and the preclusion order would not have been entered herein." In opposition to petitioners' motion, counsel argues that all of the documents requested are either within the petitioners' possession and/or public record; easily accessible via simple internet search. Counsel further argues that (a) respondent maintains the subject premises as his primary residence; does not own the subject property but only holds title as nominee for the benefit of Royal Mikita, accordingly, the property may not be seized or sold; and (b) as petitioners failed to list all lien holders and encumbrances and have failed to join same as necessary parties, petitioners are barred from maintaining this Special Proceeding.

In support of the cross-motion respondent counsel submits the affirmation of prior counsel, Michael M. Youssef, wherein he states, that due allegedly to a diagnosis of an aggressive form of Idopathic Pulmonary Fibrosis, and mental illness; he defaulted in the instant matter. Mr. Youssef further alleges that he was diagnosed with the aforementioned condition on June 20, 2019, and has had to withdraw from representation on many cases. In support, Mr. Youssef submits a one-page document which lists coronary and non-coronary findings; however, it was not accompanied by a doctor's affidavit explaining the findings.

Counsel submits the affirmation of respondent in which the respondent alleges that (a) he is entitled to a homestead exemption as the subject property is his primary residence; and (b) he is only the nominal title holder of the 55 Schliegel Blvd property, and that Royal Mikita is the true owner and is primarily responsible for repayment of the mortgage. Respondent fails to attach any additional documentary support, including, but not limited to, an affidavit from Royal Mikita.

In reply, petitioners argue, among other things, that (a) Mr. Youssef fails to provide any proof as to mental illness; (b) from counsel's review of e-courts, there is no proof of Mr. Youssef withdrawing from cases and Mr. Youssef is still actively litigating on behalf of clients; (c) Mr. Youssef had failed to comply with court-ordered discovery long before June 20, 2019; (d) respondent has failed to meet his burden of proving entitlement to a homestead exemption; and (e) as per CPLR 1001, lienholders are not necessary parties. In support, petitioners attach a Verified Answer and Counterclaim which was e-filed by Mr. Youssef on October 22, 2019

Discussion

As relevant here, a court, in its discretion, may vacate a judgment on the ground of a party's "excusable default" (CPLR 5015[a][1]). To prevail on a motion to vacate a default judgment on this ground, a party must demonstrate a reasonable excuse for the default and a meritorious defense (see Jian Hua Tan v AB Capstone Development, LLC, 163 AD3d 937, 937-938 [2d Dept 2018]; Ashley v Ashley, 139 AD3d 650, 651 [2d Dept 2016]; Lambert v Schreiber, 69 AD3d 904, 905 [2d Dept 2010]; Pemberton v Fuchs, 57 AD3d 863, 864 [2d Dept 2008]).

"The determination of what constitutes a reasonable excuse generally lies within the sound discretion of the trial court" (Jian Hua Tan, 163 AD3d at 938; Herrera v MTA Bus Co., 100 AD3d 962, 963 [2d Dept 2012]). A court has discretion to accept law office failure as a reasonable excuse for default where the claim is supported by a "detailed and credible explanation" of the default at issue (CPLR 2005; see also Herrera, 100 AD3d at 963; Swensen v MV Transp., Inc., 89 AD3d 924, 925 [2d Dept 2011]).

The illness of a party's attorney, when corroborated by medical documentation, including the affirmation of a physician, suffices as a reasonable excuse for vacatur of a default. (Pierot v Leopold, 154 AD3d 791, 792 [2d Dept 2017]; Weitzenberg v Nassau County Dept. Of Recreation & Parks, 29 AD3d 683, 685 [2d Dept 2006]; Norowitz v Ponconco, Inc., 96 AD2d 581, 582 [2d Dept 1983]). Mr. Youssef's alleged physical and mental health issues are not established by a doctor's affirmation and therefore do not serve as a reasonable excuse to vacate the default. (Pierot v Leopold, 154 AD3d at 792). Nonetheless, Mr. Youssef's initial default occurred prior to the alleged June 20,

2019 date of diagnosis, and Mr. Youssef fails to submit detailed submissions explaining the respondent's delays in responding to the petitioners' discovery demands, in complying with the court's February 27, 2019 order mandating discovery, as well as his failure to oppose the petitioners' April 16, 2019 motion to strike (*compare with, Hageman v Home Depot U.S.A., Inc.*, 25 AD3d 760 [2d Dept 2006]).

Finally, the Court notes that respondent's Answer was stricken and judgment entered after a history of noncompliance with orders to produce discovery essential to this litigation. In *Gibbs v St. Barnabas Hosp.* (16 NY3d 74 [2010]) the Court of Appeals, considering a similar pattern of noncompliance with court orders, emphasized the need for all parties to abide by rules of proper practice and the necessity to enforce court orders, holding:

“there is . . . a compelling need for courts to require compliance with enforcement orders if the authority of the courts is to be respected by the bar, litigants and the public . . . our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice (*see e.g. Brill v City of New York*, 2 NY3d 648 [2004]; *Kihl v Pfeffer*, 94 NY2d 118 [1999]). The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well. For these reasons, it is important to adhere to the position we declared a decade ago that ‘[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court

orders with impunity' (Kihl, 94 NY2d at 123)" (Gibbs, 16 NY3d at 81).

The Court finds that given the history of this litigation, the explanation proffered by respondent and his former counsel is vague, unsubstantiated and incredible, and does not constitute a reasonable excuse for respondent's default (see Herrera, 100 AD3d at 963]; Wells Fargo Bank, N.A. v Cervini, 84 AD3d 789 [2d Dept 2011]; Swensen, 89 AD3d at 925 [2d Dept 2011]). Given the Court of Appeals' guidance in Gibbs, as well as Second Department case law cited above, the Court finds that it would be an improvident use of its discretion to vacate the default judgment in light of respondent's history of default and noncompliance. Further, prior counsel's alleged illness, which constituted the excuse for the default, only accounted for a small period of time in which respondent was to have provided discovery. As no other reasonable excuse was given, respondent's cross-motion for vacatur is denied. (Price v Salvo, 203 AD2d 349 [2d Dept 1994]).

The petitioners established their prima facie entitlement to judgment as a matter of law by submitting, among other things, evidence that an underlying judgment, which led to the commencement of enforcement proceedings and Sheriff's sale of the subject property, remained outstanding and was a valid lien against the subject property (Wells Fargo Bank, N.A. v IPA Asset Management III, LLC, 111 AD3d 820, 822 [2d Dept 2013]). In opposition, respondent failed to raise a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]; Breskin v Moronto, 172 AD3d 1296, 1297 [2d Dept 2019]). As such, petitioners' motion for summary judgment is granted. Accordingly, it is

ORDERED, that petitioners' motion (motion sequence 005) to direct the sale of the premises by the New York City Sheriff of the respondent's 100% interest in the real property known as and located at 1063 East 35th Street, Brooklyn, NY, Block 7599, Lot 25, is hereby granted in its entirety; and it is further

ORDERED, that respondent's cross-motion (motion sequence 006) to vacate the August 1, 2019 Preclusion Order is hereby denied in its entirety; and it is further
This constitutes the decision and order of the Court.

E N T E R,

A handwritten signature in black ink, appearing to be 'J. S. C.', written over a horizontal line.

J. S. C.