Berdiev v 148 W. 136th Realty LLC
2021 NY Slip Op 31513(U)
May 4, 2021
Supreme Court, Kings County
Docket Number: 506230/19
Judge: Karen B. Rothenberg

At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4th day of May, 2021.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

----------X

SANAT BERDIEV and LOLA KHATAMOVA,

Plaintiffs,

- against - Index No. 506230/19

148 WEST 136TH REALTY LLC,

Defendant.

----------X

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	13-27 31-36, 38
Opposing Affidavits (Affirmations)	58-62 42-51, 70-74
Reply Affidavits (Affirmations)	65-69, 70-74 53-56

Upon the foregoing papers, plaintiffs Sanat Berdiev and Lola Khatamova move (mot seq one), by order to show cause, for an order: (1) setting aside the mortgage and assignment of leases and rents recorded as of July 29, 2019 between nonparty SNCO CAP LLC (SNCO) and defendant 148 West 136th Realty LLC (defendant or Realty) (the Suspect Loan), as well as the subsequent reassignment of said mortgage, leases and rents by SNCO to nonparty Normandy Capital Trust (Normandy); (2) enjoining defendant from disbursing, distributing, transferring or dissipating any funds it received on account of the Suspect

Loan; (3) enjoining the members and principals of the defendant from disbursing, distributing, transferring or dissipating any of the Suspect Loan funds that they received from defendant without prior court approval; (4) if any nonparty received funds from the Suspect Loan restraining said nonparties from further transfers of said funds prior to court approval; (5) appointing a receiver for the Suspect Loan funds; (6) requiring defendant to identify the bank account(s) wherein the funds from the Suspect Loan are being held; (7) if the Suspect Loan proceeds have already been distributed, directing defendant to disclose the identity of all recipients of the Suspect Loan funds, their addresses and the bank account(s) where such funds were transferred or deposited; and (8) awarding plaintiffs legal fees that it incurred in making this application.

Defendant Realty cross-moves (mot. seq. two) for an order: (1) vacating the default judgment issued on October 26, 2017, pursuant to CPLR 317, and, affording it a reasonable opportunity to interpose an answer to the amended complaint, and (2) consolidating this action with the action captioned *Berdiev et al. v 148 West 136 Realty LLC, et al.*, Kings County index No. 502383/17.

Background

On February 6, 2017, plaintiffs commenced a labor law action under index No. 502383/17, and on March 14, 2017, plaintiffs filed an amended complaint. Defendant Realty owns the property at 148 West 136th Street in New York, a building with more than 10 residential units (Building).

The amended complaint alleges that "[o]n or about January 11, 2017, construction, demolition and non-routine repairs were being conducted at the Building by defendant Realty, its agents and contractors and was controlled by Defendants". It further alleges that plaintiff Sanat Berdiev, who was employed by Erion Kaloshi, a contractor at the Building "fell from a substantial height when the beam he was standing on and which was used as a work platform shifted, gave way and/or collapsed, causing Plaintiff BERDIEV to fall approximately 10 feet or more to the basement level below". Plaintiff Berdiev allegedly suffered serious personal injuries, including traumatic brain injury.

Realty failed to answer the amended complaint or otherwise appear in the labor law action. By an October 26, 2017 order, the Court (Cohen, J.) issued a default judgment against Realty and ordered an inquest at the time of trial.

Plaintiffs filed a motion for an order severing the action against defendant Realty. By a February 21, 2019 order (Restraining Order), this court granted the motion and ordered that: 1) The action against defendant 148 West 136th Realty LLC is severed; Plaintiff to file a Note of Issue in the severed action by 3/21/19; and 3) until the inquest and any adjourned dates thereof, defendant is enjoined from transferring title to [the] property located at 148 W. 136th St., New York, NY 10030 without court approval. On March 21, 2019, plaintiffs filed a note of issue and certificate of readiness. An inquest on damages regarding Realty was scheduled for September 10, 2019.

Plaintiff's Order to Show Cause

Meanwhile, on August 2, 2019, prior to the scheduled inquest, plaintiffs moved, by order to show cause with a temporary restraining order (TRO),[1] for an order "enjoining and restricting Defendant from disbursing the funds from [a July 29, 2019] mortgage closing . . ." Plaintiffs' counsel explains that:

> "This affirmation is respectfully submitted on an emergency basis to enjoin and estop an ongoing fraudulent transfer being perpetrated in violation of Court order. This action has been severed by the Court Order, for the purpose of holding an inquest on damages, from the related Labor Law action, where Defendant 148 WEST 136th Realty LLC, a commercial real estate enterprise, defaulted despite proper service. Thereafter, Defendant was repeatedly notified by Plaintiffs' counsel of the default judgment granted against it. Further, on February 21, 2019, this Court issued an Order enjoining, pending the inquest, any transfers relating to the subject building without prior Court approval. Despite this, Plaintiffs' counsel has just learned, through an ACRIS auto notification, that on July 29, 2019, just before the damages inquest scheduled by the Court in this action, Defendant pulled out $2.9 million out of the subject building, which otherwise was mortgage free. Moreover, the mortgagee [SNCO] is an entity that was just formed on May 16, 2019.
>
> "These facts are alarming and strongly indicate contempt of Court and fraudulent conveyance to avoid a lien on the property…"

[1] A TRO was granted pending the return date of the motion, which restricted and restrained defendant Realty and nonparties SNCO and Normandy from distributing, disbursing, transferring or dissipating any of the Suspect Loan funds. The TRO also provided that defendant Realty "shall, within one (1) business day . . . disclose to Plaintiffs' counsel the bank account information for the account wherein the Suspect Loan proceeds are being held" or "the identity of all such recipients of the Suspect Loan funds, their addresses, the bank account information for accounts where such funds were transferred or deposited."

Plaintiffs' counsel affirms that a copy of the Restraining Order and the note of issue were served upon Realty at its address registered with the New York State Department of State. The Order to Show Cause also directed that nonparties SNCO and Normandy be served with plaintiffs' moving papers.

Plaintiffs' counsel asserts that "[t]he Suspect Loan stands in violation of the Restraining Order because "the Court sought to prevent fraudulent transaction[s] aimed at undercutting the enforceability of any judgment to be obtained against Defendant REALTY." Plaintiffs' counsel argues that Realty failed to seek court approval, as required by the Restraining Order, "before it proceeded to effectively wipe out most of the equity in the Building" which "is tantamount to a *de facto* transfer of a beneficial interest in title."

Plaintiffs' counsel asserts that "[s]ince Defendant knew of the default judgment order and received a copy of the Restraining Order, its action in mortgaging the Building right before the inquest bespeaks bad faith" and "contempt of court." Plaintiffs seek a hearing on the issues of defendant Realty's contempt of court and to what extent nonparty SNCO "acted in complicity with Defendant REALTY for purposes of willfully undertaking actions to thwart Plaintiffs' ability to collect on the impending money judgment." Plaintiffs also seek an order setting aside the $2.9 million Suspect Loan and mortgage "as same were obtained through a violation of the express and implied mandates of the Restraining Order."

In addition, plaintiffs seek injunctive relief, including an order restraining the funds

from the Suspect Loan and the appointment of a receiver. Plaintiffs argue that "[l]iability has already been established in Plaintiff's favor and a money judgment is, practically speaking, inevitable in this action." Plaintiffs assert that they will be irreparably harmed and prejudiced unless the proceeds of the Suspect Loan are protected "because once the equity is wiped out and money is removed from the Defendant's bank accounts, it is highly probable that Plaintiffs will find themselves with an uncollectable judgment."

Defendant's Opposition

Realty, in opposition, submits an affirmation from Theodore Feldheim (Feldheim), its sole member, who affirms that Realty did not violate the Restraining Order because it only enjoined Realty from "transferring title to [the Building] without Court approval" and "there has been no transfer of title since the Order was issued." Feldheim explains that "[i]n or around August 2019 [Realty] refinanced its mortgage with SNCO LLC for terms more favorable than its previous mortgage" and "refinancing was entirely unrelated to this action." Feldheim does not address, or even mention, the TRO, which required Realty to disclose information regarding the Suspect Loan proceeds, including the identity, addresses and bank account information for the recipients of the funds.

Feldheim asserts that plaintiff has no ownership interest in the Building, plaintiff's complaint does not seek a declaratory judgment, and there is no notice of pendency effecting the Building. Realty argues that plaintiffs lack standing to set aside the SNCO mortgage. Feldheim argues that "there is no basis in law that would entitle Plaintiff to *any*

of the relief it seeks, much less an order requiring [Realty] to give any refinance proceeds to Plaintiff" and "[a]ny other outcome would amount to an improper judicial taking." Realty also argues that unwinding its mortgage with SNCO, a nonparty to this action, would deprive both Realty and SNCO of due process of law.

Plaintiffs' Reply

Plaintiffs, in reply, assert that "the official ACRIS system filings reflect that there was no existing mortgage on the [Building] prior to Defendant depleting the equity in the [Building] by taking out $2.9 million" and Feldheim fails to "disclose any details about the purported prior mortgage for which there is no record on ACRIS."

Plaintiffs' counsel also notes that "no records confirming the fund location were provided [by Realty] as required by the TRO, [which] raises a concern that perhaps no money ever even changed hands and the entire mortgage might have been a sham." Plaintiffs' counsel further argues that "[t]he Court should draw every negative inference against Defendant for its failure to comply with the strict disclosure requirements of the TRO" and "Defendant is [in] contempt of the TRO."

Regarding SNCO and Normandy, plaintiffs submitted affidavits of service reflecting that those nonparties were served with the Order to Show Cause and TRO, and note that those nonparties failed to appear or respond to the Order to Show Cause.

Defendant's Cross Motion

On January 22, 2020, after the inquest, Realty cross-moved to vacate the October

26, 2017 default judgment issued against it, pursuant to CPLR 317. Feldheim claims that "I have operated under the reasonable position that my insurance provider was actively defending this action on behalf of [Realty]" because in 2017 he forwarded the complaint to Realty's insurance broker and Feldheim affirms that he never received a notice from his insurer declining coverage. Notably, Feldheim claims that he first learned of Realty's 2017 default when he conducted a title search in connection with the July 29, 2019 refinance of the Building. Realty's counsel argues that "[a] misunderstanding as to whether an insurance carrier would provide a defense on the movant's behalf is a reasonable excuse sufficient to vacate a default."

Feldheim contends that Realty has a meritorious defense to the labor law action because "[i]f any party is liable, it is those individuals who [Realty] retained to conduct the construction at the [Building]." In addition, Feldheim asserts that Realty "intends to adopt each of the defenses already raised by its co-defendants in [the labor law] action" including that: "any damages sustained by the Plaintiff were caused by his own negligence; that any injury sustained by Plaintiff [is] the result of the superseding and/or intervening acts [of] negligence of one or both of the co-defendants; and that any apportionment of fault attributed to [Realty] must be apportioned in full to its co-defendants." Furthermore, vacating its default will not prejudice any of the parties to the labor law action because discovery is still pending.

While Realty's notice of cross motion also seeks an order consolidating this action

with the labor law action (effectively vacating the February 21, 2019 Restraining Order which severed this action against Realty from the labor law action), Realty does not discuss, or even address, that branch of its cross motion.

Plaintiffs' Opposition to the Cross Motion

Plaintiffs, in opposition, argue that Realty is making its motion to vacate long after the passage of the one-year period following [Realty] learning of the action, which is in violation of the statutory time limit set forth in CPLR 317. Plaintiffs also point out that Feldheim admitted that Realty received the summons and complaint in 2017 and is not disputing personal jurisdiction or service of the summons.

Plaintiffs argue that Realty has failed to demonstrate a meritorious defense to the labor law action. While Realty argues that it should not be held responsible because it did not control the means and methods of the construction work at the Building, plaintiffs argue that "this is not an acceptable meritorious defense when the action involves the breach of non-delegable duties under Labor Law §§ 240 (1) and 241 (6).

Plaintiffs also assert that they would be prejudiced by consolidation at this juncture since discovery in the labor law action has been completed, including all party depositions, note of issue was filed and dispositive motions have already been decided.

Defendant's Reply

Realty, in reply, submits an affirmation from Feldheim claiming, *for the first time*,

that Realty was not properly served with the summons and complaint.

Discussion

Plaintiffs' Order to Show Cause

The Restraining Order explicitly provides that "[p]ending the inquest and any adjourned dates thereof, [Realty] is enjoined from *transferring title* to [the] property . . . without court approval". The Restraining Order, by its express terms, did not enjoin Realty from encumbering the Building with a mortgage. Thus, the Restraining Order does not provide a basis to set aside the $2.9 million mortgage and assignment of leases and rents recorded against the Building on July 29, 2019, or for injunctive relief regarding the Suspect Loan. Consequently, those branches of plaintiffs' motion seeking to set aside the Suspect Loan, enjoin the disbursement, distribution, transfer or dissipation of the Suspect Loan funds and to appoint a receiver for the Suspect Loan funds are denied.

However, Realty failed to comply with the TRO issued by this court, which required it to promptly disclose the bank account information for the Suspect Loan proceeds, the identities of all recipients of the Suspect Loan funds, their addresses and the bank account information for accounts where such funds were transferred or deposited. Realty's failure to provide plaintiffs with such information, as required by the TRO, warrants a hearing regarding Realty's contempt of court.

Defendant's Cross Motion

On January 22, 2020, *more than two years after* Realty was served with notice of

entry of the default judgment, and after an inquest on damages was already held, Realty cross-moved for an order, pursuant to CPLR 317, vacating the October 26, 2017 default judgment issued against it. Realty's motion pursuant to CPLR 317 is untimely since it was filed more than two years after Realty was served with notice of entry of the default judgment.

Furthermore, CPLR 317 is inapplicable because Realty admittedly received the summons and complaint in the labor law action. Feldheim submitted an affirmation in support of Realty's cross motion in which he admitted that Realty received the summons and complaint in the labor law action and that he forwarded the pleadings to Realty's insurance broker. Feldheim's reply affirmation, which asserted *for the first time* that Realty did not receive notice of the summons and complaint in the labor law action, will not be addressed or considered (*see Allstate Ins. Co. v Dawkins*, 52 AD3d 826, 826-827 [2008] [holding that "the Supreme Court properly declined to address (Allstate's) argument, made for the first time in its reply papers . . ."]). Realty is not entitled to an order vacating the 2017 default judgment, pursuant to CPLR 317, because Realty's cross-moving papers failed to demonstrate that Realty did not receive notice of the summons in time to defend the labor law action.

Notably, while Feldheim claims that he first learned of the October 26, 2017 default judgment against Realty when he conducted a title search in connection with the July 29, 2019 mortgage, he does not explain why Realty waited another six months before cross-

moving to vacate the October 26, 2017 default judgment. In addition to Realty's inexplicable delay, Realty has failed to provide a reasonable excuse for its default, which precludes vacatur under CPLR 5015 (*Ki Tae Kim v Bishop*, 156 AD3d 776, 777 [2017]). Feldheim's claim that he forwarded the 2017 pleadings to Realty's insurance broker, never received a denial of coverage, and therefore, assumed that Realty was being defended in the labor law action is unreasonable. Furthermore, the court declines to vacate Realty's default and consolidate this action with the labor law action at this late stage of the proceedings to avoid substantial prejudice, since an inquest on damages was already held in this action and discovery is complete in the labor law action. Accordingly, it is

ORDERED that plaintiffs' motion (mot. seq. one) is only granted to the extent that the parties shall appear for a contempt hearing on June 9, 2021, regarding Realty's failure to comply with the August 2, 2019 TRO issued by this court; plaintiffs' motion is otherwise denied; and it is further

ORDERED that defendant Realty's cross motion (mot. seq. two) is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.