

**Little Rock Dev. Corp. v New York State Off.
of Mental Health**

2009 NY Slip Op 33347(U)

May 29, 2009

Sup Ct, New York County

Docket Number: 113730-07

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Justice

Little Rock Development Corp
Plaintiff (s)

INDEX NO.

113730-07

MOTION DATE

MOTION SEQ. NO.

003

MOTION CAL. NO.

- v -

NYS Office of Mental Health et al
Defendant(s)

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 THE ACCOMPANYING MEMORANDUM DECISION *and*

status court scheduled for

June 25 2009 @ 9:30 am

Part 10, 60C PM 232

FILED

JUN 02 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated:

May 29, 2009

Hon. Judith J. Gische, 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 10**

-----X
Little Rock Development Corp.,

Plaintiff (s),

-against-

New York State Office of Mental Health and
SUS Mental Health Programs, Inc.,

Defendant (s).
-----X

DECISION/ ORDER
Index No.: 113730-07
Seq. No.: 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
LRDC OSC (vacate d/jm) w/ AF affid, RAL affirm, exhs	1
Def OMH opp w/SJF affirm, exhs	2
Def SUS opp w/KDF affirm, exhs	3
Non-party S&L opp w/KDS affirm	4
Order, Gische J., 4/2/09	5
AOS of OSC	6

FILED
JUN 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

The court has before it a motion by plaintiff Little Rock Development Corp. ("LRDC") to vacate the court's prior order of December 4, 2008 that dismissed the complaint and set down defendants' counterclaims for an Inquest ("dismissal order"). LRDC contends it has excusable default and meritorious claims, therefore the dismissal order should be vacated. This motion is opposed by each of the defendants ("OMH" and "SUS" or collectively "defendants"), as well as by LRDC's former attorneys, the law firm of Scott & Liburd. The firm asserted a retaining lien on LRDC's files.

The branch of LRDC's motion related to outgoing counsel's unpaid legal fees has been resolved in accordance with the court's April 2, 2009 order. Scott & Liburd has been ordered to turn over LRDC's litigation files, upon LRDC meeting certain conditions set forth in the April 2nd order. The balance of the motion with respect to the reinstatement of the complaint, however, remains for the court to decide.

The court's decision and order is as follows:

Arguments

LRDC is a not for profit corporation. The City of New York sold the property located at 421 Chester Street in Kings County ("the property") to LRDC for the sum of six dollars (\$6.00). The deed, dated October 21, 2005, contains a restrictive covenant, requiring that LRDC develop the property into housing for the mentally ill. OMH and LRDC anticipated that LRDC would operate the facility once built. An integral part of this operating agreement is that OMH would provide construction management services and money (\$5,000,000) to fund the construction project.

In its complaint, LRDC challenged a lease reportedly signed by its former CEO, Norman Frazier ("Frazier") in favor of SUS. The lease which is, for the entire building and property at 421 Chester Street, is for renewable one (1) year periods at an annual rent of one dollar (\$1.00).

LRDC's current CEO, Anthony Fleming, states that Frazier was investigated by OMH and an audit revealed numerous instances of self dealing and illegal activity. According to LRDC, this "lease" is yet another instance of such self-dealing. LRDC contends that the lease contains a specific condition that was not met. Paragraph 27 of the rider to the lease provides that the lease has to be approved "by two-thirds of the

entire Board of Directors of Landlord [LRDC] . . ." Fleming contends no such vote was held, but Frazier signed the lease in SUS's favor anyway.

LRDC has now retained new counsel ("Lenowitz"). LRDC contends that it has excusable default and that it failed to go forward with its case, not because its CEO (Fleming) was inattentive to it, but because LRDC lacked funds to hire a new attorney once Scott & Liburd was permitted to withdraw as counsel. Order, Gische J., 8/7/07. LRDC claims that the law firm not only charged LRDC excessive legal fees, but that it also helped the former CEO (Frazier) in his alleged bad acts¹.

LRDC contends that it has a meritorious claim against the defendants and defenses to the counterclaim asserted by OMH. It argues that Frazier had no authority to transfer control of the building to SUS by entering into the lease, and the lease was not approved by 2/3rds vote of the board, as the lease provides.

Though separately represented, OMH and SUS support each other's arguments in opposition to LRDC's motion. Both argue that Fleming repeatedly failed to come to court conferences and the case languished for a year. They argue further that after an audit of LRDC practices, OMH decided that LRDC was unqualified to operate the new facility. OMH describes a pattern of misappropriation of money by Frazier and others of LRDC while he was LRDC's CEO. OMH contends it had the right to enter into an operating agreement with SUS, hence the lease. According to OMH, Frazier entered into the lease with SUS at its request.

Discussion

¹Any claims regarding the former attorneys of records for LRDC are not before the court to decide.

To vacate an order entered on default, the party seeking that relief must set forth excusable default and a meritorious defense. CPLR § 5015 (a); Gray v. B.R. Trucking Co., 59 N.Y.2d 649 (1983). LRDC's complaint was dismissed for failure to appear through counsel.

It is beyond cavil that corporations are fictional "persons" created by law, with limited liability. In re Sharon B., 72 N.Y.2d 394, 398 (1988). Therefore, unlike a natural person, a corporation, even a not-for-profit corporation must appear by an attorney. In re Sharon B., *supra*; Oliner v. Mid-Town Promoters, Inc., 2 N.Y.2d 63, 64 (1956). Thus, whether Fleming came to every court conference or not is tangential to whether LRDC has now presented a reasonable excuse for why it did not previously appear by counsel.

The breakdown in communication (and possible conflict of interest) between LRDC and its former attorneys accounts for some of the delay in bringing this case to a conclusion and possibly some of the defaults. Furthermore, LRDC, a not for profit corporation, reports it could not afford to hire new counsel once Scott & Liburd was relieved. This was a concern repeatedly expressed by Fleming when he came to court. Thus, the court finds that LRDC has presented excusable default.

Defendants argue that LRDC has no "case" against them, and therefore, the complaint should not be restored for that reason. However, "the quantum of proof needed to prevail on a CPLR § 5015 (a) (1) motion is not as great as that required to successfully oppose a motion for summary judgment." Winney v. County of Saratoga, 252 A.D.2d 882, 676 N.Y.S.2d 356 (3rd Dept 1998). Due process requires that this case, the defenses thereto, and the counterclaims be decided on the merits. There are

numerous disputes that have to be decided in this case. Among those framed by this particular motion are whether OMH directed Frazier to offer the lease to SUS, and whether it had the right to do so, without approval by a majority of the LRDC board. The legal significance of this remain unclear. Including whether LRDC suffered any damages as a result. Still, the claims made against LRDC are serious and the matter should proceed on its merits.

The plaintiff has met its burden on this motion by showing excusable default and that it has meritorious claims. The defendants have not shown they will be prejudiced by having the complaint restored. Therefore, the motion by LRDC to vacate the order dismissing the complaint is hereby granted. The complaint is reinstated.

OMH seeks permission to serve an amended answer and counterclaim to assert a cause of action in foreclosure, if the complaint is restored. According to OMH this will put all the issues surrounding title and possession of the property before the court. This relief, however, was not raised in a cross motion. Nor has a proposed amended answer been attached to OMH's papers. While issues raised by this proposed counterclaim go well beyond the limited scope of this motion. Ultimately, LRDC's right to own the property is significant in the context of the parties' overall disputes. Therefore, the relief sought informally is denied without prejudice to OMH seeking this relief by motion.

It appears that discovery is not yet complete, but is unclear what remains to be done. The court hereby schedules this case for a **status conference on June 25, 2009 at 9:30 a.m. in Part 10.**

Conclusion

It is hereby

Ordered that LRDC's motion to vacate the court's December 4, 2008 order dismissing the complaint is hereby granted and the complaint is hereby restored; and it is further

Ordered that OMH's request for permission to serve an amended answer is denied, without prejudice to proceeding by motion; and it is further


Ordered that this case is hereby scheduled for a **status conference on June 25, 2009 at 9:30 a.m. in Part 10**; and it is further

Ordered that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

Ordered that this constitutes the decision and order of the court.

Dated: New York, New York
May 29, 2009

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
JUN 02 2009
CLERK'S OFFICE