

**Vecchio v Valentin**

2009 NY Slip Op 30523(U)

March 11, 2009

Supreme Court, Greene County

Docket Number: 08-1308

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF GREENE

JOHN VECCHIO & CONNIE VECCHIO,  
as Trustees of the John Vecchio & Connie  
Vecchio Revocable Living Trust,

Plaintiffs,

**DECISION and ORDER**  
**INDEX NO. 08-1308**  
**RJI NO. 19-08-3982**

-against-

JAMES M. VALENTIN, LISA L. VALENTIN,  
and KANE and CUMMINS, as escrow agents,

Defendants.

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Supreme Court Greene County All Purpose Term, March 3, 2009  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

This action involves a dispute between the parties to a real estate contract, which did not close. Discovery in this matter is ongoing and plaintiffs, for the second time, move this court for summary judgment against defendant James Valentin and for a default judgment against defendant Lisa Valentin. The Valentin defendants oppose the motions and move to amend James Valentin's answer to include Lisa Valentin as an answering defendant. Plaintiffs for the second

time have failed to demonstrate their entitlement to summary judgment, but have now demonstrated their entitlement to a default judgment. However, as defendants demonstrated their entitlement to both vacating the default and amending the answer, the plaintiffs' default judgment motion is denied and defendants' motion to amend the answer is granted.

On plaintiffs' first motion for a default judgment, plaintiffs made no showing that service upon Lisa Valentin was "complete" because they did not submit proof that the affidavit of service was duly "filed with the clerk of the court" in accord with CPLR §308(4). On this record, however, plaintiffs have corrected such error. Plaintiffs submit an affidavit of service, which was duly filed and date stamped, demonstrating that service upon Lisa Valentin was "complete" under CPLR §308. This record further shows full compliance with CPLR §3215(f), otherwise demonstrating plaintiffs' entitlement to a default judgment against Lisa Valentin.

Despite Lisa Valentin's demonstrated default, "[p]ublic policy favors the resolution of cases on the merits". (Watson v. Pollacchi, 32 AD3d 565 [3d Dept. 2006] quoting Aabel v. Town of Poughkeepsie, 301 AD2d 739 [3d Dept. 2003]). In furtherance of such policy, "Supreme Court is vested with the discretionary authority to permit late service of an answer upon a showing of a reasonable excuse for the delay and a meritorious cause of action". (Rickert v. Chestara, 56 AD3d 941 [3d Dept. 2008]).

Here, Lisa Valentin demonstrated a reasonable excuse. She alleges that neither defendant was represented by counsel at the commencement of this action. Her husband answered the complaint, pro se, in a timely manner. She believed that such answer constituted her appearance as well. While such belief is clearly incorrect, it is not wholly inconceivable that this pro se litigant could have made such mistake nor that such mistake is reasonable. Moreover, plaintiffs

do not controvert her allegations. As such, Lisa Valentin's excuse is found to be reasonable. (*See generally* Wade v. Village of Whitehall, 46 AD3d 1302 [3d Dept. 2007][a pro se litigant's mistake about the legal effect of a court's decision was a reasonable excuse]; Cerrone v. Fasulo, 245 AD2d 793 [3d Dept. 1997]).

On this record, Lisa Valentin has also alleged meritorious defenses to plaintiffs' action. Her defenses focus on non-formation of the contract herein and the plaintiffs' failure to set forth a "time of the essence" closing date. Both defenses, if substantiated, would effectively prevent plaintiffs' recovery herein. Again, plaintiffs do not controvert her allegations. As Lisa Valentin has demonstrated both a "reasonable excuse" and a "meritorious" defense, plaintiffs' motion for a default judgment is denied.

Moreover, "[i]t is well settled that provided that there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit, leave to amend pleadings under CPLR §3025(b) should be freely granted." (Ciarelli v. Lynch, 46 AD3d 1039, 1040 [3d Dept. 2007][internal quotations omitted]). Here, defendants have demonstrated that the proposed amended answer poses no undue prejudice to plaintiffs. The proposed amended answer, except for naming Lisa Valentin as an answering defendant and formatting changes, is virtually identical to James Valentin's original answer. By James Valentin's original answer, plaintiffs had timely notice of all of the proposed answer's affirmative defenses and its counterclaim; as such, plaintiffs cannot claim surprise. Moreover, discovery is still ongoing which will allow plaintiffs a full opportunity to conduct discovery relative to defendants' amended answer. Additionally, the defendants' proposed amended answer is not plainly lacking in merit. It re-alleges each of the affirmative defenses and the counterclaim originally set forth in James Valentin's answer, which

state cognizable defenses to this real property contract action.

Accordingly, defendants' motion to amend their answer is granted. The amended answer must be filed and served within ten (10) days of the date of this Decision and Order.

Turning next to plaintiffs' motion for summary judgment, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]). Here, plaintiffs have again failed to meet their initial burden.

Plaintiffs again submit affidavits establishing formation of the contract and the non-closing of title, alleging the defendants' breach by failing to close. Plaintiffs fail to establish however, that they gave a time of the essence notice, that was "clear, distinct, unequivocal and provide[d] a definite and reasonable time within which to perform". (Weintraub v. Stankovic, 43 AD3d 543, 544 [3d Dept. 2007]). Because plaintiffs failed to demonstrate that a "time of the essence" date for this real estate contract was set and breached, plaintiffs have not demonstrated defendants' breach as a matter of law. (Weintraub, supra).

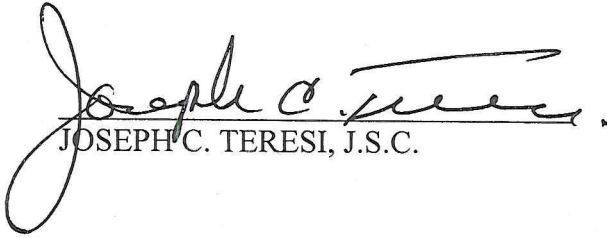
Accordingly, because plaintiffs have failed to demonstrate their entitlement to summary judgment as a matter of law, their motion for summary judgment is denied.

All papers, including this Decision and Order, are being returned to the attorney for the defendants. 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: March //, 2009  
Albany, New York



JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion for Summary Judgment, undated, Affidavit of John Vecchio, dated January 26, 2009, Affirmation of Don Cummins, dated January 14, 2009, with attached Exhibits "A" - "C", Affidavit of Ronnie McCue, dated January 27, 2009, and Affirmation of Ralph Lewis, Jr., dated January 28, 2009, with attached Exhibits "A" - "C".
2. Notice of Motion for Default Judgment, dated January 27, 2009, Affidavit of John Vecchio, dated January 26, 2009, Affidavit of Ronnie McCue, dated January 27, 2009, Affirmation of Don Cummins, dated January 14, 2009, with attached Exhibits "A" - "C", and Affirmation of Ralph Lewis, Jr., dated January 27, 2009, with attached unnumbered exhibits.
3. Notice of Cross-Motion, dated February 25, 2009, Affidavit in Support of Lisa Valentin, dated February 25, 2009, with attached unnumbered exhibit, Affidavit in Support of James M. Valentin, with attached unnumbered exhibit, Affirmation of John Kingsley, dated February 25, 2009.