SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.: 101605/09
Motion No.: 002
003
004

TOTTENVILLE SQUARE LLC,

Plaintiffs

against

LEDJIM CORP.,
LEDJIM CORP., d/b/a MY GYM CHILDREN'S FITNESS CENTER OF STATEN ISLAND,
EDWARD J. MISKANIC,
LISA MISKANIC, and
DAVID PETEROY

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of the following: (1) motion to vacate a default judgment; (2) motion for summary judgment; and (3) cross-motion for summary judgment.

Papers	Numbered
Tottenville Notice of Motion and Affidavits Annexed	1
Peteroy Notice of Cross-Motion with Affidavits Annexed	2
Miskanic Notice of Motion with Affidavits Annexed	3
Tottenville Answering Affidavits	4
Peteroy Replying Affidavits	5
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendants Edward J. Miskanic and Lisa Miskanic's ("Miskanics") motion to vacate a default judgment awarded to Plaintiff Tottenville Square LLC ("Tottenville") for unpaid rent under a lease agreement pursuant to CPLR 317 and 5015 is denied.

Plaintiff Tottenville's motion for partial summary judgment on the issue of Defendant David Peteroy's ("Peteroy") liability as guarantor for unpaid rent pursuant to CPLR 3212 is granted.

Defendant Peteroy's cross-motion for summary judgment dismissing Tottenville's complaint on the basis of res judicata and collateral estoppel pursuant to CPLR 3212 is denied.

PROCEDURAL HISTORY

Two separate actions were commenced by Tottenville against the Miskanics and Peteroy. The first, in Civil Court, sought to evict the Miskanics for unpaid rent. The second is the present action. The Civil Court action as against Peteroy was discontinued by stipulation on September 11, 2008, because Peteroy was not a tenant in possession of the leased premises at issue. By order of the Civil Court dated January 26, 2009, the Miskanics were required to relinquish possession of the leased premises after they defaulted on a lease agreement with Tottenville. Tottenville filed a summons and complaint on June 16, 2009, initiating proceedings for unpaid rent against the Miskanics, as tenants, and Peteroy, as guarantor. Peteroy entered an Answer on August 12, 2009. The Miskanics failed to answer and a default judgment against them was granted on December 4, 2009. Shortly thereafter, the Miskanics filed the current motion to vacate the default judgment.

FACTS

This is a commercial real estate action to recover for a breach of a commercial land use agreement in which the landlord, Tottenville, seeks to recover unpaid rent from the Miskanics as tenants, and Peteroy as the guarantor on the lease agreement. On November 17, 2005, the Miskanics signed a lease to rent the premises owned by Tottenville located at 7001 Amboy Road, Staten Island, NY10307 for a period of five years (the "Lease") at a monthly payment of $7,011.67. The Lease commenced on March 1, 2006 and was intended to expire on March 31, 2011. Peteroy was not a co-signatory to the Lease. However, Peteroy did agree to act as guarantor for any unpaid rent or charges that became due under the Lease by signing a guaranty on November 15, 2005 (the "Guaranty").

After the Miskanics failed to pay rent beginning July 1, 2008, resulting in outstanding rents due and owing that totaled $67,749.03, Tottenville began eviction proceedings. By order of the Civil Court on January 26, 2009, the Miskanics were required to vacate the premises. On March 6, 2009, the Miskanics vacated the premises.

On June 16, 2009, Tottenville initiated an action for past unpaid rent due and owing under the Lease as well as accelerated rent payments through the end of the Lease term by filing a summons and complaint. The total amount sought was $302,564.24. Defendants were served by "nail and mail" under CPLR 308(4) on July 24th and 25th, 2009. The Miskanics were allegedly away on vacation at the time and did not receive a copy of the summons and complaint until the second week of August. Peteroy received the summons and complaint and entered an answer on August 12, 2009. Once the Miskanics received the summons and complaint, they allegedly forwarded it to their attorney for review. The Miskanics allegedly received notice of the December 4, 2009 default judgment in January, 2010 and, realizing their attorney had failed to appear on their behalf, retained alternative counsel.

DISCUSSION

Miskanic's Motion to Vacate the Default Judgment

The decision as to the setting aside of a default in answering is generally left to the sound discretion of the Court.[1] It is the policy of the courts to favor disposition of claims on the merits and not by default judgment.[2]

The Miskanics seek to vacate the default judgment of foreclosure and sale because they did not become aware of the summons in time to respond to the complaint. They claim to have a reasonable excuse for the default, and a meritorious cause of action pursuant to CPLR §§ 317 and 5015.

A party is entitled to vacate a default judgment entered against it under CPLR 317 if it can

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[1] *MacMarty, Inc. v. Scheller*, 201 A.D.2d 706 [2d Dept 1994]

[2] *Harcztark v. Drive Variety, Inc.*, 21 A.D.3d 876 [2d Dept 2005]; *Bell v. Toothsavers, Inc.*, 213 A.D.2d 199 [1st Dept 1995]

show that it was served by a method other than personal service, did not receive notice of the summons in time to defend the action, and has a meritorious defense.[3] As has been emphasized in numerous cases, there is no necessity for a defendant moving pursuant to CPLR 317 to show a "reasonable excuse" for its delay.[4]

The Miskanics assert that Tottenville effectuated service through the "nail and mail" method of CPLR 308(4). Such service is not considered personal service.[5] The Miskanics allegedly did not receive notice of the summons in time to respond because he was on vacation during the time in which the summons and complaint were affixed and mailed to their usual place of abode..

The Miskanics fail to allege sufficient facts to indicate that he did not receive notice of the summons in time to defend the action. Indeed, Tottenville did not even move for the entry of a default judgment until October 13, 2009, a full two months after the Miskanics allege they had received the summons and complaint. After the Miskanics's alleged receipt of the summons and complaint in the second week of August, they had more than enough time to submit an Answer and provide an excuse for such delay.[6] Therefore, the Miskanics are not entitled to vacate the default judgment under CPLR 317.

While the Miskanics cannot vacate the default judgment pursuant to CPLR 317, they nevertheless succeed in providing a reasonable excuse for the default along with a meritorious defense, which entitles them to vacate the default judgment under CPLR 5015(a)(1).[7]

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[3] CPLR § 317

[4] *Eugene Di Lorenzo, Inc. v. A. C. Dutton Lumber Co.*, 67 N.Y.2d 138, 141 [1986]

[5] *Krisilas v. Mount Sinai Hosp.*, 2009 NY Slip Op 5093 [2d Dept 2009]

[6] *Levine v. Forgotson's Cent. Auto & Elec., Inc.*, 2007 NY Slip Op 5232 [2d Dept 2007] (where receipt of the summons and complaint two weeks after original service was held to be in time to defend the action)

[7] *Delgado v. Velacela*, 56 A.D.3d 515 [2d Dept 2008]

The determination of whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the Court based on all relevant facts, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits.[8] Law office failure may be considered when determining whether a reasonable excuse exists.[9]

In this case, the Miskanics allege that their prior attorney failed to keep them abreast of the action pending before this Court. The Miskanics argue that these inefficiencies led to their being prejudiced by an order granting summary judgment against them on default. This Court finds that these alleged inefficiencies are a reasonable excuse in determining whether a default judgment should be vacated.

Clear and convincing proof of the existence of a meritorious defense is not required on a motion to vacate a default judgment, except in usury cases. On a motion to vacate default, it is sufficient if the defendant sets forth facts sufficiently establishing that such a defense is meritorious.[10]

In this case the Miskanics alleges facts that set forth a meritorious defense. Whether these alleged defenses are successful remains to be seen. But, for the purposes of vacating a default pursuant to CPLR 5015(a)(1), said allegations are sufficient. Therefore, the default judgment entered against the Miskanics on December 4, 2009 must be vacated.

Peteroy's Cross-motion for Summary Judgment Against Tottenville

Peteroy believes he is entitled to summary judgment dismissing Tottenville's complaint

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[8] *Harcztark,* supra

[9] *Montalvo v. Nel Taxi Corp.*, 114 A.D.2d 494; 494 N.Y.S.2d 406 [2d Dept 1985]

[10] *Anamdi v. Anugo*, 229 A.D.2d 408 [2d Dept 1996]

because the prior Civil Court action, which was discontinued as against him with prejudice, implicates res judicata and collateral estoppel thereby prohibiting Tottenville from relitigating the issue of his liability for the Miskanics's unpaid rent.

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact" (CPLR §3212[b]). "A movant for summary judgment must demonstrate entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact."[11] "Moreover, in deciding the motion, the court is required to accept the opposing party's version of the facts as true."[12] Summary judgment is a drastic remedy and "should not be granted where there is any doubt as to the existence of a material and triable issue of fact."[13] Issue finding, rather than issue determination constitutes the key to the procedure.[14] In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.[15]

Once the moving party has made a showing of sufficient evidence, the burden shifts to the party opposing summary judgment to put forth evidence in admissible form to establish a triable issue of fact.[16]

Peteroy fails to satisfy his initial burden of establishing his entitlement to summary judgment dismissing Tottenville's claims against him. Peteroy asserts that the prior stipulation of

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[11] *Washington v. Community Mutual Savings Bank*, 308 A.D.2d 444 [2d Dept 2003]

[12] *Rizk v Cohen*, 73 N.Y.2d 98 [1989]

[13] *Jablonski v. Rapalje*, 14 A.D.3d 484 [2d Dept 2005]

[14] *Anyanwu v. Johnson*, 276 A.D.2d 572 [2d Dept 2000]

[15] *Makaj v. Metro. Transp. Auth.*, 18 A.D.3d 625 [2d Dep't 2005]

[16] *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]

discontinuance signed by Tottenville releasing Peteroy from the action to evict the Miskanics[17] implicates res judicata and collateral estoppel, thereby precluding Tottenville from relitigating the issue of Peteroy's liability.

Res judicata operates to bar any claim arising out of the same transaction or series of transactions, even if based upon different theories.[18] Collateral estoppel is an equitable doctrine that precludes a party from relitigating an issue raised and decided against that party or those in privity in a prior action or proceeding.

Tottenville's ability to sue Peteroy under the Guaranty was allegedly negated because the Guaranty arose out of the Lease transaction and thus arose out of the same transaction that was litigated in the eviction proceeding. Since the stipulation discontinued the eviction action against Peteroy with prejudice, any action against Peteroy that arose out of the same transaction at issue in the eviction proceeding was barred by res judicata.

Peteroy's insistence that Tottenville's claims against him as guarantor are blocked by res judicata is unfounded. The prior eviction proceeding was a summary proceeding wherein the court did not have the authority to hear testimony on the issue of accelerated rent as damages once the landlord-tenant relationship was terminated by the eviction.[19] Peteroy was not in privity of contract with Tottenville regarding possession of the leased premises as he was not a co-signatory to the Lease. An action on a guaranty does not belong in a summary proceeding because the obligation owed under the guaranty is not classified as "rent."[20] Tottenville's claim against Peteroy centered around damages that were not within the purview of the court in the eviction proceeding. As such,

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[17] Exhibit E, Peteroy's Notice of Cross-Motion

[18] *O'Brien v. Syracuse*, 54 N.Y.2d 353 [1981]

[19] *Ross Realty v. V & A Fabricators, Inc.*, 42 A.D.3d 246 [2d Dept 2007]

[20] *Realty Equity Holdings 3820, L.L.C. v. Devito Furniture Corp.*, 2003 NY Slip Op 51577U [App. Term 2003]

the current action against Peteroy as guarantor is not barred by res judicata because Tottenville did not have the capacity to litigate the Guaranty in the prior action.

Collateral estoppel is an equitable doctrine that precludes a party from relitigating an issue raised and decided against that party or those in privity in a prior action or proceeding.[21] The policies underlying its application are avoiding relitigation of a decided issue and the possibility of an inconsistent result.[22]

Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling.[23] The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party. The party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination.[24]

Peteroy fails to adequately allege that the issue of his liability as guarantor on the Lease was decided in a prior action since, as has been discussed above, the court in the summary proceedings to evict the Miskanics did not have the jurisdiction to hear arguments on accelerated rent as damages.[25] The fact that Peteroy was dismissed from the eviction proceedings with prejudice does not bear on the current action because the issue of Peteroy's liability as guarantor was not necessarily

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[21] *Buechel v. Bain*, 97 N.Y.2d 295 [2001]

[22] *D'Arata v New York Cent. Mut. Fire Ins. Co.,* 76 NY2d 659, 664 [1990]; *Schultz Constr., Inc. v. Franbilt, Inc.*, 14 A.D.3d 895 [3d Dept 2005]

[23] *Gilberg v Barbieri*, 53 NY2d 285 [1981]

[24] *Buechel*, supra

[25] *Ross Realty*; supra

decided. Peteroy's liability did not terminate with the surrender of the premises.[26] As the Guaranty itself states in part:

> ...this guaranty...shall remain in full force and effect until payment in full to the Landlord of all sums payable under the Lease.

The stipulation that discontinued the Civil Court action against Peteroy, which was negotiated and prepared by attorneys for the respective parties, never mentions the Guaranty or Peteroy in his capacity as guarantor, nor seeks to limit the responsibilities of Peteroy as guarantor in any way. Since Tottenville has yet to receive payment in full of all sums alleged to be payable under the Lease, the Guaranty remains in full effect.

Even if this court found that the issue of Peteroy's liability had been necessarily decided in the prior action, Tottenville has demonstrated that a triable issue of fact exists as to whether it had a full and fair opportunity to litigate the issue. As previously mentioned, the Guaranty signed by Peteroy was not addressed in the proceedings. Such a Guaranty is a contract that stands separate and apart from the Lease and is rightfully addressed in an action such as this which seeks to recover accelerated rent as damages for the Miskanics's breach of the Lease.

As Peteroy has failed to satisfy his initial burden of establishing his entitlement to summary judgment, Peteroy's motion must be denied.

Tottenville's Motion for Partial Summary Judgment

Tottenville believes it is entitled to summary judgment on the issue of liability against Peteroy, as guarantor, for any damages that cannot ultimately be recovered from the Miskanics because Peteroy signed the Guaranty.

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[26] *ULM Holding Corp. v. Strand Communications LLC*, (Sup. Ct. New York County, April 16, 2010)

On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty.[27] A guaranty must be construed "in the strictest manner".[28] A guaranty is independent from the document it purports to guaranty and by its terms stands alone in imposing direct and primary obligations for payment on the guarantor.[29]

Here, Tottenville has produced sufficient evidence to satisfy its initial burden of establishing its entitlement to summary judgment. In support of the motion, Tottenville has produced documentary evidence showing the existence of the Guaranty of all rent obligations under the Lease, signed by Peteroy,[30] the existence of unpaid rent,[31] and Peteroy's failure to compensate Tottenville for any damages suffered as a result of Miskanic's non-payment under the Lease.

Since Tottenville has satisfied its initial burden, the burden now shifts to Peteroy to raise the existence of a triable issue of fact.[32]

As discussed above, there are no triable issues of fact as to whether Tottenville is barred from relitigating the issue of Peteroy's liability under the doctrines of res judicata and collateral estoppel. Therefore, since Peteroy cannot show that a triable issue of material fact exists, Tottenville is entitled to summary judgment on the issue of liability against Peteroy.

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[27] *Davimos v. Halle,* 2006 NY Slip Op 9514, 2 [1st Dept 2006]

[28] *Arlona Ltd. Partnership v. 8th of Jan. Corp.*, 2008 NY Slip Op 3571, 1 [2d Dept 2008]

[29] *City of New York v. Clarose Cinema Corp.*, 256 A.D.2d 69 [1st Dept 1998]

[30] Exhibit E, Tottenville's Notice of Motion

[31] Exhibit G, Tottenville's Notice of Motion

[32] *Zuckerman, supra*

CONCLUSION

The default judgment against the Miskanics must be vacated because the Miskanics have presented a reasonable excuse for default as well as a meritorious defense. Notwithstanding this court's vacating of the default judgment entered against the Miskanics, Peteroy is liable as guarantor for any damages that cannot ultimately be recovered from the Miskanics because the Guaranty is a contract separate and apart from the Lease. As Tottenville is not barred by res judicata or collateral estoppel from relitigating the issue of Peteroy's liability as guarantor, Peteroy's cross-motion for summary judgment dismissing Tottenville's claims must be denied. Similarly, since Tottenville has established that the Guaranty remains in full effect and that the conditions for enforcing the Guaranty have been met, Tottenville's motion for summary judgment on the issue of Peteroy's liability as Guarantor must be granted.

Accordingly, it is hereby:

ORDERED, that Defendants Edward J. Miskanic and Lisa Miskanic's motion to vacate the default judgment entered against them is granted; and it is further

ORDERED, that Defendant David Peteroy's cross-motion for summary judgment dismissing Plaintiff Tottenville's claim is denied; and it is further

ORDERED, that Tottenville's motion for summary judgment on the issue of liability against Peteroy is granted; and it is further

ORDERED, that the Miskanics shall file and serve an answer within 30 days of the entry of this order.

All parties shall appear in DCM Part 3 on Wednesday, August 25, 2010 at 9:30 a.m. for a Preliminary Conference.

ENTER,

DATED: June 29, 2010

Joseph J. Maltese
Justice of the Supreme Court