

New York Prop. Holding Corp. v Rose

2010 NY Slip Op 30749(U)

April 1, 2010

Supreme Court, New York County

Docket Number: 100089/2001

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

NEW YORK PROPERTY HOLDING CORP.,

Plaintiff,

-against-

ANNA ROSA, As Administratrix of the Estate of
MIGUEL ROSA, and SWIDLER & SWIDLER, ESQ.
as escrow agent and stakeholder, FAUSTO ROSA,

Defendants.

INDEX NO. 100089/01

MOTION DATE Dec. 16, 2010

MOTION SEQ. NO. 007

MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion for a default judgment

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-4

5-6

7

Cross-Motion: Yes No

Upon the foregoing papers, plaintiff's motion for an order pursuant to CPLR § 3215 granting a default judgment against defendant Fausto Rosa is decided in accordance with the accompanying decision and order.

FILED

APR 05 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/1/10


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X
NEW YORK PROPERTY HOLDING CORP.,

Plaintiff,

-against-

ANNA ROSA, As Administratrix of the Estate of
MIGUEL ROSA, and SWIDLER & SWIDLER, ESQ.,
as escrow agent and stakeholder, FAUSTO ROSA,

Defendants.

-----X
O. PETER SHERWOOD, J.:

DECISION AND
ORDER

Index No. 100089/2001

FILED
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In this action, *inter alia*, for breach of a contract of sale, plaintiff New York Property Holding Corp. ("plaintiff") moves pursuant to CPLR § 3215 for a default judgment against defendant Fausto Rosa on the first cause of action in the Amended Supplemental Verified Complaint. The motion is opposed by defendant Fausto Rosa.

This action has its genesis in a contract of sale that plaintiff, as purchaser, and defendant Anna Rosa ("Anna"), as Administrator of the Estate of Miguel Rosa, as seller, entered into on November 15, 1999, pursuant to which Anna agreed to sell plaintiff the premises, a mixed residential and commercial building known as 2 Manhattan Avenue, New York, New York ("the premises"), for a purchase price of \$725,000.00. In the course of this litigation for specific performance of the contract of sale, Justice Sherry Klein Heitler, the previously assigned Justice, granted summary judgment as to liability, denied renewal as to that determination by decision and order dated October 7, 2004, and directed the parties to proceed to closing on the sale of the property. The latter order was affirmed on appeal by the Appellate Division, First Department (*see, New York Prop. Holding Corp. v Rosa*, 26 AD3d 186 [1st Dept 2006]).

Subsequent thereto, the closing was further delayed because Anna had not obtained from the Surrogates Court the necessary amended Letters of Administration. In or about October 2008, the Surrogate's Court issued an order amending the prior Letters of Administration which allowed the matter to proceed to closing. In the interim, Anna had apparently violated the terms of the contract of sale by entering into various leases with respect to the premises, which plaintiff contends were

at rates which were far below market or legal rates and were excessively tenant friendly, without first obtaining plaintiff's approval thereto.

By decision and order dated June 18, 2009, this Court granted plaintiff's application for leave to supplement and amend the complaint to add Fausto Rosa ("Fausto") as a party defendant. The order further provided that plaintiff was to serve defendants, including Fausto, with a copy of the Temporary Restraining Order ("TRO"), which included certain injunctive relief, and the order. On or about June 19, 2009, plaintiff filed the Amended Supplemental Summons and the Amended Supplemental Verified Complaint with the New York County Clerk's Office. Plaintiff had been advised by its attorneys that in order to move for ejectment, Fausto was a necessary party to this litigation (Goldstein Aff. ¶ 21). Plaintiff contends in the Amended Supplemental Complaint that Fausto, who is Anna's son and allegedly Anna's agent and/or the premises manager, arranged each of the subject leases and Anna signed off on them (Amend. Compl. ¶¶ 24, 32). Fausto also personally entered into leases with Anna for residential and commercial space at the premises (*id.* at ¶¶ 32-34, 39-41). Plaintiff seeks to eject Fausto from the residential and commercial spaces he occupies at the premises, to nullify as unconscionable the leases for the premises to which Anna and Fausto conspired to enter in violation of the contract of sale, and to recover monetary damages against Anna for breach of the contract of sale and against both Anna and Fausto for tortious interference with the contract of sale and fraudulent misrepresentation (*id.* at 54-69). The affidavit of service, attached to the motion papers as Exhibit "2", indicates that service of the Amended Supplemental Summons and Amended Supplemental Verified Complaint were personally served upon Fausto on June 22, 2009, pursuant to CPLR § 308 (1). However, contrary to plaintiff's contention, the affidavit of service does not indicate that any additional notice of the Amended Supplemental Summons and Amended Supplemental Verified Complaint were made upon Fausto by first class mail. However, none was necessary (*cf.* CPLR § 3215 [g][3][i]).

In support of its motion for a default, plaintiff submits the affirmation of its attorney, Andrew T. Miltenberg, Esq., of the law firm Nesenoff & Miltenberg, LLP, annexed to which are an affidavit of Larry Goldstein, plaintiff's Vice President and managing member of the premises, and Brian Reilly, a licensed real estate broker, attesting to the merits of plaintiff's claim, together with exhibits "1" through "25" consisting, *inter alia*, of the amended supplemental summons and amended

supplemental verified complaint, the affidavit of service, the prior decisions of Justice Klein Heitler and the Appellate Division, the contract of sale for the premises, and the various leases at issue. Mr. Miltenberg states that Fausto has made threats against plaintiff and the premises and as long as Fausto is an occupant of the two leased portions of the premises, plaintiff cannot proceed to closing (Miltenberg Aff. ¶¶ 8-9). Goldstein and Reilly in their affidavits attest to the losses plaintiff is allegedly sustaining as a result of the "Sweetheart Leases" and the legal fees plaintiff has incurred over the 10 years since this litigation was commenced as a result of defendants' conduct in intentionally interfering with the closing of the contract of sale for the premises.

In opposition, Fausto submits the affirmation of his attorney, Garris L. Williams of the Law Offices of Harry Hertzberg, and his own sworn affidavit. Fausto essentially acknowledges service of the Amended Supplemental Summons and Amended Supplemental Verified Complaint by which he claims to have first learned that he was made a party to this litigation. He contends that he then received a motion for a default judgment at which time he retained counsel to answer the motion on his behalf. That motion was withdrawn by plaintiff (Motion Sequence No. 006). Mr. Williams asserts that contrary to the Court's June 18, 2009 decision and order, Fausto was never served with the TRO or with that order. By letter dated October 13, 2009, plaintiff's counsel advised the Court that it was withdrawing its motion for a default judgment against Fausto. On October 19, 2009, after Mr. Williams was advised by plaintiff's counsel that the first motion for default against Fausto was withdrawn, he served an answer on Fausto's behalf. However, he then received the instant motion for default together with a letter from plaintiff's counsel rejecting the answer.

The instant motion was filed with the Court on October 21, 2009, with a return date of November 6, 2009. Fausto's excuse for failing to timely answer is that he did not know how to respond when he received the Amended Supplemental Summons and Amended Supplemental Verified Complaint and was unaware that there was a time period within which to respond. Fausto argues that the delay in answering was minimal, he would suffer prejudice if the default is granted as he would then be ejected from his home, where he has resided for over 10 years, and from his business, thereby depriving him of his livelihood, and that plaintiff would not be prejudiced as it had only recently added Fausto to the action and had not been prevented from prosecuting its claims by Fausto's delay in answering.

* 5]

In reply, Mr. Miltenberg acknowledges that Fausto's answer was rejected. However, he contends that the answer was served four months after Fausto was served, Fausto proffers no excuse, reasonable or otherwise, for the delay, and he has failed to set forth any proof of a meritorious defense.

Although Fausto's excuse for his delay in answering essentially amounts to a claim of ignorance of the law which in many contexts has been held to not constitute a reasonable excuse (see, e.g., *Bayo v Burnside Mews Assocs.*, 45 AD3d 495 [1st Dept 2007]; *West v New York City Hous. Auth.*, 35 AD3d 313 [1st Dept 2006]), the excuse here is deemed to be adequate since the delay was relatively brief, plaintiff has not demonstrated any significant prejudice as a result of the delay and public policy favors resolution of cases on the merits (see, *Jones v 414 Equities LLC*, 57 AD3d 65, 81 [1st Dept. 2008]; *Pagan v Four Thirty Realty LLC*, 50 AD3d 265 [1st Dept. 2008]). Moreover, there is no evidence that Fausto intended to ignore, neglect or default in this case. Where, as here, no default order or judgment has been entered, a showing of a potential meritorious defense is not an essential element of a motion to serve a late answer (see, *Cirillo v Macy's*, 61 AD3d 538 [1st Dept 2009]; *Jones v 414 Equities LLC*, *supra*; *Guzetti v City of New York*, 32 AD3d 234, 238 [1st Dept. 2006]).

Accordingly, it is

ORDERED that plaintiff's motion for a default judgment against defendant Fausto Rosa is denied; and it is further

ORDERED that the attorneys for the parties are directed to appear for a preliminary conference as to the Amended Supplemental Verified Complaint in Part 61, 60 Centre Street, Room 341, on May 5, 2010, at 9:30 a.m.; and it is further

ORDERED, that plaintiff shall serve a copy of this decision and order with notice of entry upon defendants within 20 days of entry.

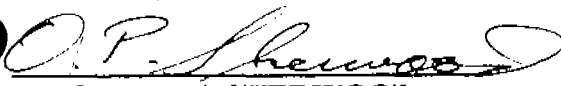
This constitutes the decision and order of the court.

DATED:

4/1/10

FILED
APR 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

ENTER,


O. PETER SHERWOOD
J.S.C.