STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

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MICHAEL G. MILLNER,

Plaintiff, DECISION AND ORDER

v.

Index #2007/06218

ROCHESTER LUMBER COMPANY,

Defendant.

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Respondent, Rochester Lumber Company, moves by order to show cause for an order pursuant to CPLR 5015(a) relieving respondent from so much of an order dated November 13, 2007 as awarded attorneys' fees in the amount of $31,587.98, directed payment thereof, authorized entry of a judgment, directing execution and delivery of a mortgage release. In addition to opposing the relief sought by respondent, petitioner submits a notice of motion seeking an order pursuant to CPLR 3025 and 1002 granting leave to amend the petition to join Roberts Capital Corp. as an additional party petitioner, or in the alternative, an order pursuant to CPLR 1012(a)(3) and/or 1013 permitting Roberts Capital Corp. to intervene as an additional party petitioner, or in the further alternative, declaring that respondent is not entitled to set off the award rendered in this proceeding against any judgments or debts that it may hold against petitioner.

This matter previously came before the court in August, 2007. At that time, the court issued a decision from the bench,

granting various items of relief sought by petitioner. Additionally, the court stated:

> I think in the circumstances that reasonable attorneys' fees incurred in the prosecution of this action alone, just this petition is appropriate, given the circumstance, given the provisions of the mortgage, a clear rule – a clear rule of interpretation of contracts which provide that the typewritten portions fully trump preprinted portions which are irreconcilable conflict with them, I find that these are.

The court concluded its decision by stating, "Settle on the amount and get me an order."

The instant controversy arose because respondent's counsel, due to a law office failure, never reviewed the order in the time frame provided. Consequently, the order was signed by the court and entered by the petitioner, and respondent learned only of the contents after entry of the order, when it was served upon counsel. Respondent now seeks to contest various portions of that order, including the award of attorneys' fees in the amount of $31,587.98.

Motion to Vacate

CPLR 5015(a) states:

> The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
>
> (1) excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice

> of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry...

A party seeking to vacate an order pursuant to CPLR 5015(a)(1) must establish that it has both a reasonable excuse for the delay and that it has a meritorious defense to the action. See Kaufman & Satran LLP v. Sidbern Estates, Inc., 4 A.D.3d 454 (2d Dept. 2004); 65 North 8 Street HDFC v. Suarez, 18 A.D.3d 732 (2d Dept. 2005); M-Dean Realty Corp. v. General Sec. Ins. Co., 6 A.D.3d 169 (1st Dept. 2004). "It is generally left to the sound discretion of the Supreme Court to determine what constitutes a reasonable excuse . . . and a meritorious defense." Beizer v. Funk, 5 A.D.3d 619, 620 (2d Dept. 2004). The movant must submit supporting facts in evidentiary form sufficient to justify its default, and an affidavit must be from one with personal knowledge of the events surrounding the default. Solorzano v. Cucinelli Family, LLC, 1 A.D.3d 887, 887 (4th Dept. 2003).

As to the meritorious defense, the litigant need not *prove* that the asserted defense has merit. Rather, the defendant must only demonstrate "a *potentially* meritorious defense." Marinoff v. Natty Realty Corp., 17 A.D.3d 412, 413 (4th Dept. 2005). Furthermore, the decision to set aside the default is left to the sound discretion of the court, and this exercise of discretion will not be disturbed if there is support in the record therefor. Mjahdi v. Maguire, 21 A.D.3d 1067, 1068 (2d Dept. 2005).

Here, respondent's claim of law office failure is an excusable default. See CPLR 2005; Chiarello v. Alessandro, 38 A.D.3d 823 (2d Dept. 2007); Tri-State Environmental Contracting, Inc. v. M.H. Kane Const., Inc., 25 A.D.3d 436 (1st Dept. 2006). Respondent's claim in this regard is bolstered by the affidavit of counsel's secretary who inadvertently placed the proposed order in the incorrect pile of documents for counsel's review, as well as counsel's consistent affidavit. Respondent's failure to challenge the proposed order was an excusable default.

As to the merit of the defenses respondent seeks to use to challenge the order, the court finds as follows. Counsel for petitioner acknowledges minor overcharges and discrepancies of attorneys' fees. The affirmation of Warren Rosenbaum, Esq. states:

> 3. However, my time entries for September 4, and September 19, 2007 on the WOG billing records should have been entered on a separate matter on which I was working for Roberts Capital Corp. I believe this inadvertent error was the result of the fact that the work was all performed for the same client (Roberts Capital Corp.), on similar matters. As a result of this error, the total request for legal services on behalf of WOG in this matter should be reduced by $798 (2.8 hours x $285/hr.), resulting in a corrected fee and disbursement request of $10,399.98.

Affirmation of W. Rosenbaum dated November 21, 2007, ¶3. The affirmation of Thomas Jay Solomon, Esq. on this same subject states:

> 62. After reading Mr. Weider's affirmation and checking with PDQ it seems that the time that I indicated for July 20, 2007 was spent on August 6, 2007 and the time for August 5, 2007 has to change to 7 hours. The time indicated for August 6, 2007 was spent on July 20, 2007 and at this time I am unable to account for .6 hours that I have indicated for 8/5. I will submit a revised affidavit as soon as I have the right information.

Affirmation of T.J. Solomon dated November 26, 2007, at ¶62. A hearing is required to determine the reasonableness of the fee.

Respondent raises several other issues relative to the order signed by the court and the circumstances surrounding its entry. First, respondent alleges that the court's directive to the parties to "Settle amount and get me an order" meant that the parties were directed to confer for the purpose of arriving at an agreement on an amount for the attorney's fee prior to submission of the order. The court disagrees with this interpretation. "Settle amount" in this instance clearly refers to the amount due on the mortgage, see Decision Transcript, at 5, lines 9-20. Mr. Solomon indicates that petitioner ultimately accepted the mortgage figure proffered by respondent, which might explain why the amount was not discussed with respondent prior to sending the order to the court. But given the reasonable excuse of law office failure proffered by counsel, the reasonableness of the fee should be determined after a hearing.

Respondent also raises RPAPL §1921, alleging that petitioner is not entitled to an award of attorneys' fees because Roberts

Capital Corp., not petitioner, is actually paying the attorneys' fees incurred. Neither Mr. Solomon (counsel for petitioner) nor Mr. Rosenbaum (counsel for Roberts) contests that Roberts is paying the fees, and further that the fees affidavit submitted by Solomon represents fees incurred on behalf of petitioner, whereas the fees affidavits submitted by Rosenbaum represents legal services rendered on behalf of Roberts. See W. Rosenbaum affirmation dated November 21, 2007, at ¶6; T.J. Solomon affirmation dated November 26, 2007, ¶¶32-35. Roberts, however, the third mortgagee, is funding this proceeding.

RPAPL ¶1921(7) states, in relevant part:

> The court in its discretion, when granting any such order after application therefor pursuant to subdivision two of this section, may award costs and reasonable attorneys' fees to the person making the application, in the absence of the showing of a valid reason for the failure or refusal to execute the satisfaction of mortgage and deliver the same, the note and mortgage and any other documents required under subdivision one of this section.

Respondent alleges that, because petitioner is the person making the instant application, and petitioner did not actually incur any of the fees himself, those fees cannot be awarded to him.

The court disagrees with respondent's analysis. The mere fact that the money to pay for the fees is not coming out of petitioner's personal coat pocket does not negate his right to an award of fees. Although subject to ethical considerations, third

party payment of fees is common. RPAPL 1921(7) merely states that the "person making the application" is entitled to an award of attorneys' fees in certain circumstances. The statute does not require proof that the person making the application is actually paying the fees himself. Roberts Capital undoubtedly would have been a proper party petitioner under RPAPL §1921(2) as holder of a subordinate mortgage seeking to preserve its equity in the property. Barclay's Bank of N.Y. v. Market Street Mort. Corp., 187 A.D.2d 141 (3d Dept. 1993). Moreover, a third party fee payment arrangement has been held not to preclude payment of a statutorily authorized fee under several fee shifting statutes. Cf., Perkins v. Town of Huntington, 117 A.D.2d 726, 726-27 (2d Dept. 1986); Continental Bldg. Co. v. Town of North Salem, 150 Misc.2d 145, 150 (Sup. Ct. West. Co. 1991), aff'd in relevant part, 211 A.D.2d 88 (3d Dept. 1995). See also, Thomas v. Coughlin, 194 A.D.2d 281, 283 (3d Dept. 1993)(collecting authority under similar fee shifting statutes); Maplewood Management, Inc. v. Best, 143 A.D.2d 978, 979 (2d Dept. 1988)(same).

Respondent also seeks vacatur of the order due to the following paragraphs present in said order:

> ORDERED, petitioner be and hereby is awarded his reasonable attorney's fees incurred in the prosecution of this proceeding to be paid by the respondent to the petitioner in the amount and in the manner hereinafter set forth; and it is further . . .

> ORDERED, in the event that the respondent fails to pay the Net Payment to the petitioner within twenty (20) days from date of service of a copy of this order with notice of entry thereof upon respondent's attorneys of record in this proceeding, petitioner be and hereby is authorized to enter a judgment in his favor and against the respondent in the Monroe County Clerk's Office for said amount, and the Clerk by and hereby is authorized and directed to so enter the said judgment . . .

Respondent argues that these paragraphs strip it of its common law right of setoff with respect to the indebtedness evidenced by a Supreme Court judgment in the amount of $272,014.68.

Petitioner alleges that respondent's opposition to the petition in this matter, consisting solely of the Palermo Affirmation of July 3, 2007, lacks any reference to respondent's intention to set off any award obtained by petitioner. A careful review of the Palermo affirmation reveals that there was, indeed, no indication of an intention to set off any award obtained by petitioner in this proceeding against any separate judgment or debt that it may have held against petitioner. A mere reference to the indebtedness, acknowledged by petitioner in his petition, without something more, cannot give the requisite notice. As such, such an affirmative defense of setoff was waived. See Becker v. Shore Drugs, Inc., 296 A.D.2d 515, 516 (2d Dept. 2002). Matter of Kurzon v. Kurzon, 246 A.D.2d 693, 695 (3d Dept. 1998)("waived his right [to setoff] . . . by failing to raise the issue in his pleadings"); Ellenville Nat. Bank v. Freund, 200

A.D.2d 827, 828 (3d Dept. 1994) ("Although defendants maintain that they may have a right to set off against the amount due on the note amounts allegedly overpaid on prior loans, their answer, given the most amiable reading, does not even contain conclusory allegations that they intended to assert such a defense or counterclaim, let alone any facts in support thereof. Their claimed entitlement to a setoff, whether considered an affirmative defense or counterclaim, has therefore been waived."); Kivort Steel, Inc. v. Liberty Leather Corp., 110 A.D.2d 950, 952 (3d Dept. 1985) ("Whether setoff is an affirmative defense (CPLR 3018[b]) or is more akin to a counterclaim (CPLR 3019[a]), the facts in support thereof must be pleaded in the answer. Defendant's failure to do so constitutes a wavier.") As there is no indication before the court that an affirmative defense or counterclaim of setoff was ever raised by respondent in this proceeding, any such defense or claim has been waived.

Although the above is dispositive of respondent's motion (save the determination of fee amount following a hearing), petitioner contends that, even if not waived by a failure of pleading, there can be no offset because respondent's claimed setoff would be subordinate to counsel's charging lien. Respondent challenges the timing of petitioner's priority of charging lien argument, insisting that it comes unfairly for the

first time in reply to the cross-motion to amend. Although the request for attorney's fees under RPAPL §1921, §1921(a) and §1921(a)(7) was presented by the Petition (at 13), and thus necessarily would have, if appropriate, invoked Judiciary Law §475 upon institution of the proceeding quite without regard to any pleading calling attention to it, Banque Indosuez v. Sapwith Holdings Corp., 98 N.Y.2d 34, 43 (2002)("an attorney lien comes into existence, without notice or filing, upon commencement of the cause of action or proceeding"), petitioner has no charging lien here.

Petitioner sought, and was given, an order directing execution and delivery of a satisfaction of mortgage. Petitioner did not seek, nor did he obtain, any identifiable "proceeds from the litigation upon which the lien can affix." Id. 98 N.Y.2d at 44. To be sure, the success of the Petition preserved petitioner's equity in the property such that it might be reached by a subordinate creditor. But that result is inapposite. "Where the attorneys' services do not create any proceeds but consist solely of defending a title or interest already held by the client, there is no lien on the realty." Desmund v. Socha, 38 A.D.2d 22, 24 (3d Dept. 1971)("enhancement [of] value of realty] is not subject of a lien"), aff'd, 31 N.Y.2d 687 (1972). See also, City of Troy v. Capital District Sports, Inc., 305 A.D.2d 715, 716 (3d Dept. 2003)(no lien results from judgment

reducing plaintiff's debt "because the reduction did not produce proceeds in an identifiable fund"); Oppenheim v. Pemberton, 164 A.D.2d 430, 433 (3d Dept. 1990).

The above renders unnecessary any effort to resolve the nettlesome mutuality of obligation issue, much debated in the papers submitted to the court. But comment must be made given the tenor of respondent's papers. Because the judgment awarded to petitioner did not result in any identifiable or other proceeds, and the right to attorneys fees arises wholly by virtue of statute, it is questionable whether the "debts" here in question are "due to and from the same persons in the same capacity." Beecher v. Vogt Mfg. Co., 227 N.Y. 468, 473 (1920). See Millenium Environ., Inc. v. City of Long Beach of the State of New York, 35 A.D.3d 412 (2d Dept. 2006); General Elec. Corp. Bus. Asset Funding Corp. v. Hakakian, 6 A.D.3d 704, 705 (2d Dept. 2004). The court has some substantial difficulty with the proposition that the right to attorneys fees in connection with a proceeding to obtain a mortgage release from a party that has another judgment pending against the debtor, which right is not dependent on satisfaction of that other judgment, may be substantially defeated by a claimed right of setoff. The remedial purpose of the statute would be wholly defeated by acceptance of respondent's theory of mutuality in a case such as this. The fee shifting statute in this case vindicates

petitioner's fundamental right not to be deprived of his property rights without due process, and "where 'no more than private gain is directly at stake' (Fuentes v. Sherin, [407 U.S. 67] at p. 92, 92 S. Ct. at p. 2000), the opportunity to be heard is an indispensable bulwark against an arbitrary, and final, deprivation of property." Sharrook v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 166 (1978). There are "policy considerations against expanding the area of permissible self-help," People v. Reid, 69 N.Y.2d 469, 476 (1987), and what respondent did here, while perhaps not conversion, most certainly was impermissible self-help in derogation of petitioner's right to a mortgage release.

Analogous are the conversion cases in the insolvency context:

> [T]here is a line of cases which hold that a setoff should not be allowed when the creditor wishes to setoff its conversion liability to the bankrupt against a debt owed the creditor by the bankrupt. See Western Tie & Timber Co. v. Brown, 196 U.S. 502, 25 S.Ct. 339, 49 L.Ed. 571 (1905); Arkansas Fuel Oil Co. v. Leisk, 133 F.2d 79 (5th Cir. 1943); Brislin v. Killanna Holding Corp., 85 F.2d 667 (2nd Cir. 1936); In re Lykens Hosiery Mills Inc., 141 F.Supp. 891 (S.D.N.Y. 1956); Howard v. Mechanics' Bank, 262 F. 699 (E.D.N.Y.1920); McCabe v. Winship, Fed.Cas. 8, 668 (D.C.Minn. 1877); McQueen v. New, 86 Hun 271, 33 N.Y.S. 395 (1895); Shield Co. v. Cartwright, Tex.Civ.App., 172 S.W.2d 108, affd. 142 Tex. 324, 177 S.W.2d 954 (1944). The holding of these cases is that a creditor of a bankrupt should not be permitted to pay himself through the device of setoff by converting the bankrupt's property, particularly at a time when he knows of the bankrupt's insolvency.

Brunswick Corp. v. Clements, 424 F.2d 673, 676 (6th Cir. 1970). As explained in McQueen v. New, supra, a contrary rule would permit as creditor to "procure a preference over other creditors" by "taking possession of the property . . . and convert it to its own use, and, when an action was brought for its conversion, ask to offset his claim." Id. 86 Hun 271, 33 N.Y.S. at 398 ("mere statement of this proposition seems to show that the position of the appellant cannot be sustained").[1] Although not on all fours, these cases clearly stand for the proposition that respondent's resort to impermissible self-help measures in this case taints it with unclean hands such that a court should not extend to it an equitable remedy of offset.

A hearing as described above is ordered.

Petitioner's Motions

Petitioner submits a notice of motion seeking various relief in the alternative. Given the court's discussion and determination above with respect to respondent's claim of setoff, petitioner's motion is granted to the extent the court hereby declares that respondent is not entitled to a setoff of the award rendered in this proceeding against any judgments or debts that

[1] WESTLAW has this case reversed by McQueen v. New, 87 Hun 206, 33 N.Y.S. 802, but from the dates of the two decisions, and the explicit reference to id. 10 Misc. 251, 30 N.Y.S. 977 (O'Brien, J.) in 87 Hun 206 as the case being reversed, and the identity of court and three judge panel assigned, the case cited in the text was not reversed.

it may hold against petitioner. The other relief sought in the alternative, chief among them amendment of the pleadings to add Roberts Capital as a party petitioner, is thereby rendered moot.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: December 17, 2007
Rochester, New York