

Global Asset Mgt., Inc. v Lewis

2007 NY Slip Op 32935(U)

September 19, 2007

Supreme Court, New York County

Docket Number: 0107313/2005

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HERMAN CAHN
Justice

PART 49

Global Asset

INDEX NO. 107313/05

Lewis

- v -

MOTION DATE 6/18/07

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . .

FILED
SEP 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/19/07 A. Cahn

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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GLOBAL ASSET MANAGEMENT, INC.,

Index No. 107313/05

Plaintiff,

-against-

IGNACIO F. LEWIS,

Defendant.

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HERMAN CAHN, J.:

Plaintiff Global Asset Management, Inc. (Global) moves to reargue its motion for a default judgment, CPLR 2221 (d) defendant's cross-motion to dismiss the complaint for lack of personal jurisdiction. Upon reargument, Global seeks a default judgment (CPLR 3215) on its cause of action for specific performance of a real estate contract, and to strike the answer.

Lewis requests costs from Global due to the allegedly frivolous nature of this motion.

Background

This action arose out of a contract for the sale of real property, located in Manhattan, New York, owned by Lewis. On December 15, 2004, Global and Lewis allegedly entered into a contract for the sale of the property for \$335,000. Global alleges that it transferred a down payment of \$32,000 to an escrow account, and remains ready, willing, and able to purchase the property pursuant to the terms of the contract, at all times (Complaint, ¶¶ 3, 5). Global asserts that on the date scheduled for closing, May 16, 2005, Lewis's attorney informed Global that Lewis refused to close on the property (*id.*, ¶ 11).

Thereafter, on June 16, 2005, Global instituted this action for specific performance of the

Contract, and filed a notice of pendency against the property. Lewis alleges that he was never properly served with the summons and complaint. According to Lewis, he only learned on March 15, 2006 that an action had been commenced against him when he received a copy of the complaint after it was allegedly mailed from Global's corporate affiliate by certified mail, nearly a year after Global filed it (Squire Aff at ¶ 14). On May 4, 2006, nearly 11 months after Global commenced the action, Lewis filed and served an answer. In the Answer, Lewis raised the affirmative defense of lack of personal jurisdiction. Global notified Lewis that it was rejecting the Answer because it was untimely served.

Subsequently, on July 14, 2006, Global moved for a default judgment, pursuant to CPLR 3215 (a), and to strike the Answer due to untimely service. Lewis cross-moved for an extension of time to appear, plead or to compel Global's acceptance of the Answer, or to permit Lewis to file and serve an amended answer pursuant to 3012 (d). Additionally, he cross-moved for an order deeming the Contract void due to fraud, to permit Lewis to interpose a cross-claim against his former attorney, Vincent A. Apicella, Esq., and to dismiss the complaint for lack of personal jurisdiction.

On November 14, 2006, the court referred the issue of whether Lewis was properly served to a Special Referee to hear and report, and held Global's motion and Lewis's cross-motion in abeyance pending receipt of the Special Referee's report, and a motion to confirm or vacate the same (Wotman Aff. Ex A).

Thereafter, and prior to a hearing being held, the parties attempted to settle the action. In fact, counsel for both parties notified this court that a settlement had been reached (Jan 10, 2007 Tr at 5:9-26, 6:2-14). However, Lewis, who allegedly does not speak English and had been

relying on his daughter to translate communications with his attorney, maintained that he did not consent to the settlement.

In February of 2007, Global moved to enforce the terms of the alleged settlement agreement, to stay the hearing before the Special Referee on the issue of personal jurisdiction, and to disqualify Lewis's attorney with respect to the issue of whether the parties indeed reached a settlement. The court referred the issue as to whether the parties reached a settlement to a Special Referee to hear and report, and declined to stay the hearing on the issue of personal jurisdiction (Feb 23, 2007 and May 1, 2007 Decisions). A Special Referee has been appointed to hear both issues, but a hearing has yet to be conducted.

Discussion

Global is moving for leave to reargue (CPLR 2221 [d]) on the ground that by sending the issue of personal jurisdiction to a traverse hearing before a special referee, the court overlooked the waiver provision of CPLR 3211 (e). That provision states that "an objection that the summons and complaint . . . was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship" (CPLR 3211 [e]). Global contends that because Lewis failed to file a motion to dismiss based upon lack of personal jurisdiction within 60 days after he served, albeit untimely, the Answer, Lewis waived any objection to personal jurisdiction and, thus, it was improper for the court to consider Lewis's objection to personal jurisdiction.

Global's motion for leave to reargue is denied because, in sending the matter to a traverse hearing to determine whether the court obtained jurisdiction over Lewis, the court did not

overlook or misapprehend the waiver provision contained in CPLR 3211 (e). In the first instance, the court has not yet determined Global's motion for a default judgment and Lewis's cross-motion for either an extension of time to appear, plead or to compel the acceptance of the Answer, or to permit Lewis to file and serve an amended answer pursuant to 3012 (d). Rather, the motion and cross-motion are being held in abeyance pending a hearing before a Special Referee.

CPLR 3211 (e) is clear that if the defense of lack of personal jurisdiction is raised in a defendant's answer, that party must move to dismiss based upon this ground within 60 days of service of an answer or else it will be waived unless the court extends that time. Absent a decision on Lewis's cross-motion, however, it is premature to determine whether Lewis waived the defense of lack of personal jurisdiction under the statute.

After Lewis raised the affirmative defense of lack of personal jurisdiction in the Answer (Answer, ¶ 4), he cross-moved for, inter alia, an extension of time to appear and serve an answer, in the event that the court deemed the Answer not served or filed. Thus, assuming arguendo that the court grants Lewis's cross-motion insofar as he seeks an extension of time to appear and answer based upon the demonstration of undue hardship, his right to raise the jurisdictional defense would not have been waived by the 60-day deadline set forth in CPLR 3211 (e), despite having cross-moved to dismiss more than 60 days beyond the filing of the Answer, because his time to move for dismissal on that ground would necessarily be extended (*cf. Thompson v Cuadrado*, 277 AD2d 151, 152 [1st Dept 2000]).

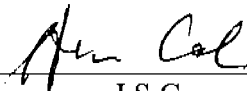
Finally, Lewis's request for costs due to the alleged frivolous nature of this motion is denied.

Accordingly, it is

ORDERED that the motion and cross-motion are denied.

Dated: September 19, 2007

ENTER:



J.S.C.

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