Heidari v First Advance Funding Corp.

2007 NY Slip Op 32895(U)

August 21, 2007

Supreme Court, Queens County

Docket Number: 0004878/2007

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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ABDOLREZA HEIDARI,

Plaintiff,

Index No: 4878/07
Motion Date: 7/25/07
Motion Cal. No: 18
Motion Seq. No: 2

-against-

FIRST ADVANCE FUNDING CORP.,
NY PRIDE HOLDINGS INC.,
ESMAEIL HOSSEINIPOUR a/k/a ESSY
HOSSEINIPOUR CAPITAL AT WORK
HOLDINGS, LLC a/k/a CAPITAL AT WORK CO.,

Defendants.

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The following papers numbered 1 to 12 read on this motion for, inter alia, an order pursuant to CPLR § 5015(a)(3), vacating and setting aside the order of the Court dated May 30, 2007, which granted the plaintiff's motion for an order seeking a preliminary injunction, without any opposition, prohibiting the defendants from transferring, conveying, hypothecating, encumbering, or otherwise affecting the beneficial ownership of or title to the real property known as 173-12 Jamaica Avenue, Jamaica, NY (Block 10214, Lot 6), during the pendency of this case.

	PAPERS NUMBERED
Order to Show Cause-Affidavits-Exhibits.....	1 - 5
Affirmations in Opposition-Exhibits.....	6 - 10
Reply.....	11 - 12

Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

This is an action sounding in breach of contract and fraud arising from the alleged failure of defendant Esmaeil Hosseinipour ("Hosseinipour") to record a mortgage on property known as 173-12 Jamaica Avenue, Jamaica, NY (Block 10214, Lot 6), as security for the alleged loan to him of $75,000.00 by plaintiff Abdolreza Heidari ("plaintiff"). In his first cause of action, plaintiff seeks to impress an equitable mortgage in the sum of $75,000.00 on the property allegedly owned by defendant NY Pride Holdings Inc. ("NY Pride"); in his second cause of action, plaintiff seeks to impose personal liability upon Hosseinipour for the $75,000.00; and in his third cause of action, plaintiff seeks monetary damages in the amount of $75,000.00. Plaintiff alleges that the failure to record the mortgage and Hosseinipour's misrepresentation that certain loan documents presented to

plaintiff, who does not speak English, for signing gave Hosseinipour a mortgage on the subject real property and deprived plaintiff of any security for the loan or any basis for enforcing a lien against the property. The "loan documents" consisted of a Fund Management Agreement between plaintiff and defendant First Advance Funding Corp.; a $400,000.00 note and mortgage from defendant NY Pride Holdings, the owner of the property, to defendant First Advance Funding Corp., companies allegedly controlled by Hosseinipour; and an assignment of an 18.75% interest in that mortgage to plaintiff. He further suggests that Hosseinipour has given a mortgage in the amount of $200,000.00 on the same property to defendant Capital at Work Co. By order dated May 30, 2007, this Court granted plaintiff's motion for a preliminary injunction prohibiting defendants from transferring, conveying, hypothecating, encumbering, or otherwise affecting the beneficial ownership of or title to the real property. Defendants now move, pursuant to CPLR §5015(a)(3), to vacate that order, which was granted without opposition, on a myriad of grounds.

"CPLR § 5015(a)(3). . . authorizes the court to relieve an aggrieved party from a judgment upon the ground of 'fraud, misrepresentation or other misconduct of an adverse party'"Tortorello v. Tortorello, 161 A.D.2d 633 (2nd Dept.1990)[failure of counsel to apprise hearing court of existence of modified retainer agreement]. Thus, aside from vacating a default judgment upon proof of a meritorious defense and a reasonable excuse for the default, such vacation also may occur solely upon proof that the judgment resulted from fraud, misrepresentation, or misconduct. See, Halali v. Vista Environments, Inc., 8 A.D.3d 435 (2nd Dept. 2004); Chemical Bank v. Vazquez, 234 A.D.2d 253 (2nd Dept.1996); see, also, Civil Service Bar Ass'n, Local 237, Intern. Broth. of Teamsters v. City of New York, 64 N.Y.2d 188, 199 (1984)[concurring opinion]["Relief is thus authorized when it is established that the judgment sought to be vacated is infirm in consequence of fraud, misrepresentation or other misconduct practiced on the court in which the judgment was granted."]

Decisional law, however, has distinguished between a claim of "intrinsic fraud," in which the movant is required to offer a reasonable excuse for their default in opposing the prior motion and a meritorious claim [see Morel v Clacherty, 186 A.D.2d 638, 639 (2nd Dept. 1992)], and a claim involving "extrinsic fraud," in which such a showing is not required. Shaw v Shaw, 97 A.D.2d 403 (1983)["In our opinion, a movant seeking relief from a judgment under this paragraph, at least on the ground of extrinsic fraud, need not show that he has a meritorious defense or cause of action"]. The Shaw court defined "extrinsic fraud" as a "fraud practiced in obtaining a judgment such that a party may have been prevented from fully and fairly litigating the matter," which would be applicable here. Defendants' claim, however, fails no matter whether the fraud is characterized as "intrinsic" or "extrinsic."

In the case of a claim of "intrinsic" fraud, CPLR § 5015 (a)(3) permits a court to vacate a default judgment entered against a party based upon the alleged "fraud, misrepresentation, or other misconduct," of the other party, provided that movant demonstrates both a reasonable excuse for the default and the existence of a meritorious defense. Lopez v. Tierney & Courtney Overhead Door Sales Co., Inc., 8 A.D.3d 347 (2nd Dept. 2004); Beale v. Yepes, 309 A.D.2d 886, 887 (2nd Dept. 2003). The determination of what constitutes a reasonable excuse is left to the sound discretion of the court (see, Scarlett v. McCarthy, 2 A.D.3d 623 (2nd Dept. 2003); Westchester Med. Ctr. v.

Clarendon Ins. Co., 304 A.D.2d 753 (2nd Dept. 2003). Abrams v. City of New York, 13 A.D.3d 566 (2nd Dept. 2004). See, also, Gironda v. Katzen, 19 A.D.3d 644 (2nd Dept. 2005); Liotti v. Peace, 15 A.D.3d 452 (2nd Dept. 2005). Law office failure may, in the court's discretion, serve as a reasonable excuse. See, CPLR 2005; Royal Agricola, S.A. v. F.D. Import and Export Corp., __ A.D.3d __, 828 N.Y.S.2d 908 (2nd Dept. 2007); Washington Mut. Home Loans, Inc. v. Jones, 27 A.D.3d 728, (2nd Dept. 2006); Liotti v. Peace, supra; Ray Realty Fulton, Inc. v. Kwang Hee Lee, 7 A.D.3d 772 (2nd Dept. 2004).

Here, defendants allege that the default in answering the prior motion occurred because counsel "failed to properly calendar the time within which to appear, answer or otherwise move with respect to the plaintiff's complaint." Counsel for defendants goes into great detail outlining his failure to remove, upon his return from court on the initial return date of the preliminary injunction motion on March 21, 2007, the "green colored carrying case which [he] typically use[s] to carrying [sic] papers back and forth to Court;" the leaving of the carrying case on a ledge, which resulted in his assistant not calendaring the adjourned date of the motion or opening a file in this matter; the placement of other files over the "file;" and his realization, once the papers were discovered, that the motion had been determined without opposition. There is no question that defendants have an excuse; the issue is whether the excuse is reasonable or, as asserted by plaintiff, mere negligence. The Court finds that defense counsel, notwithstanding a detailed recitation to substantiate the default, has failed to come forward with a justifiable reason for the failure to oppose the motion for a preliminary injunction. See, Forward Door of New York, Inc. v. Forlader, 41 A.D.3d 535 (2nd Dept. 2007)["a conclusory, undetailed, and uncorroborated claim of law office failure does not amount to a reasonable excuse"]; Piton v. Cribb, 38 A.D.3d 741 (2nd Dept. 2007)["a conclusory and unsubstantiated claim of law office failure will not rise to the level of a reasonable excuse"]; McClaren v. Bell Atlantic, 30 A.D.3d 569 (2nd Dept. 2006) ["conclusory and unsubstantiated claim of law office failure was insufficient to constitute a justifiable excuse"]; Elrac, Inc. v. Holder, 31 A.D.3d 636 (2nd Dept. 2006)["conclusory and unsubstantiated excuse of law office failure did not amount to a reasonable excuse"]. Since defendants failed to adequately substantiate the alleged law office failure that resulted in their failure to oppose plaintiff's underlying motion, their motion to vacate the default in opposing the motion by asserting law office failure as the reasonable excuse must fail.

Questionable is whether they have a meritorious defense to the action in that the documentary evidence:

> conclusively demonstrates that the plaintiff has nothing more than an eighteen and three quarter (18.75%) percent participatory interest in a loan solely as an investor with defendant, First Advance Funding Corp., and not as a secured party such as a mortgagee thereby barring him from asserting a claim for an equitable mortgage against the Property or for fraud as against defendants, NY Pride Holdings Inc. and Esmaeil Hosseinipour a/k/a Essy Hosseinipour, with whom plaintiff has no contractual or other relationship.

It is well established that to support dismissal of a complaint founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (citations omitted)." Fleming v. Kamden Properties, LLC, 41 A.D.3d 781 (2nd Dept. 2007); Martin v. New York Hosp. Medical Center of Queens, 34 A.D.3d 650(2nd Dept. 2006); Del Pozo v. Impressive Homes, Inc., 29 A.D.3d 621 (2nd Dept. 2006). Such a motion "may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law (citations omitted)." Ruby Falls, Inc. v. Ruby Falls Partners, LLC, 39 A.D.3d 619 (2nd Dept. 2007). See, Kupersmith v. Winged Foot Golf Club, Inc., 38 A.D.3d 847 (2nd Dept. 2007); Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 A.D.3d 34 (2d Dept. 2006). The documentary evidence, consisting of the Fund Management Agreement, in no way resolves all factual issues as a matter of law. In any event, to the extent defendants seek to vacate their default in opposing the prior motion, they did not satisfy the two-prong condition precedent of demonstrating both a reasonable excuse for such default, which they failed to do, and a meritorious defense to the motion, which is questionable. Krieger v. Cohan, 18 A.D.3d 823 (2nd Dept.2005); 16 AD3d 422 (2nd Dept. 2005); Lopez v Tierney & Courtney Overhead Door Sales Co., Inc., 8 A.D.3d 347 (2nd Dept. 2004); Beale v Yepes, 309 A.D.2d 886, 887 (2003).

Moreover, to the extent plaintiffs assert that the preliminary judgment should be vacated pursuant to CPLR § 5015(a)(3), defendants failed to establish that plaintiff procured the judgment by fraud, misrepresentation, or other misconduct. Czernicki v. Lawniczak, 41 A.D.3d 418(2nd Dept. 2007); Citicorp Vendor Finance, Inc. v. Island Garden Basketball, Inc., 27 A.D.3d 608 (2nd Dept. 2006). That plaintiff filed a notice of pendency and moved for a preliminary injunction standing alone is insufficient to establish either fraud, misrepresentation or other misconduct. See, Reingold v. Bowins, 34 A.D.3d 667 (2d Dept. 2006) [both provisional remedies at issue]. Assuming, arguendo, that defendants' claim with respect to plaintiff's failure to affirmatively state that a notice of pendency had been filed makes out extrinsic fraud in the procurement of the preliminary injunction, they still would have to show that this conduct "prevented them from fully and fairly litigating this matter." Putnam County Nat. Bank of Carmel v. Simpson, 204 A.D.2d 297 (2nd Dept. 1994). This they failed to do. It was defendants' negligence in misplacing the papers, not anything done by plaintiff, that "prevented them from fully and fairly litigating this matter."

Accordingly, defendants' motion to vacate the preliminary judgment entered against them is denied. The continuation of the preliminary injunction is conditioned upon plaintiff paying use and occupancy and filing an undertaking in accordance with CPLR 6312. "Although the fixing of the amount of an undertaking when granting a motion for a preliminary injunction is a matter within the sound discretion of the court [see, Blueberries Gourmet v. Aris Realty Corp., 255 A.D.2d 348, 680 N.Y.S.2d 557 (2nd Dept. 1998); see, Clover St. Assocs. v. Nilsson, 244 A.D.2d 312, 313, 665 N.Y.S.2d 537 (2nd Dept. 1997)], the language of CPLR 6312(b) is "clear and unequivocal," and it requires the party seeking the injunction to give an undertaking [see, Carter v. Konstantatos, 156 A.D.2d 632, 633, 549 N.Y.S.2d 131 (1996); Walter Karl, Inc. v. Wood, 137 A.D.2d 22, 29, 528 N.Y.S.2d 94 (2nd Dept. 1988); Burmax Co. v. B & S Indus., 135 A.D.2d 599, 601, 522 N.Y.S.2d 177(2nd Dept. 1987)]." Schwartz v. Gruber, 261 A.D.2d 526, 527 (2nd Dept. 1999); see, Livas v.

Mitzner, 303 A.D.2d 381 (2nd Dept. 2003). The standard to be applied in fixing the undertaking is an amount that is rationally related to the damages the nonmoving party might suffer if the court later determines that the relief should not have been granted. See, Lelekakis v. Kamamis, 303 A.D.2d 380 (2nd Dept. 2003); Schwartz v. Gruber, 261 A.D.2d 526 (2nd Dept. 1999); Carter v. Konstantatos, 156 A.D.2d 632 (2nd Dept. 1996); Bennigan's of New York, Inc. v. Great Neck Plaza, L.P., 223 A.D.2d 615 (2nd Dept. 1996). As a general rule, however, the amount is fixed by the court after a hearing held for such purpose. See, Cohn v. White Oak Coop. Hous. Corp., 243 A.D.2d 440 (2nd Dept. 1997); Peron Rest. v. Young & Rubicam, Inc., 179 A.D.2d 469 (1st Dept. 1992); Times Sq. Stores Corp. v. Bernice Realty Co., 107 A.D.2d 677 (2nd Dept. 1985). The parties hereby are directed to appear before this court in Part 19, courtroom 63, on October 17, 2007, at 10:30 A.M., for a hearing to determine the amount of the undertaking. Copies of this order are being sent to counsel for the parties on the motion by facsimile.

There is no basis to grant defendants leave to interpose a late answer since they have not demonstrated a reasonable excuse for their default. Henriquez v. Purins, 245 A.D.2d 337 (2nd Dept.1997). In the absence of a cross motion, this Court does not consider plaintiff's request, made in his affidavit in opposition, for the entry of a default judgment against defendants. See, New York State Div. of Human Rights v. Oceanside Cove II Apartment Corp., 39 A.D.3d 608 (2nd Dept. 2007); Blam v. Netcher, 17 A.D.3d 495 (2nd Dept. 2005); Myung Chun v. North American Mortgage Co. 285 A.D.2d 42 (1st Dept. 2001); CPLR 2215; Siegel, N.Y. Prac. § 249, at 403 [3d ed.].(see, Dowling Textile Mfg. Co. v. Land, 179 A.D.2d 621, 578 N.Y.S.2d 238).

Dated: August 21, 2007

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J.S.C.