

**Reingold v Bowins**

2007 NY Slip Op 30370(U)

March 2, 2007

Supreme Court, Suffolk County

Docket Number: 0024800

Judge: Martin J. Kerins

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Supreme Court - State of New York  
IAS PART 12 - SUFFOLK COUNTY

MOTION DATE: 01-18-07  
ADJ. DATE: 02-01-07  
MOT. SEQ: 011-MD

**PRESENT:**

Hon. MARTIN J. KERINS  
J.S.C.

Copy

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G. STEVEN REINGOLD,	:
	:
	:
Plaintiff(s),	:
	:
- against -	:
	:
	:
BARBARA BOWINS, F/K/A BARBARA	:
REINGOLD, A/K/A BARBARA REINGOLD	:
SASS,	:
	:
Defendant(s).	:
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Upon the following papers numbered 1 to 37 read on this motion to vacate a default and to strike the answer ;  
Notice of Motion/ Order to Show Cause and supporting papers 1-12; Notice of Cross Motion and supporting papers  
.....; Answering Affidavits and supporting papers 13-26; Replying Affidavits and supporting papers 27-37;  
Other .....; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the portion of the motion (011) by the plaintiff pursuant to CPLR 5015(a) and that portion of the motion seeking to strike the defendant's answer for failure to complete discovery are denied.

This is an action to impose a constructive trust upon a home which plaintiff reportedly purchased in the name of his sister, the defendant herein. In order to demonstrate a constructive trust, four elements must be established: (1) A confidential or fiduciary relationship, (2) A promise, express or implied, (3) a transfer in reliance thereon and (4) unjust enrichment (*see Sharp v Kosmalski*, 30 NY2d 119; *Levy v. Moran*, 270 A.D.2d 314; *Neos v Neos*, 262 AD2d 467).

Plaintiff now moves pursuant to CPLR 5015[a][5].

CPLR 5015[a][5] provides in pertinent part:

The court which rendered a judgment or order may relieve a party from it under such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

5. reversal, modification or vacatur of a prior judgment or order upon which it is based.

The order of this Court (Loughlin, J.) dated, May 16, 2006, granted defendant's unopposed motion and awarded her possession of the subject premises. This decision was based upon the plaintiff's failure to comply with a prior order of the court directing him to make monthly mortgage payments for his use and occupancy of the premises. A judgment of possession and warrant of eviction was thereafter granted on August 2, 2006.

The requirement that plaintiff make monthly mortgage payments for his use and occupancy of the premises had been imposed by this Court (Loughlin, J.), by order dated, January 18, 2005. Plaintiff contends here that this directive to him was solely meant as a modification of a preliminary injunction that had been previously granted to him by order of this Court (Klein, J.) dated, April 28, 2003. Plaintiff was required to post an undertaking as a condition of the preliminary injunction.

Plaintiff now argues on this motion, that the preliminary injunction was eventually vacated by the court (Loughlin, J.) by order dated, October 3, 2005, on the ground that plaintiff had failed to post the required undertaking. He further argues that since the preliminary injunction was vacated, so too were the modifications that were imposed upon him, i.e., the requirement that he make monthly mortgage payments for his use and occupancy of the premises. Therefore, since he was no longer required to make the payments, this Court should not have awarded possession to defendant on those grounds.

A party seeking to obtain relief from an order entered upon his or her default in opposing a motion must demonstrate a reasonable excuse for the default and a meritorious defense to the motion (see CPLR 5015[a][1]; *Matter of Phillips v Goord*, 16 A.D.3d 422, 790 N.Y.S.2d 709; *NYCTL 1998-2 Trust v Levin*, 13 A.D.3d 595, 786 N.Y.S.2d 351; *Costanza v Gold*, 12 A.D.3d 551, 784 N.Y.S.2d 380; *Melish v Melish*, 267 A.D.2d 218, 699 N.Y.S.2d 305). In that regard, plaintiff has failed to demonstrate a reasonable excuse for his default of the prior motion. On that issue, plaintiff argues that he presented his affidavit in opposition to his prior attorney and that he believed that same had been used to oppose the prior motion by plaintiff. He was not aware that his prior attorney did not submit an affidavit in opposition. As a result, defendant herein was awarded possession of

**G. Steven Reingold v Barbara Bowins**

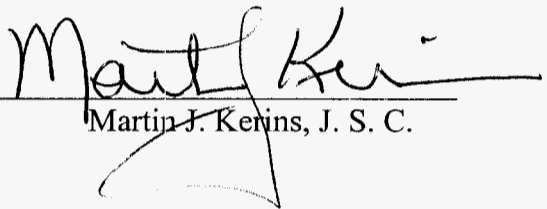
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the premises pursuant to the judgment of possession and warrant of eviction. Although the Court has the discretion to excuse a default resulting from law office failure (see, CPLR 2005; **Rosado v Economy El. Co.**, 236 AD2d 598; **Miles v Blue Label Trucking**, 232 AD2d 382), the conclusory affirmation of the plaintiff is insufficient to establish an excusable default. Plaintiff has offered little more than a bald conclusory allegation to explain the default which is insufficient and does not amount to an excusable default (**Gourdet v. Hershfeld**, 277 A.D.2d 422; **Van Kleeck v. Horton Mem'l Hosp.**, 251 A.D.2d 494).

The plaintiff also moves to strike the defendant's answer based upon her failure to comply with discovery and appear for depositions. This portion of the motion is also denied as the plaintiff has failed to submit an affirmation of a good faith effort to resolve the issue, which is required for motions related to discovery (see 22 NYCRR 202.7; **Barnes v. NYNEX, Inc.**, 274 AD2d 368 [2nd Dept. 2000]).

Dated: March 2, 2007  
RIVERHEAD, NY

  
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Martin J. Kerins, J. S. C.

FINAL DISPOSITION \_\_\_\_\_

NON-FINAL DISPOSITION ✓