

Hampton Valley Farm, Inc. v Flower

2005 NY Slip Op 30087(U)

January 10, 2005

Supreme Court, Suffolk County

Docket Number: 0022426/1992

Judge: Melvyn Tanenbaum

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY**

PRESENT:

Hon. MELVYN TANENBAUM
Justice

MOTION #034& 035-Mot D

R/D: 080904
S/D 101404

HAMPTON VALLEY FARM, INC., THE SUN QUEST
CORPORATION and ROSE ANN SHEARIN

Plaintiffs,

PLTF'S/PET'S ATTY:
ROSE ANN SHEARIN, Plaintiff Pro Se
1524 Thorne Road
Nashville, NC 27856

- against -

FLOWER & MEDALIE, ESQS., FLOWER & PLOTKA,
ESQS., FLOWER, PLOTKA & MEDALIE, ESQS., and
"JOHN DOE" 1-10, SAID NAME BEING FICTITIOUS
UNKNOWN TO THE PLAINTIFFS, THE
INDIVIDUALS BEING ASSOCIATED WITH AND/OR
EMPLOYEES OF THE NAMED DEFENDANTS

Defendants.

DEFT'S/RESP'S ATTY:
LONG, TUMINELLO, BESSO, SELIGMAN,
QUINLAN & WERNER, ESQS.
120 Fourth Avenue
Bay Shore, New York 11706

Upon the following papers numbered 1 to ___ read on this motion _____

Notice of Motion/Order to Show Cause and supporting papers _____; Notice of Cross Motion and supporting papers _____
Answering Affidavits and supporting papers _____ Replying Affidavits and supporting papers _____
Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiffs for an order pursuant to CPLR Section 5015 vacating a default judgment entered against the plaintiffs in the Office of the Suffolk County Clerk on April 18, 1995 in the sum of \$115,575.53 is determined as follows:

Plaintiffs commenced this action in September, 1992 seeking to recover damages for alleged excessive billing for legal services rendered by the defendants/attorneys while representing "Shearin" in connection with a series of lawsuits and real estate matters. Plaintiffs complaint also alleges that defendants engaged in unethical conduct and unlawfully converted escrow funds and "Shearin's" equity in the corporate plaintiff Hampton Valley Farms, Inc..

In June, 1992 plaintiff "Shearin" discharged the defendants and retained attorney William C. Miller. The working relationship between "Shearin" and her incoming attorney "Miller" deteriorated during the spring of 1993. Plaintiff's counsel "Miller" initially sought to be relieved as "Shearin's" counsel by notice of motion dated May 14, 1993 claiming that "Shearin" no longer was cooperating with him.

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While the attorney's application was pending the attorneys for both parties appeared in court on June 7, 1993. The defendants had prepared a complaint with the intent of commencing an action against the plaintiffs seeking to recover additional attorneys fees. During the June, 1993 conference the attorneys entered into a so-Ordered Stipulation (Lama, J.) deeming the defendants proposed complaint a counterclaim in this action. The Stipulation which was filed on July 22, 1993 provides:

"1. That the verified complaint in the action entitled: " Flower & Medalie, a Partnership on behalf of it itself, and as the Successor in Interest to Both Flower, Plotka & Medalie, a Partnership, and Flower & Plotka, a Partnership v. Rose Ann Shearin, Buena Vida Farms, Inc., Hampton Valley Farm, Inc. and The Sun-Quest Corporation," a copy of which is annexed hereto as Exhibit "A", shall be deemed a counterclaim against the plaintiffs, Hampton Valley Farms, Inc., The Sun-Quest Corporation and Rose Ann Shearin in the above captioned action, and a cross-claim against Buena Vida Farms, Inc., which shall be deemed an additional defendant in the above-captioned action.

2. The caption of said complaint annexed hereto as Exhibit "A" shall be deemed amended to the caption of the above captioned action and all references to the plaintiff therein shall be deemed a reference to a defendant, and all reference to any defendant therein except Buena Vida Farms, Inc., shall be deemed a reference to a plaintiff.

3. The plaintiffs, Hampton Valley Farms, Inc., the Sun-Quest Corporation and Rose Ann Shearin, and the additional defendant, Buena Vida Farms, Inc., shall answer such complaint as if it were counterclaims and cross-claims, respectively, within twenty days after the date of this stipulation.

4. This Stipulation may be submitted to the court to be "So Ordered" without any further notice to any party."

Thereafter by Order (Lama, J.) dated September 20, 1993 plaintiff's counsel's motion to be relieved as the attorney representing "Shearin" was denied without prejudice to renewal.

On January 18, 1994 the defendants made a motion seeking an order pursuant to CPLR Section 3215 granting a default judgment against the plaintiffs based upon plaintiffs failure to comply with the June 7, 1993 So-Ordered Stipulation. Defendants claimed that the plaintiffs failed to timely answer the counterclaim and cross claim. In response plaintiff's counsel submitted a second application to be relieved as plaintiffs attorney. By Order (Lama, J.) dated May 20, 1994 plaintiff's counsel's application to be relieved was denied with leave to renew by order to show cause and defendants motion was denied "in the interest of justice with leave to renew upon the relief of plaintiff's counsel and the termination of any stays associated therewith or upon leave of the court."

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In July, 1994 the defendants submitted a motion to reargue their prior default judgment motion and the May 20, 1994 Order denying the application claiming that plaintiffs intentionally defaulted by not timely serving an answer to defendants counterclaim. Plaintiff's counsel "Miller" made a third application dated October 8, 1994 seeking to be relieved. By Order (Lama, J.) dated January 31, 1995 defendants motion to reargue was granted and upon reargument defendants motion seeking an order granting a default judgment against the plaintiffs was granted. Plaintiff's counsel's cross motion was again denied with leave to renew by order to show cause. A default judgment was thereafter entered against the plaintiffs on April 18, 1995.

Plaintiff's counsel's fourth application to be relieved was brought on by Order to Show Cause (Lama, J.) dated October 10, 1995. By Order (Lama, J.) dated December 15, 1995 "Miller's" motion was granted and the attorney was relieved as counsel for the plaintiffs in this proceeding.

In May, 1997 plaintiff "Shearin", now acting pro se, made two motions seeking to discontinue this action and to vacate the default judgment entered against the plaintiffs in April, 1995. By Order (Henry, J.) dated July 14, 1997 the Court denied both applications. Since that time plaintiff "Shearin" has made a series of written applications raising issues related to the claims underlying this action and the defendants attempt to collect monies claimed to be due in connection with their counterclaim for legal fees.

By Short form Order dated December 17, 2003 the Court scheduled a hearing with respect to plaintiffs most recent application which sought an order pursuant to CPLR Section 5015 vacating the judgment entered against the plaintiffs. By Short form Order dated February 23, 2004 the Court limited the scope of the hearing to the issue of ascertaining whether the default judgment should be re-opened based upon a constitutional deprivation of plaintiff "Shearin's" rights.

A hearing with respect to that issue was held on October 14, 2004. The witnesses who testified at the hearing included plaintiff Rose Ann Shearin and defendants Edward Flower and Randolph Medalie and plaintiff's former counsel, William C. Miller.

Attorney "Miller" testified that he represented "Shearin" beginning in 1992 and prepared and filed this action. "Miller" stated that "Shearin" ceased "having contact" with the attorney's office within two or three weeks after "Shearin" moved to North Carolina. Based upon that lack of cooperation "Miller" made an application to be relieved as "Shearin's" counsel in May, 1993. While "Miller's" motion was pending the attorney attended a court conference and entered into a So-Ordered Stipulation which required that plaintiffs answer the defendants counterclaim. "Miller" testified that subsequent to May, 1993 plaintiff "Shearin" never voluntarily contacted the attorney who was then continuing to represent her and that he never served an answer to the counterclaim. "Miller" also claimed that he forwarded approximately twenty letters to "Shearin" without any response.

In response to questions from the Court, "Miller" testified that he was never retained to represent the plaintiff "Shearin" or the plaintiff corporations in the new action commenced by the defendants. Although "Miller" conceded that he had no authority to execute any stipulation on behalf of the plaintiffs with respect to the defendants new action, he maintained that he had authority under the original retainer agreement to represent the plaintiffs for any counterclaims which were instituted in the original action. The attorney testified that he did not formulate an answer to the counterclaim because he could not contact "Shearin" to discuss the proposed answer. "Miller" claimed that he sent letters to "Shearin" advising her of the pending

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default judgment application but that "Shearin" failed to respond. "Miller" stated that service of the counterclaim was never personally made upon the plaintiffs. Defendant "Flower" also testified that he believed the summons and complaint which became the defendants counterclaim was served on one or more of the plaintiff corporations but was not personally served upon the individual plaintiff "Shearin".

Plaintiff "Shearin" testified that she gave her attorney "Miller" authority to answer the complaint. "Shearin" testified that she first learned of the default judgment entered against the plaintiffs in April, 1996 and that approximately one year later she made a written application to vacate the default.

Due process protects against deprivation of liberty or property interests (BOARD OF REGENTS v. ROTH, 408 US 564, 925 Sct 2701, 39 LEd2d 548 (1972)). The Supreme Court in BOARD stated:

"Property interests are not created by the Constitution. Rather they are created... by existing rules or understandings that stem from an independent source such as state law— rules or understandings that secure certain benefits and that support claims of entitlement of those benefits." (BOARD OF REGENTS v. ROTH, 408 US at 577, 92 S Ct. at 2709).

The requirements of procedural due process attach to governmental deprivations of interests encompassed by the 14th Amendment's protection of liberty and property.

In order to commence an action or proceeding in New York, due process requires that the pleadings which form the basis of an action against an individual defendant be personally served upon that individual (CPLR Sections 308 & 403). Absent proof that a claim which forms the basis of a complaint or counterclaim has been personally served upon an individual, the court lacks jurisdiction over the individual defendant. In such a circumstance any judgment awarded against a defendant over which the court did not have jurisdiction in the underlying proceeding would violate a defendant's due process rights and therefore would not be enforceable.

The credible evidence adduced at the hearing establishes that plaintiffs were represented by counsel until irreconcilable differences developed between the attorney and "Shearin" during the spring of 1993. There is no dispute that "Miller" and "Shearin" did not speak and had no contact following the attorney's May 14, 1993 original motion to be relieved as counsel. Moreover counsel "Miller" testified that he was not retained and never obtained authority from "Shearin" to represent her in any action other than the one he commenced and was then pending in court.

Under these circumstances "Miller" clearly was without authority to act on behalf of the plaintiffs during the June, 1993 conference in which a counterclaim was asserted against the plaintiffs without their knowledge. Absent authority to represent the plaintiffs, the attorney could not waive the jurisdictional requirements which require that a party be given adequate notice of claims asserted against them and a reasonable opportunity to be heard. The evidence shows that "Miller" had neither the express or implied authority to act on behalf of the plaintiffs and therefore any stipulation entered into by the attorneys present at the conference was a nullity that could not confer jurisdiction over the absent non-consenting parties. (This is unlike the proceedings by an attorney duly authorized to act AMBRO v. COVENEY, 20 NY2d 850 (1967)).

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Although defendants claim that plaintiffs application must be denied since an identical application was made in 1997 before Justice Henry and denied by Order dated July 14, 1997, the issue presented in this application was a jurisdictional inquiry and never the subject of the prior application. Having determined that the Court never obtained jurisdiction over the plaintiffs prior to entry of the default judgment, the law of the case doctrine has no application since the prior order was limited to a determination of whether the defaulting party had an acceptable excuse for her failure to appear and a meritorious defense to the defendants counterclaim. Absent personal service of the claims against a defaulting party, a default judgment is a nullity since a court lacked jurisdiction over the counterclaim defendants. (CPLR Section 5015 (a)(4); SHAW v. SHAW, 97 AD2d 403, 467 NYS2d 231 (2nd Dept., 1983)). The stipulation was a nullity consequently the "So Ordered" provisions lacking a proper jurisdictional predicate were also a nullity. Based upon the testimony and the evidence presented during the hearing the default judgment entered against the plaintiffs must be vacated. Accordingly it is

ORDERED that this motion by plaintiffs for an order pursuant to CPLR Section 5015 vacating a default judgment entered against the plaintiffs in the Suffolk County Clerk's Office on April 18, 1995 in the sum of \$115,575.53 is granted, and it is further

ORDERED that the Clerk of the Court is hereby directed to vacate and set aside the default judgment entered by the defendants against the plaintiffs on April 18, 1995, and it is further

ORDERED that plaintiffs are directed to serve an answer to defendants counterclaim and cross claim within thirty days of the date of service of a certified copy of this order with notice of entry.

Dated: January 10, 2005

Hon. Melvyn Tanenbaum

J.S.C.