

**Lobo Pioneer, Inc. v Bullock**

2007 NY Slip Op 32208(U)

July 23, 2007

Supreme Court, Albany County

Docket Number: 0036052/0061

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

LOBO PIONEER, INC.,

Plaintiffs,

-against-

**DECISION and ORDER**  
**INDEX NO. 3605-06**  
**RJI NO. 01-07-088917**

KENNETH BULLOCK,

Defendant.

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Supreme Court Albany County All Purpose Term, June 11, 2007  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Brian J. O'Donnell, Esq.  
*Attorney for Plaintiff*  
Hite, O'Donnell & Beaumont, P.C.  
26 Century Hill Drive, Suite 204  
Latham, New York 12110

Mary Vinciguerra D'Ambrosio, Esq.  
*Attorney for Defendant*  
The Vinciguerra Law Firm  
10 Utica Avenue  
Latham, New York 12110

**TERESI, J.:**

Defendant, Kenneth Bullock, moves for Summary Judgment and a Default Judgment due to Plaintiff's failure to make a timely Reply to the Counterclaim of April 2007. The Defendant also requests attorney's fees, sanctions, and other relief that this Court deems proper. Plaintiff, Lobo Pioneer, Inc. opposes and cross-moves for an Order pursuant to CPLR § 5015(a) vacating the plaintiff's default on the defendant's counterclaim and pursuant to CPLR § 3012(d) compelling the defendant to accept the Reply which the plaintiff served untimely. Further, the Plaintiff requests a denial of the Defendant's Motion for Summary Judgment, and a grant of

Plaintiff's Cross-Motion for Summary Judgment.

This case arises out of a breach of contract suit filed by the Plaintiff, Lobo Pioneer, Inc. ("Lobo"), in June of 2006. Lobo, the owner of a golf course in Saratoga County, entered into a contract with Kenneth Bullock to sell its property in May of 2005. An initial deposit of \$5,000 from a discarded April contract was applied to the May contract, in addition to \$20,000 that was paid as an earnest money deposit by the Defendant. In August 2005, it was determined that time was of the essence and a closing date was set. Nevertheless, a new contract was entered into by the parties in October of 2005. The October contract failed for lack of attorney approval in November of 2005. Later, NBT (formerly Bank of Canajoharie) foreclosed on the property.

It is undisputed that the defendant failed to close on the property. Moreover, it is agreed that the parties continued to discuss the sale of the golf course after the time set for closing had passed. During this time a subsequent contract was formulated, however, both parties disapproved of the latter contract. Plaintiff contends that the latter contract only substituted an attorney approval clause and that Mr. Bullock's failure to close constituted a breach of the May contract for which Summary Judgment should be granted. In contrast, Defendant contends that the latter agreement was for the same subject property, with the same buyer and seller, using the same deposit money, and should be considered a valid contract resulting in a novation of the May deal. The defendant also moves for Summary Judgment on the merits, as well as attorney's fees, sanctions, and other relief as this court deems just and proper.

A preliminary conference was held, and Plaintiff was granted additional time to respond to Defendant's initial motions. Such response was due on May 31, 2007. On May 31, 2007, the Plaintiff filed a Notice of Cross-Motion, which the Defendant rejected as untimely. The plaintiff

contends that all factual allegations were limited to the plaintiff's Complaint and the defendant's Answer. Plaintiff asserts that the Reply was limited to a claim regarding the return of \$25,000 deposited by the defendant in escrow in connection with his contract to buy the golf course. As such, Plaintiff contends that his untimely Reply to the Counterclaim resulted in no prejudice to the defendant and was due to oversight by his counsel's law office. In contrast, Defendant maintains that he was prejudiced by the inability to use the \$25,000 deposit and interest in the escrow account. The plaintiff served a Reply which the defendant rejected. Plaintiff moves to compel the defendant to accept the Reply. Defendant opposes and submits that if Plaintiff is allowed to enter an untimely Reply, that Plaintiff pay Defendant's attorney's fees and costs.

An extension of time to appear or plead may be awarded if the movant establishes the existence of a reasonable excuse for the default. See, CPLR 3012(d); see Watson v. Pollacchi 32 AD3d 565 (3<sup>rd</sup> Dept. 2006). It is the preference of courts that cases be decided on the merits rather than on default. See, DFI Communications, Inc. v. Golden Penn Theater Ticket Service, 87 AD2d 778 (1<sup>st</sup> Dept. 1982). Moreover, CPLR § 2001 allows the court to disregard a mistake, omission, defect or irregularity if a substantial right of a party is not prejudiced.

In this matter, the Plaintiff should not be prejudiced by the inadvertent mistake of its counsel. While the Court recognizes the Defendant's submissions, this Court is inclined to have matters resolved upon the merits rather than by default.

Further, after a full review of the record this Court finds that there are triable issues of fact and will deny both the Plaintiff and Defendant's motions for summary judgment.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." Napierski v. Finn, 229 A.D.2d 869, 870 (3d Dept

1996). In deciding whether summary judgment is warranted, the court's main function is issue identification, not issue determination. See Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law. See Wingrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidence must be construed in a light most favorable to the party opposing the motion. See Dykstra v. Winridge Condominium One, 175 A.D.2d 482, 483 (3d Dept. 1991). In order to defeat a motion for summary judgment the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. See Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986); see also Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

A novation has four elements, each of which must be present in order to demonstrate novation: (1) a previously valid obligation; (2) agreement of all parties to a new contract; (3) extinguishment of the old contract; and (4) a valid new contract. See Callanan Industries, Inc. V. Micheli Contracting Corp., 124 A.D.2d 960, 961 (3d Dept. 1986). Here, there is a triable issue as to whether the October contract should be considered a novation of the April contract, particularly in light of the negotiations between the parties after April, and the use of the previous escrow account as a deposit. As such, the Court will deny both parties' motions for summary judgment, and denies defendant's motion for default and orders defendant to accept plaintiff's reply.

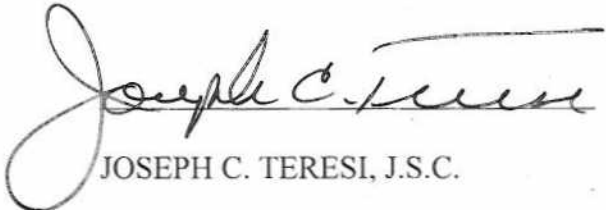
All papers, including this Decision and Order, are being returned to the attorney for the Plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing,

entry and notice of entry

So ordered.

Dated: July 23 2007

Albany, NY



JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

- 1. Affidavit by Anthony Sabatino, dated April 14, 2007
- 2. Affidavit in Support of Motion for Summary Judgment and Motion for Default Judgment by Kenneth Bullock, dated April 24, 2007
- 3. Affidavit in Support of Motion for Summary Judgment and Motion for Default Judgment with attached Exhibits, by Mary Vinciguerra D'Ambrosio, dated April 24, 2007
- 4. Order to Show Cause by Hon. Joseph C. Teresi, dated April 25, 2007
- 5. Notice of Cross-Motion by Brian J. O'Donnell, Esq., dated May 31, 2007
- 6. Affidavit of Brian J. O'Donnell, Esq. with attached Exhibits, dated May 31, 2007
- 7. Affidavit of Gloria N. Wheeler with attached Exhibits, dated May 31, 2007
- 8. Affidavit of Kenneth Bullock with attached Exhibits, dated June 8, 2007
- 9. Defendant's Reply to Cross Motion by Mary Vinciguerra D'Ambrosio, dated June 11, 2007