

Roth Law Firm, PLLC v Adams

2011 NY Slip Op 30148(U)

January 21, 2011

Sup Ct, New York County

Docket Number: 110620-2009

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C. —

PART 10

Index Number : 110620/2009

ROTH LAW FIRM PLLC.

vs
ADAMS, BENJAMIN

Sequence Number : 002

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.*

FILED

JAN 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

*and PC scheduled for
2/24/11 @ 9:30am Part 10*

Dated: 1/21/11

JJG
HON. JUDITH J. GISCHE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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
The Roth Law Firm, PLLC,

Plaintiff (s),

-against-

Benjamin Adams, Adam & Associates, P.C.
Esquire Land Services, LLC, Benjamin Michael
Realty, Inc., and Ambassador Funding, LLC,

Defendant (s).
-----x

DECISION/ ORDER

Index No.: 110620-2009

Seq. No.: 002

PRESENT:

Hon. Judith J. Gische

J.S.C.

FILED

JAN 24 2011

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

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Papers

Numbered

Pltff's n/m (3215) w/EPS affirm, exhs	1
Defs x/m (various) w/BMA affid, exhs (sep backs)	2,3
Pltff's opp and further support w/RAR affid, EPS affirm, exhs	4

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

GISCHE J.:

This is an action for fraudulent conveyances brought pursuant to Debtor Creditor Law §§ 273, 274 and 276. Plaintiff previously brought a motion for entry of a default judgment against the defendants. Although the motion was submitted on default, it was denied by the court (Order, Gische J., June 18, 2010) ("prior order"). While the motion was *sub judice*, the court was notified by defendant Benjamin M. Adams, sued herein as Benjamin Adams ("Mr. Adams") that defendant Adams & Associates, P.C. ("A&A") had filed for chapter 7 protection under the bankruptcy laws. The denial of the prior

motion was without prejudice.

There is now before the court a motion by plaintiff to reargue and renew the court's prior order and a cross motion by the defendants to file a late answer. Each party opposes the other's motion.

A motion for reargument is addressed to the court's discretion (Foley v. Roche, 68 AD2d 558, 567 [1st Dept. 1979]). The moving party has to show that the court either overlooked or misapprehended relevant facts or misapplied controlling principles of law (300 West Realty Co. v. City of New York, 99 AD2d 708 [1st Dept. 1984]). Plaintiff's motion to reargue is denied. The court did not misapprehend any facts or misapply the law. There were no arguments made by plaintiff about whether any of the defendants were afforded protection under the bankruptcy laws. Furthermore, the prior motion was against the Adams defendants and Benjamin Michael Realty, Inc. whereas this motion is limited to defendants Esquire Land Service, LLC ("Esquire") and Ambassador Funding, LLC ("Ambassador").

The court will, however, allow plaintiff to renew its prior motion as to defendants Esquire and Ambassador based upon new facts that were unavailable at the time of the original motion and, therefore, unknown to the court (Wilder v. May Dept. Stores Co., 23 A.D.3d 646 [2nd Dept 2005]).

The court will also decide whether any of the defendants should be allowed to file a late answer.

Arguments

Plaintiff obtained a money judgment against Adams & Associates, P.C. ("A&A") in the principal amount of \$47,725, entered February 5, 2009 ("judgment"). The

judgment was after a jury trial in which plaintiff prevailed on its breach of lease claims (The Roth Law Firm, PLLC v. Adams & Associates, P.C., Index No. 106757-06). The judgment remains unsatisfied.

On November 10, 2009, A&A filed a Chapter 7 petition for bankruptcy (In re Adams & Associates, P.C., Case No. 09-24108-rdd). The Roth Law Firm, PLLC is identified as a creditor holding an unsecured, nonpriority claim and the petition is signed by Mr. Adams as president of A&A.

Upon renewal, A&A acknowledges that there is a bankruptcy stay in effect as to all defendants, except Esquire and Ambassador. As to those defendants, plaintiff argues the bankruptcy stay does not protect them and, therefore, plaintiff is entitled to a default judgment against them because they were duly served but chose to ignore the complaint.

Mr. Adams argues, on behalf of Esquire and Ambassador, although neither of these entities are entitled to protection under the bankruptcy laws, the court should extend the stay because of the nature of the claims against all the defendants. In the complaint, plaintiff alleges that A&A transferred assets to the other defendants in an effort to make itself judgment proof. Although Mr. Adams denies that any of the defendants were properly served, he seeks to defend the case on its merits.

In support of its motion and in opposition to the cross motion to file a late answer, plaintiff argues that the non-bankrupt defendants have no meritorious defenses and, therefore, should not be permitted to file a late answer.

Discussion

A default in answering the complaint is deemed to be an admission of all factual

allegations contained in the complaint and all reasonable inferences that flow from them (Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 [2003]). Plaintiffs are entitled to a default judgment against the defendants, provided they demonstrate they have a *prima facie* cause of action (Gagen v. Kipany Productions Ltd., 289 AD2d 844 [3rd dept. 2001]). Since plaintiff had not met that burden, its motion for entry of a default judgment is denied because defendants have set forth excusable default and potentially meritorious defenses.

Whether or not defendants were properly served, they seek to defend the claims against them on the merits. This is consistent with public policy, favoring the resolution of cases on the merits (Klughaupt v. Hi-Tower Contractors, Inc., 64 A.D.3d 545 [2nd Dept 2009]). Plaintiff did not obtain a judgment on default and, therefore, the requirements of CPLR 5015 do not apply. Even if CPLR 5015 does apply, in the interest of justice, the court will allow Esquire and Ambassador the opportunity to serve a later answer. The answer shall be served within ten (10) days of entry of this decision and order.

The motion by Esquire and Ambassador for a stay of this action pending the resolution of the bankruptcy proceedings is denied. Stays pursuant to 11 U.S.C. § 362(a) are limited to debtors and may not be extended to non-bankrupt entities (In re United Health Care Organization, 210 B.R. 228 [S.D.N.Y.1997]). Although some courts have held that under specific circumstances non-debtors may be protected by the automatic stay, that is only where it contributes to the debtor's efforts to achieve rehabilitation (In re United Health Care Organization, 210 B.R. 228 [S.D.N.Y.1997]). This case does not fall within that narrow exception.

Accordingly,

It is hereby,

ORDERED that plaintiff's motion to reargue is denied, but its motion for permission to renew is granted; upon renewal, however, the court denies its renewed motion for entry of a default judgment against defendants Esquire and Ambassador; and it is further

ORDERED that the motion by defendants Esquire and Ambassador for permission to serve a late answer is granted; The answer shall be served within ten (10) days of entry of this decision and order; and it is further

ORDERED that the motion by defendants Esquire and Ambassador for a stay of this action against them based upon the Chapter 7 filing by Adams & Associates, P.C. in bankruptcy court is denied; and it is further

ORDERED that the claims against the remaining defendants are stayed due to the bankruptcy petition filed by Adams & Associates, P.C.; and it is further

ORDERED that any relief not expressly addressed is hereby denied; and it is further

ORDERED that the court hereby schedules a **preliminary conference in Part 10, 60 Centre Street, Room 232 on February 24, 2011 at 9:30 a.m.**; and it is further

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

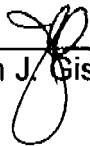
Dated: New York, New York
January 21, 2011

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JAN 24 2011

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-Page 5 of 5-

So Ordered:



Hon. Judith J. Gische, JSC