MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 24

ACF HILLSIDE, L.L.C.,

- against -

GEORGE LAMBRAKIS, as Managing Member of Eagle Realty, L.L.C.,

INDEX NO. 27393/08

MOTION SEQ. NO. 4

MOTION DATE: April 27, 2010

BY: AGATE, J.

Plaintiff ACF Hillside, LLC (ACF) has moved for summary judgment on its complaint.

Eagle Realty LLC owns and operates real estate known as 87-11 178th Street, Jamaica, New York, 178-20 Hillside Avenue, Jamaica, New York, and 178-39 Hillside Avenue, Jamaica, New York. Defendant George Lambrakis, who holds a one third interest in Eagle Realty, serves as the managing member of the company, and Gregory Lambrakis and Alexander Lambrakis, both members, each hold a one-third interest in the company. Plaintiff ACF, which made capital contributions totaling $900,000 to the company, has the status of a "special member." Eagle Realty obtained various loans from Archer Capital Fund, L.P.

Pursuant to Eagle Realty's operating agreement dated February 28, 2008, the managing member has the right to "redeem" the special member's interest in the company through the service of a redemption notice, and the special member can require the company to redeem its interest through the service of a "put notice." Section 2.4(e) of the operating agreement provides that "should *** an event of default under the Loan Documents be ongoing beyond any applicable notice and cure period *** then a Put Notice will be deemed to have been given by the Special Member ***." Section 2.4(d) provides in relevant part: "In the event the Company does not pay the Redemption amount in full by the date that is fifteen (15) days after the delivery of the Redemption Notice or Put Notice, as applicable, then (i) the Managing Member shall immediately and automatically have no further right to act on behalf of the Company, (ii) from and after such time, the Special Member shall have the sole authority with respect to the management and control of the Company ***."

On or about February 28, 2008, Archer Capital Fund, L.P. made a loan to Eagle Realty in the original principal amount of $25,250,000 (the Hillside loan). On April 1, 2008, Eagle defaulted under the loan documents.

On August 29, 2008, plaintiff ACF' s attorney delivered a "Deemed Put Notice" pursuant to section 2.4(e) of the operating agreement to defendant George Lambrakis, as the managing member of Eagle Realty. The notice stated in relevant part: " Please be advised that our client has been informed by Archer Capital Fund *** that the company is in default under the loan documents beyond any applicable notice and cure

period. Accordingly, pursuant to Section 2.4(e) of the Operating Agreement, the Company must redeem ACF's Special Member Interest immediately. Failure to do so on Tuesday, September 2, 2008 will cause the Special Member to take the position of Managing Member and remove Mr. George Lambrakis therefrom ***." Eagle Realty did not redeem plaintiff ACF's special member interest on September 2, 2008, nor did the company deliver to the plaintiff assets and business records necessary for its operation.

Plaintiff ACF began this action for specific performance on or about November 10, 2008, alleging that defendant George Lambrakis had breached the operating agreement by failing to surrender management and control of the company. Defendant Lambrakis asserts fraud as his primary defense to this action for breach of contract, and he makes the following allegations: In January, 2006, Emmanuel Lambrakis (the father of the three members of Eagle Realty), acting on behalf of Eagle Realty, entered into a brokerage agreement with Frank Bitzas for the sale of the commercial property located at 178-02/30 Hillside Avenue, Jamaica, New York. Fast Track Services, whose principal was Marc Kallman, Esq., offered through Bitzas to buy the property for $19,400,000, but Eagle Realty rejected the offer. If the property could not be sold, Emmanuel Lambrakis intended to build upon it, and, on May 10, 2006, Bitzas informed him that Archer Capital Fund, L.P. was interested in financing its development. Bitzas introduced Kallman to Emmanuel Lambrakis as an attorney familiar with real estate development and familiar with Archer Capital and its related companies. Kallman became the attorney for the Lambrakis family and its

businesses, but, according to the defendant, "Kallman and Archer worked together to defraud the defendants out of their properties from the very beginning." Emmanuel Lambrakis, on behalf of Eagle Realty, entered into a finance agreement whereby Archer Capital would provide a loan in the amount of $7,400,000 for a period of twelve months. In or about March, 2007, Archer Capital and Eagle Realty entered into another agreement whereby the former promised to loan the latter an additional $2,600,000 for a twelve month period due to expire on April 1, 2008. The loan would be secured by properties owned by Eagle Realty, GEL, LLC and GRL, LLC. Although there were defaults on the repayment of the $2,600,000 loan, plaintiff Archer allegedly told the mortgagors and guarantors "not to worry" since Archer intended to lend $25,000,000 more for various purposes, including coverage of the earlier loans. Emmanuel Lambrakis allegedly had personal dealings with Kallman and Joel R. Fogel, one of Archer Capital's agents, for the $25,000,000 loan, and he relied on their alleged representations that the earlier loans would not be held in default. Lambrakis and his three sons went to Kallman's office on February 27, 2008 and allegedly signed a number of blank pages as allegedly requested by plaintiff Archer Capital. Emmanuel Lambrakis allegedly told Kallman that the signature pages were not to be used without his permission. By August, 2008, Archer Capital had allegedly still not made the $25,000,000 loan to Eagle Realty, and Lambrakis demanded that Kallman send a default notice to Archer Capital. However, on August 29, 2008, Kallman advised Lambrakis that he had received a notice from the attorney for Archer Capital declaring Eagle Realty in default of an "operating

agreement" made on February 28, 2008. Emmanuel Lambrakis allegedly then learned for the first time that the signature pages had been used without his consent for the operating agreement and for other documents which he had never seen.

A preliminary conference order of this court entered October 15, 2009 reads in relevant part: "Defendants shall produce all documents requested in plaintiff's request for documents dated 8/7/2009 on or before 12/4/2009 and appear for deposition at Kaye Scholer LLP on or before 12/11/09 at 10:00 AM or be precluded from offering evidence or testimony at trial in support of their defenses and counterclaims." The order noted: "Defendants have defaulted five previous times in producing documents or appearing for deposition in this and related actions. A companion preclusion order has already been entered in the related case Archer Capital Fund LP v GEL LLC (Index No. 27397/08)." The defendant failed to produce any documents and failed to appear for his deposition. The defendant offers as an excuse for not complying with the order entered October 15, 2009 that his prior attorney desired to be relieved of his duties and failed to appear for the preliminary conference. However, the defendant does not allege that his prior attorney was unaware of the order, and the defendant did not show that he ever moved to vacate his default under the preliminary conference order.

"[T]he 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 Hospital*,

68 NY2d 320, 324.) Plaintiff ACF successfully carried this burden by submitting evidence sufficient to establish a prima facie case of breach of contract against the defendant. Plaintiff ACF established that Eagle Realty defaulted on its loan obligations, that under the terms of the operating agreement the plaintiff has the right to assume the management and control of the company, and that defendant Lambrakis has failed to relinquish the management and control of the company.

The burden on this motion shifted to the defendant to produce evidence showing that there is an issue of fact which must be tried (*see, Alvarez v Prospect Hospital, supra*) or to demonstrate the existence of a defense warranting the denial of summary judgment. (*See, Plantamura v Penske Truck Leasing, Inc.,* 246 AD2d 347.) The defendant failed to carry this burden.

The conditional order of preclusion in this court's preliminary conference order entered October 15, 2009 directing the defendant to make disclosure or be precluded from offering evidence or testimony at trial in support of his defenses and counterclaims was self-executing, and the defendant's default on his discovery demands rendered it absolute. (*See*, *Wilson v Galicia Contracting & Restoration Corp*. 10 NY3d 827; *Lopez v City of New York*, 2 AD3d 693.) The effect of the order is to prevent the defendant from offering any evidence tending to defeat the plaintiff's cause of action for breach of contract. (*See*, *Wilson v Galicia Contracting & Restoration Corp*., *supra*.) An order of preclusion can have the effect of rendering a party unable to withstand a motion for summary judgment. (*See, e.g.*,

Panagiotou v Samaritan Village, Inc., 66 AD2d 979; *Samuels v Montefiore Medical Center*, 49 AD3d 268; *State Farm Mut. Auto. Ins. Co. v Hertz Corp.,* 43 AD3d 907.) A defendant who is unable to offer admissible evidence as a consequence of an order of preclusion cannot raise an issue of fact sufficient to withstand summary judgment. (*See*, *Hesse Const., LLC v Fisher,* 61 AD3d 1143.)

To avoid the adverse impact of the conditional order of preclusion, the defendant had to offer a reasonable excuse for his failure to comply and had to demonstrate a meritorious defense. (*See*, *Panagiotou v Samaritan Village, Inc*., *supra*; *State Farm Mut. Auto. Ins. Co. v Hertz Corp*., *supra*.) The defendant failed to carry this burden.

The defendant's excuse is insufficient. The defendant alleges that his prior attorney wanted to be relieved as counsel and failed to appear at the preliminary conference which resulted in the issuance of the conditional order of preclusion. However, the defendant does not allege that his prior attorney did not know about the preliminary conference order. Indeed, the defendant's present attorney asserts "[i]t is submitted that the mere mailing, from plaintiff's counsel to defendant's counsel of a pc order that is unilaterally entered into by plaintiff's counsel with preclusion language within same is not analogous ***." The court infers that the plaintiff's attorney mailed a copy of the preliminary conference order to the defendant's former attorney. A perfunctory claim of law office failure is insufficient to excuse a failure to comply with a conditional order of preclusion. (*See*, *AWL Industries, Inc. v QBE Ins. Corp*., 65 AD3d 904.) Moreover, where there is a

pattern of default and neglect, an attorney's negligence is properly imputed to the client in determining whether the client has demonstrated a valid excuse for a default. (*See*, *Santiago v Santana*, 54 AD3d 929*; Edwards v Feliz,* 28 AD3d 512; *MRI Enterprises, Inc. v Amanat*, 263 AD2d 530.) The defendant also did not allege that he took action to ascertain the status of his case while his prior attorney was seeking to be relieved. (*See*, *Edwards v Feliz, supra.*) In any event, the defendant's present attorney failed to show that he did not know about the order of preclusion before the plaintiff made the instant motion for summary judgment and could not have moved before that time to vacate the order of preclusion. The doctrine of laches may be applied in determining whether to vacate a default (*see, e.g., First Nationwide Bank v Calano*, 223 AD2d 524), and, in the case at bar, the defendant's inexcusable delay in asserting his problems with his former attorney until the plaintiff served its motion for summary judgment leaves him subject to the order of preclusion.

The defendant does not have a meritorious defense to the instant action. The defendant's allegations of a conspiracy to commit fraud involving the attorney representing the Lambrakis family and its businesses on the financing transactions rest on surmise, conjecture, and suspicion, and the allegations are thus insufficient to withstand a motion for summary judgment. (*See*, *Marino v Parish of Trinity Church,* 67 AD3d 500.)

Finally, although the complaint demands attorney's fees, the plaintiff did not allege that a contractual clause, statute, or court rule authorizes their recovery in this case. (*See*, *Hooper Associates, Ltd. v AGS Computers, Inc*., 74 NY2d 487.)

Accordingly, the plaintiff's motion for summary judgment on its complaint is granted except as to attorney's fees.

Settle order.

Dated: July 8, 2010

AUGUSTUS AGATE, J.S.C.