

Schwenk v Schwenk

2007 NY Slip Op 30580(U)

March 6, 2007

Supreme Court, Queens County

Docket Number: 0023502/2004

Judge: James P. Dollard

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, JAMES P. DOLLARD IAS PART 5
Justice

-----x
SANDY SCHWENK,

Plaintiff,

-against-

EVA SCHWENK,

Defendant.
-----x

Index No. 23502/04

Motion Date: Jan. 9, 2007

Cal. No. 30

Motion Sequence No. S002

The following papers numbered 1 to 8 read on this motion by plaintiff for an order pursuant to CPLR §2005, 2221 and 5015 granting reargument and renewal of the order of Justice Peter J. O'Donoghue dated September 13, 2006 which granted defendant's summary judgment motion, without opposition.

	<u>PAPERS NUMBERED</u>
Order to Show Cause-Affidavit-Exhibit.....	1 - 4
Affirmation in Opposition.....	5 - 7
Reply Affirmation.....	8

Upon the foregoing papers it is ordered that this motion is denied.

Plaintiff movant Sandy Schwenk seeks an order granting reargument/renewal of a motion made by defendant, Eva Schwenk returnable on July 17, 2006 and submitted on that date, without opposition. Since the underlying motion was granted without opposition the instant motion "may be made, on notice to any judge of the court" (See CPLR §2221(a)(1) and as such does not have to be referred to Justice O'Donoghue.

In the first instance, the motion to reargue is denied and the motion to renew is denied. Movant cannot reargue and/or renew a motion which he never opposed. His sole remedy is by motion to open his default (See, Ross v. Magid, 22 AD2d 829, (2d Dept., 1964) citing Burns v. Coyle, 258 App. Div. 618). In order to open his default in appearance in opposition to the summary judgment (underlying) motion submitted July 17, 2006, plaintiff must establish an excusable default and a meritorious cause of action.

Plaintiff's attorney, Jay B. Itkowitz, Esq. explains his "excusable default" in appearance in opposition to the underlying motion essentially as "law office failure". "Law office failure" has been accepted as a reasonable excuse to open a default in appearance in opposition to a motion (Rockland Transit Mix, Inc. v. Rockland Enterprises, 23 AD3d 630 (2d Dept. 2006)). In Rockland Transit Mix, a clerk from the defaulting attorneys' office failed to file and serve opposition papers which had been timely prepared. Such is not the case at bar. Mr. Itkowitz argues that there had been a period of "staff turnover" around the period of July 18, 2006. However, the underlying motion papers were served on plaintiff's counsel on May 23, 2006, some two months prior.

With regard to a meritorious cause of action, plaintiff has similarly failed to establish that he has a meritorious claim for a constructive trust. Although he claims in paragraph four of his affidavit that "defendant advised plaintiff that they should divorce for financial reasons, but continued to live together as husband and wife" and in paragraph 10 that "defendant retained control of the bank account" and in paragraph 20 that "plaintiff transferred his interest in the Woodhaven property to defendant, for no consideration, on February 1, 1992", the opposition papers reveal in Exhibit 12, the Judgment of Divorce that the "Stipulation of Settlement Agreement entered into between the parties on the 7th day of January 1992 shall be incorporated by reference into this Judgment and that they shall not be extinguished by merger but shall in all events survive the decree and be binding upon the parties, and shall be enforced in this Court or any other Court of competent jurisdiction." In paragraph two of the aforesaid Stipulation of Settlement plaintiff transferred "all of his rights title and interest in the premises known as 89-09 85th Street, Woodhaven, New York to the wife." Plaintiff was represented by counsel, John J. Guadagno, P.C. when he executed this agreement. His present claim in paragraph 21 of his affidavit is that he "conveyed ownership in the Woodhaven property to defendant with the express understanding between them that if defendant sold the Woodhaven property, the defendant would pay over to plaintiff 1/2 of the

net proceeds of the sale." The Court finds that there is no merit to this claim. It was plaintiff husband who was represented by counsel during the divorce proceedings and defendant wife was pro se. Moreover, he forfeited any right he had to the Woodhaven property in the Stipulation of Settlement.

Exhibit 14 to the opposition papers evince that defendant wife refinanced the Woodhaven property on September 1, 1993 in her name only. It appears that plaintiff was unemployed from 1991 until July 1994. Defendant wife also contends that although plaintiff contends she had control over the joint bank account, from November 1994 through February 2000 plaintiff had withdrawn more than \$45,130.00. With regard to the Pennsylvania property, defendant sates in her opposition that the house was sold under a Contract of Sale (Exhibit 16) for \$97,000.00. There is also an addendum that Eva Schwenk and Sandy Schwenk agree to divide the "proceeds from the sale of the property located at 113 Glen Circle Dr., Tobyhanna, PA 18455 as follows:

Eva Schwenk to receive	\$25,082.32
Sandy Schwenk to receive	\$ 5,082.32"

The agreement is on century 21 Mountain Real Estate letterhead and is dated July 18, 2002 and it is duly executed by Eva Schwenk and Sandy Schwenk respectively.

Plaintiff's reply papers solely consist of plaintiff's counsel's affirmation which states that defendant's opposition raises "factual issues with respect to plaintiff and the rental value of the Woodhaven property and are therefore utterly irrelevant to the issue of whether the default should be vacated and the matter restored to the calendar." This argument is misplaced. Defendant's opposition addresses the meritorious nature of plaintiff's claims. Defendant has set forth documentary evidence that plaintiff forfeited his right in the divorce settlement to the Woodhaven property on which he presently seeks to impose a constructive trust on the Bayside property purchased in 1998, over six years after the divorce. In accordance with the foregoing, plaintiff has failed to establish a meritorious cause of action.

Dated: March 6, 2007

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J.S.C.