Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IA Part 15
Justice

HELEN IWU and AMBROSE IWU, x

Plaintiff,

- against -

ESTATE OF HAROLD MCCUMMINGS, CHERYL SMITH, as the Administrator of the Estate of HAROLD MCCUMMINGS, CHERYL SMITH, Individually,

Defendants.
x

Index Number 23952 2007

Motion Date November 24, 2009

Motion Cal. Number 21

Motion Seq. No. 2

The following papers numbered 1 to 8 read on this motion by defendants Estate of Harold McCummings, Cheryl Smith as the Administrator of the Estate of Harold McCummings, and Cheryl Smith, individually, for an order vacating their default, pursuant to CPLR 317 and 5015(a), and granting the defendants leave to serve an answer.

	Papers Numbered
Order to Show Cause - Affirmation - Affidavit - Exhibits (A-B)	1-4
Opposing Affirmation - Exhibits (A-F)	5-6
Reply Affirmation	7-8

Following a conference held on April 10, 2010 with all appearing counsel, this court hereby modifies its decision dated February 1, 2010 and determines the motion as follows:

Plaintiffs Helen Iwu and Ambrose Iwu allege that they entered into a contract with

Harold McCummings dated May 11, 2004 to purchase real property located at 159-08 132nd Avenue, Springfield Gardens, New York, for the sum of $410,000.00. Plaintiffs made a down payment in the sum of $15,000.00, payable to the seller's attorney which was held in escrow. Plaintiffs allege they obtained a mortgage commitment, a title report, had the property inspected and surveyed, and requested the closing be scheduled. Plaintiffs were informed on September 10, 2004 that Mr. McCummings had died and therefore the closing could not take place.

Since Mr. McCummings was domiciled in the State of South Carolina at the time of his death, his will was admitted to probate in that state, and his daughter Cheryl Smith was named the Executor of the Estate of Harold McCummings. Plaintiffs sought to have the decedent's estate convey the subject real property to them, and commenced an action, in September, 2004, entitled *Helen Iwu and Ambrose Iwu v Estate of Harold McCummings*, (Index No. 21392/2004), which has been marked off the calendar.

Plaintiffs allege herein that Cheryl Smith's prior counsel informed them that Ms. Smith was the Administrator of the Estate of Harold McCummings, and that she would conclude the closing. Ms. Smith entered into a new contract of sale, dated January 16, 2007, whereby she agreed to sell the subject real property to the Iwus for the sum of $475,000.00. The contract recites that the seller is Cheryl Smith, as Administrator of the Estate of Harold McCummings, while the contract and rider are executed by "Cheryl Smith." The down payment previously paid by the prospective purchasers was transferred to the seller's new counsel, and remains in escrow. The closing did not take place and, on September 25, 2007, Helen Iwu and Ambrose Iwu commenced this action for specific performance and compensatory damages against the Estate of Harold McCummings, Cheryl Smith as the Administrator of the Estate of Harold McCummings and Cheryl Smith, individually.

Defendants Cheryl Smith, individually, and Cheryl Smith as the Administrator of the Estate of Harold McCummings were served with process in South Carolina on December 31, 2007. Defendant Estate of Harold McCummings was purportedly served with process in New York on November 27, 2007. None of the defendants served an answer or otherwise moved, or appeared, in this action. This court in an order dated August 8, 2008, granted the plaintiffs' motion for a default judgment against the defendants. Plaintiffs were directed to file a note of issue and to appear at an inquest as to damages on November 25, 2008. The inquest was thereafter adjourned several times, and plaintiffs' counsel notified Ms. Smith of these adjournments.

The inquest was completed on September 29, 2009. This court, in an order dated September 30, 2009, determined that the plaintiffs had sustained their burden of proof as to damages, and granted plaintiffs' request for specific performance. Defendants were directed to execute any and all documents necessary to transfer title to the subject property, pursuant

to the January 16, 2007 contract of sale, within 20 days from the date of service of said order, together with notice of entry. The September 30, 2009 order also permitted plaintiffs to pay any and all liens, taxes any other encumbrances on the property and then deduct such amounts from the purchase price at the closing of title. The order of September 30, 2009 was served on the defendants, together with notice of entry on October 2, 2009.

Defendants, pursuant to an order to show cause dated November 2, 2009, now seek an order vacating their default, and permitting them to serve an answer, pursuant to CPLR 317 and 5015(a)(1) and (4). Ms. Smith asserts that she has a reasonable excuse for the default based upon law office failure, and a meritorious defense in that she lacked the authority to enter into the contract of sale in January, 2007 or to be named as the representative of the estate in the pleadings, as she was not appointed the Executor of the Estate of Harold McCummings in New York, until November 2007.

Ms. Smith states in her affidavit that when she entered into the January, 2007 contract of sale she did not know that she needed to be appointed as a representative of her father's estate in New York in order to sell and convey real property located in New York. She further states that she did not receive a letter regarding a closing in September, 2007 and that she could not have conveyed the real property then as she was not appointed the representative of the estate in New York at that time.

Ms. Smith states that she engaged two separate law firms to advise her and assist her in obtaining an appointment as the representative of her father's estate in New York, and that she finally engaged a third firm which succeeded in that matter. Ms. Smith further states that, after the pleadings were served at her residence in South Carolina, she engaged counsel in New York to represent her in this action, but that counsel did not respond to the summons and complaint, and the default judgment was issued. She additionally states that after November 2, 2007, she informed the plaintiffs of her appointment and that she was ready and willing to close, but that the plaintiffs refused to go forward with the closing.

In support of the motion, defendants have submitted a copy of the Queens County Surrogate's Court Decree, dated November 2, 2007, which granted her petition for ancillary probate of the Last Will and Testament of Harold McCummings and states that she would be issued Ancillary Letters testamentary sufficient to operate on any property located within this state, upon taking and subscribing the statutory oath and designation.

Plaintiffs' counsel, in opposition, asserts that the defendants have had every opportunity to file an answer, but have refused to do so. It is asserted that the motion for a default judgment was served on the defendants eight months after they were served with process and that the defendants were thereafter served with various notices regarding the inquest, but that they never sought to serve an answer during that two year period. It is

asserted that plaintiffs were unaware of any counsel who previously represented the defendants in this action, and notes that neither Ms. Smith, nor her counsel, have identified the attorneys she allegedly retained who failed to respond to the summons and complaint.

Plaintiffs further assert that defendants have not demonstrated a meritorious defense, in that they failed to move for more than two years after they defaulted in answering; that at the time Ms. Smith entered into the 2007 contract of sale she did not inform the prospective purchasers that she lacked the authority to do so and cannot make such an allegation at this stage, even if true; and that Ms. Smith has failed to indicate the manner in which the plaintiffs were informed about a closing after November 2007. Plaintiffs' counsel asserts that in view of Ms. Smith's statement that she is willing to close, there is no longer any dispute between the parties and that a closing should be scheduled as soon as possible. Defendants, however, assert that the pending tax foreclosure action affecting the real property needs to be addressed by the parties.

Defendants' counsel, in reply, has submitted the names of the prior counsel engaged by Ms. Smith, and states that while the second attorney attempted to negotiate a settlement, he also failed to respond to the pleadings, and that this resulted in the default judgment.

The within motion was held in abeyance pending a conference scheduled for March 10, 2010, pursuant to an order dated February 1, 2010. In view of the fact that the issues presented in the within motion could not be resolved at said conference, this court in an order dated March 17, 2010 stayed the execution of the order of September 30, 2009, pending the determination of the within motion.

It is noted that the court's records reveal that although a judgment of foreclosure and sale was recently entered in the tax lien proceeding, it appears that the subject real property has not yet been sold pursuant to said judgment. Therefore, the subject property remains the property of the record owner up until the actual sale and may be redeemed.

CPLR 317 permits defendants a fair opportunity to defend lawsuits on their merits, except in actions specifically excluded from coverage. Thus, if a party defaults after having been served by any method other than "personal delivery" to the party or its agent for service designated under CPLR 318, that party may seek to open the default and defend the action on the merits. CPLR 317 applies whether service was made within or without the state.

"Personal delivery," within the meaning of CPLR 317, is equivalent to in-hand delivery under CPLR 308(1) or CPLR 318. Therefore, a defendant served under CPLR 308(2)(3)(4) or(5) may be entitled to invoke the protective provisions of CPLR 317. CPLR 317 presumes that the court had personal and subject matter jurisdiction to enter the underlying default judgment. Accordingly, if the court did not acquire personal jurisdiction

over the defendant because the suit was commenced by improper service, the defendant may obtain vacatur without satisfying the requirements of CPLR 317 (*see Ariowitsch v Johnson*, 114 AD2d 184, 185-186 [1986]; *Salomon Bros. Realty Corp. v McFarland*, 7 Misc 3d 1003A [2005]; *Cornell v Amell*, 132 Misc 2d 144 [1986]; *Queensboro Leasing, Inc. v Resnick*, 78 Misc 2d 919 [1974]; Weinstein, Korn & Miller, 2-317 New York Civil Practice: CPLR P 317.01).

CPLR 317 provides that a person not served personally and who does not appear "may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry." The defaulting defendant must also establish that he or she did not personally receive notice of the summons in time to defend, and that he or she has a meritorious defense.

A party seeking relief from an order or judgment on the basis of excusable default pursuant to CPLR 5015 (a) (1) must provide a reasonable excuse for the failure to appear and demonstrate the merit of the cause of action or defense (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr Co.*, 67 NY2d 138, 141 [1986]; *Goldman v Cotter*, 10 AD3d 289, 291 [2004]; *Navarro v A. Trenkman Estate, Inc.*, 279 AD2d 257, 258 [2001]; *Mediavilla v Gurman*, 272 AD2d 146, 148 [2000]). The party seeking relief pursuant to CPLR 5015(a)(1) is required to so move within one year after he or she has been served with a copy of the judgment and notice of entry.

The determination of the sufficiency of the proffered excuse and the statement of merits rests within the sound discretion of the court (*Navarro v A. Trenkman Estate, Inc.*, 279 AD2d at 258). A default based upon law office failure will be excused where it is supported by a detailed and credible explanation of the default (*see 330 Wythe Ave. Assoc., LLC v ABR Constr., Inc.*, 55 AD3d 599 [2008]; *Caputo v Peton*, 13 AD3d 474 [2004]; CPLR 2005).

In addition, a court may exercise its inherent powers to "vacate its own [decree] for sufficient reason and in the interests of substantial justice" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]; *see Ladd v Stevenson*, 112 NY 325, 332 [1889]; *Matter of Blaukopf*, ___ AD3d ___,2010 NY Slip Op 4376, 2010 NY App Div LEXIS 4297 [2010]; *Matter of Culberson*, 11 AD3d 859, 861 [2004]; *Goldman v Cotter*, 10 AD3d 289, 293 [2004]).

CPLR 5015(a)(4) permits relief from a judgment or order when the rendering court lacked jurisdiction over the defendant. No issue of discretion arises in such an application, as a judgment or order granted in the absence of jurisdiction over the defendant is a nullity which must be set aside unconditionally (*Gager v White*, 53 NY2d 475 [1981]; *Shaw v Shaw*, 97 AD2d 403 [1983]); *see also Royal Zenith Corp. v Continental Ins. Co.*,

63 NY2d 975 [1984]).

An examination of the papers submitted herein, as well as the court's file, fails to establish whether the defendants were served with the order of August 8, 2008, which granted plaintiffs' motion for a default judgment. In addition, Ms. Smith does not state when she became aware of said order. However, the order dated September 9, 2009, which granted plaintiffs' request for specific performance, and for damages was served, together with notice of entry on Ms. Smith, on October 2, 2009. The within order to show cause is dated November 2, 2009. Therefore, defendants' motion to vacate the order of August 8, 2008 and the order of September 9, 2009, is timely.

Defendant Estate of Harold McCummings is not a proper party to this action, as "[a]n estate is not a legal entity and any action for or against the estate must be by or against the executor or administrator in his or her representative capacity" (*100 W. 72nd St. Assoc. v Murphy*, 144 Misc 2d 1036, 1040 [1989]; *Grosso v Estate of Gershenson*, 33 AD3d 587 [2006]). Therefore, the service of process on the Estate of Harold McCummings was a nullity. In view of the fact that the court lacks jurisdiction over the Estate of Harold McCummings, that branch of defendants' motion which seeks an order vacating the order of August 8, 2008 and the order of September 30, 2009 is granted as to the Estate of Harold McCummings. The complaint is dismissed as to this defendant.

Since Harold McCummings died leaving a will, and as Cheryl Smith has been appointed the Executor of the Estate of Harold McCummings, the parties' use of the term Administrator, in both the contract of sale and the within pleadings is a misnomer. For the purpose of this order, however, she will be referred to as the Administrator. With respect to Cheryl Smith, individually, and Cheryl Smith, as Administrator of the Estate of Harold McCummings, these defendants have sufficiently established that the default in answering the complaint and the plaintiffs' prior motions was due to law office failure, and therefore is excusable. Ms. Smith, a South Carolina resident, engaged counsel in New York to represent her in this action and to obtain Letters of Administration in New York. There is no evidence that she intended to abandon her defense of this action, and the failure to answer the complaint and prior motions was due to the inactions of her prior counsel.

The court further finds that defendants have a meritorious defense to this action. As to the claim for specific performance, although Ms. Smith was appointed the Executor of the Estate of Harold McCummings in South Carolina, she was not appointed the Executor of her father's estate in New York at the time she entered into the January, 2007 contract of sale, or at the time the within action was commenced. The Hon. Robert Nahman, Surrogate of Queens County, issued a decree granting ancillary probate pursuant to SCPA Article 16, on November 2, 2007. The papers submitted herein do not establish whether Ms. Smith thereafter posted a bond and was issued Ancillary Letters Testamentary which would permit

her to enter into a contract and sell estate assets located in New York, including the subject real property (*see generally* SCPA 1602, 1610). Therefore, defendants may raise as a defense to this action Ms. Smith's lack of authority to represent the decedent's estate in New York, and her lack of authority to sell or convey real property belonging to the estate located in New York, or otherwise bind the estate in New York, both at the time the contract was entered into and at the time this action was commenced.

Since Ms. Smith may have executed the contract of sale in her individual capacity, defendants may raise as a defense Ms. Smith's lack of authority to convey property belonging to the estate prior to the issuance of ancillary letters testamentary in this state. It is noted that the complaint does not allege any specific actions on the part of Ms. Smith in her individual capacity, although she is being sued in that capacity.

With respect to the claim for compensatory damages, this claim is based upon the estate's failure to convey the real property and is not based upon any individual acts on the part of Ms. Smith. Defendants, thus, may also raise as a defense to this claim Ms. Smith's lack of authority to act on behalf of the estate at the time the contract was entered into, and at the time this action was commenced.

It is noted that although defendants Cheryl Smith as the Administrator [sic] of the Estate of Harold McCummings and Cheryl Smith, individually, seek relief pursuant to CPLR 5015(a)(4), the moving papers do not set forth their jurisdictional objections. To the extent that the affidavits of service raise an issue as to whether the pleadings were properly served pursuant to CPLR 308(2) and 313, these defendants may raise their jurisdictional defenses in their answer.

In view of the foregoing, defendants' motion for an order vacating the orders of August 8, 2008 and September 30, 2009 is granted. The within action against the Estate of Harold McCummings is dismissed, and plaintiffs are directed to amend the caption in this action to reflect the fact that Cheryl Smith is the Executor of the Estate of Harold McCummings, not the Administrator of the Estate of Harold McCummings. Defendants are directed to serve their answer within 20 days after the service of the within order together with notice of entry.

Dated: June 7, 2010

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J.S.C.

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