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| <b>Coldwell Banker Real Estate Servs. Inc. v Gitlin</b>                                                                                                                                                                          |
| 2011 NY Slip Op 32391(U)                                                                                                                                                                                                         |
| August 25, 2011                                                                                                                                                                                                                  |
| Sup Ct, Nassau County                                                                                                                                                                                                            |
| Docket Number: 002015-09                                                                                                                                                                                                         |
| Judge: Vito M. DeStefano                                                                                                                                                                                                         |
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## SUPREME COURT - STATE OF NEW YORK

Present:

**HON. VITO M. DESTEFANO,**  
Justice

TRIAL/IAS, PART 19  
NASSAU COUNTY

**COLDWELL BANKER REAL ESTATE  
SERVICES INC., d/b/a COLDWELL BANKER  
RESIDENTIAL BROKERAGE,**

Decision and Order

Plaintiffs,

-against-

**MOTION SUBMITTED:  
June 21, 2011  
MOTION SEQUENCE:04, 05  
INDEX NO. 002015-09**

MARIE GITLIN and EDUARD GITLIN,

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

|                        |   |
|------------------------|---|
| Order to Show Cause    | 1 |
| Notice of Cross Motion | 2 |
| Affirmation            | 3 |
| Affirmation in Reply   | 4 |

The Plaintiff, Coldwell Banker Real Estate Services, Inc., moves for an order adjudicating Defendant Marie Gitlin in contempt of court based upon Ms. Gitlin's failure to comply with a subpoena. The Defendants oppose Plaintiff's motion and, cross-move, *inter alia*, for an order pursuant to CPLR 5015 vacating the judgment entered against Marie Gitlin.

For the reasons that follow, the Plaintiff's motion is granted and the Defendants' cross motion is granted in part and denied in part.

## Background

On January 13, 2010, the Defendants were served with the summons and complaint (Ex. “C” and “D” to Plaintiff’s Affirmation in Reply and in Opposition to Cross Motion). Having received no answer, the Plaintiff notified the Defendants, by letter dated February 22, 2010, that if it did not receive a response to the summons and complaint by March 4, 2010, it would seek a default judgment (Ex. “C” to Affirmation in Support of Motion).<sup>1</sup> On April 23, 2011, the Defendants were given another extension to serve and file their answer on the basis that they “had yet to find suitable counsel” (Attorney’s Affirmation in Reply at ¶ 22). Plaintiff’s counsel consented to yet another extension, affording Defendants time to answer up until July 8, 2009 (Attorney’s Affirmation in Reply at ¶ 24). Notwithstanding the three extensions, the Defendants never answered the complaint (Attorney’s Affirmation in Reply at ¶ 24).<sup>2</sup>

Thereafter, the Plaintiff moved for judgment against Ms. Gitlin pursuant to CPLR 3215.<sup>3</sup> Ms. Gitlin failed to oppose the motion. By order dated May 21, 2010, this court granted the Plaintiff’s motion awarding it judgment against Ms. Gitlin in the amount of \$56,157.50 (Ex. “B” to Affirmation in Support of Motion).

On November 16, 2010, Plaintiff served a subpoena upon Ms. Gitlin to compel her deposition (Ex. “A” to Affirmation in Support of Motion). Ms. Gitlin did not appear for the scheduled deposition. Accordingly, Plaintiff seeks an order adjudging Ms. Gitlin in contempt for failing to comply with the subpoena. Ms. Gitlin opposes the motion and cross-moves for an order, *inter alia*, vacating the judgment against her.

### *Cross Motion to Vacate Default Judgment*

A defendant seeking to vacate a judgment entered upon default in appearing and answering the complaint must demonstrate a reasonable excuse for her delay in appearing and

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<sup>1</sup> Annexed to the February 22, 2010 letter was a copy of the summons and complaint.

<sup>2</sup> Ms. Gitlin does not dispute the numerous extensions that were given but maintain that she “did not take additional steps to respond to the complaint” because she and Eduard were attempting to “resolve the issue with counsel for the Plaintiff” (Affirmation in Opposition to Motion for Contempt and in Support of Cross Motion at ¶ 22).

<sup>3</sup> The Plaintiff concedes that Eduard Gitlin is not a proper party to this action (Affirmation in Reply and in Opposition to Cross Motion ¶ 27). The court will, therefore, grant that branch of the cross motion seeking dismissal of the complaint insofar as asserted against him notwithstanding that the Defendants have failed to annex a copy of the complaint to their cross motion (CPLR 2001).

answering, as well as a meritorious defense to the action (*see New York & Presbyterian Hospital v American Home Assurance Co.*, 28 AD3d 442 [2d Dept 2006]). Further, the determination of what constitutes a reasonable excuse lies within the trial court's discretion (*see Benjamin Nurse v Figeroux & Associates*, 47 AD3d 778 [2d Dept 2008]).

After Ms. Gitlin was served with the summons and complaint, her husband, Eduard Gitlin, “had numerous discussions with [Plaintiff’s counsel] and it was [her] belief that the matter was being resolved” (M. Gitlin’s Affidavit annexed to Ex. “3” to Cross Motion at ¶ 8). However, Plaintiff’s counsel states in his affirmation that each time Eduard Gitlin contacted him and offered to settle the matter, the offer was refused (Affirmation in Reply and in Opposition to Cross Motion). Moreover, the Plaintiff consented to three requests to extend the time to answer, sent letters indicating that Ms. Gitlin was in default and moved for a default judgment, which she failed to oppose.

In view of the multiple extensions granted by Plaintiff to answer the complaint, Ms. Gitlin’s knowledge that she was in default, and that Plaintiff rejected Ms. Gitlin’s attempts at settlement, the court finds the Ms. Gitlin’s excuse for defaulting unreasonable under the circumstances (*American Shoring, Inc. v. D.C.A. Constr., Ltd.*, 15 AD3d 431 [2d Dept 2005] [“[A]ny reliance by the defendant on the parties’ settlement negotiations . . . did not constitute a reasonable excuse for the default, since the defendant was aware during those negotiations that the plaintiff had already obtained a default judgment”]). In fact, as noted, Ms. Gitlin failed even to oppose the motion for a default judgment, just as she failed to respond to the Plaintiff’s subpoena (discussed *infra*).

In the absence of a reasonable excuse, it is unnecessary to consider whether Ms. Gitlin sufficiently demonstrated the existence of a meritorious defense (*Segoria v Delcon Construction Corp.*, 43 AD3d 1143 [2d Dept 2007]; *Rosario v Beverly Road Realty Co.*, 38 AD3d 875 [2d Dept 2007]).<sup>4</sup>

#### *Motion for Contempt*

In order to prevail on a motion for contempt, the moving party must demonstrate that the party charged violated a “clear and unequivocal court order, thereby prejudicing a right of another party to the litigation” (*Rienzi v Rienzi*, 23 AD3d 447, 449 [2d Dept 2005]; *see also Dankner v Steefel*, 41 AD3d 526 [2d Dept 2007]). It is not necessary that such disobedience be deliberate; rather the mere act of disobedience, regardless of its motive, is sufficient to sustain a finding of civil contempt if such disobedience defeats, impairs, impedes or prejudices the rights

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<sup>4</sup> The court notes that it cannot conclude, on the papers submitted, which do not even contain a copy of the complaint, that Chris Galluzzo is a necessary party.

of a party” (*Yalkowsky v Yalkowsky*, 93 A.D.2d 834 [2d Dept 1983]). Pursuant to CPLR 5223, “[a]t any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment . . . [and] failure to comply with the subpoena is punishable as contempt of court.”

Ms. Gitlin does not deny receipt of the subpoena or claim that service was improper (M. Gitlin’s Affidavit annexed to Ex. “3” to Cross Motion at ¶ 8). Ms. Gitlin’s only explanation for failing to timely respond to the subpoena is that her attorney had begun negotiations with the attorney for the Plaintiff and that he was considering the settlement offer of \$3,000 (M. Gitlin’s Affidavit annexed to Ex. “3” to Cross Motion at ¶ 10). However, plaintiff’s attorney states in his affirmation that he immediately declined the offer of \$3,000, which he considered unreasonable in light of the default judgment of \$56,170.50 (Affirmation in Reply and in Opposition to Cross Motion).<sup>5</sup> Given the absence of sufficient explanation for Ms. Gitlin’s failure to appear for the deposition, the court hereby adjudges her to be in contempt of court (*Quantum Heating Services Inc. v Austern*, 100 AD2d 843 [2d Dept 1984]). In addition, the court finds and determines that her disobedience of the subpoena has defeated, impeded, impaired and prejudiced the Plaintiff’s rights and remedies; and it is further

Accordingly, it is hereby:

ORDERED that the branches (a), (b) and (c) of the Defendants’ cross motion are denied; branch (d) is granted and the complaint is dismissed insofar as asserted against Eduard Gitlin; and, it is further

ORDERED that the Plaintiff’s motion for an order adjudicating Marie Gitlin in contempt of court for failing to comply with the subpoena served upon her is granted; and, it is further

ORDERED that Marie Gitlin is adjudged in civil contempt. Ms. Gitlin may purge this contempt by appearing for a deposition in the Supreme Court, Nassau County, Lower Level, to be sworn to at such time and answer questions put to her by counsel, said deposition to occur within 15 days after service upon her of a copy of this order, service to be made pursuant to CPLR 308 (1) or (2), or the next business day if such period ends on a Saturday, Sunday or legal holiday. Another date and time may be selected by the parties, but such date, once established, shall have the same force and effect as if set down in this Order. This is a FINAL opportunity to purge the contempt.

ORDERED that if Ms. Gitlin fails to comply with this purge provision, and upon the

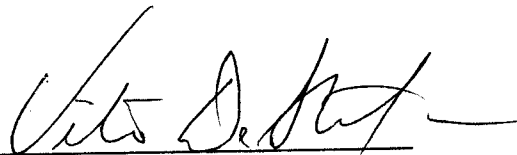
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<sup>5</sup> Although the judgment was not served with notice of entry until March 9, 2011, Ms. Gitlin and her attorney were aware of said judgment by December 21, 2010.

filing of an affidavit attesting to proper service of this Order and the failure of Ms. Gitlin to appear and purge the contempt thereunder, as punishment, the Clerk shall enter a money judgment against Ms. Gitlin in the sum of \$250, and the court shall issue a warrant directing the sheriff of any county of the State of New York, wherein Ms. Gitlin may be found, committing her to jail, there to remain until she submits to a deposition or until she is discharged according to law, pursuant to CPLR 2308.

This shall constitute the decision and order of the court.

Dated: August 25, 2011

  
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Hon. Vito M. DeStefano, J.S.C.

**ENTERED**  
AUG 29 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE