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SHORT FORM ORDER INDEX NO. 25539/2004

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

TOWN OF RIVERHEAD,

Plaintiff,

-against-

RIVERHEAD PARK CORP. and LARRY OXMAN,

Defendants.

ORIG. RETURN DATE: FEBRUARY 24, 2011
FINAL SUBMISSION DATE: FEBRUARY 24, 2011
MTN. SEQ. #: 004
MOTION: MD

PLTF'S/PET'S ATTORNEY:
SMITH, FINKELSTEIN, LUNDBERG, ISLER AND YAKABOSKI, LLP
456 GRIFFING AVENUE
RIVERHEAD, NEW YORK 11901
631-727-4100

DEFT'S/RESP ATTORNEY:
CAMPANELLI & ASSOCIATES, P.C.
623 STEWART AVENUE - SUITE 203
GARDEN CITY, NEW YORK 11530
516-746-1600

Upon the following papers numbered 1 to 7 read on this motion TO VACATE ORDER OF DISMISSAL.
Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Replying Affirmation and supporting papers 6, 7; it is,

ORDERED that this motion by plaintiff, TOWN OF RIVERHEAD, for an Order: (1) pursuant to CPLR 5015 (a) (1) and (4), vacating the Order of this Court dated October 5, 2010, and entered in the office of the Clerk of the County of Suffolk on November 19, 2010, which granted defendants' motion for summary judgment pursuant to CPLR 3211 (a) (3), upon the grounds that the Court lacked jurisdiction pursuant to 11 USC § 362 (a) (1); or in the alternative (2) pursuant to CPLR 5015 (a) (1) and (4), vacating the Order of this Court dated October 5, 2010, upon the grounds that any default on the part of the plaintiff was not willful or intentional, is excusable, and the plaintiff possesses meritorious causes of action; or in the alternative (3) pursuant to CPLR 2221 (d) and (f), granting plaintiff leave to reargue defendants' motion; or in the alternative (4) pursuant to CPLR 2221 (e) and (f), granting plaintiff leave to renew defendants' motion based upon new facts not raised on the prior motion, is hereby **DENIED** in its entirety for the reasons set forth hereinafter.

On or about October 22, 2004, plaintiff TOWN OF RIVERHEAD ("plaintiff" or "Town") commenced this action against defendants seeking permanent injunctive relief directing defendants to cease and desist all work on the premises located on the south side of County Route 58 (Old Country Road),

in Riverhead, New York ("premises"), and to enjoin any and all future work on the premises by defendants. The Town further sought an injunction restraining defendants from removing any vegetation; performing any land clearing; conducting any excavation; performing any filling; importing or exporting any soils or similar material to the site; and grading, plowing, or engaging in any agricultural uses on the premises until such time as: (a) a site plan for the premises is approved by the Town Board; (b) a remediation and restoration plan to reconstitute the wetland and reforest the premises is approved by the Town Conservation Advisory Council and the Town Board; and (c) defendants apply for and receive all necessary permits from all involved agencies to allow the proposed uses on the premises. On or about April 21, 2005, defendants joined issue by the service and filing of their answer.

By Order dated March 31, 2008, this Court denied a motion by plaintiff for a preliminary injunction seeking to: (1) temporarily restrain defendants from (a) removing any vegetation; (b) performing any land clearing; (c) conducting any excavation; (d) performing any filling; (e) importing or exporting any soils or similar material to the site; and (f) grading, plowing, or engaging in any agricultural uses, on the premises; and (2) directing defendants to remediate and restore the premises to its previous condition pursuant to the Town Code of the Town of Riverhead by restoring all improperly removed woodlands and vegetation and reconstituting the wetland that existed upon the premises prior to defendants' actions. After weighing the elements necessary for the granting of injunctive relief pursuant to Town Law § 268 (2), the Court found that the scale tipped in favor of not issuing the injunction. However, the Court held that the remaining conditions imposed by a previous Order dated April 18, 2005 (Oliver, J.) were to remain in full force and effect pending further Order of the Court, to wit: (1) no plan was to proceed without the approval of the Town; and (2) the Town was permitted to monitor the work and issue a stop order which was to be immediately obeyed by defendants or their agents or employees.

Defendants subsequently filed a motion for summary judgment seeking dismissal of plaintiff's complaint. Defendants had alleged that in the Order of March 31, 2008, the Court denied the relief sought by the Town with respect to an Order directing defendants to abate and correct the alleged violations existing on the premises, finding that such relief is beyond the scope of Town Law § 268 (2). Therefore, defendants argued that this had become law of the case. As such, defendants contended that summary judgment was appropriate. In the alternative, defendants sought to amend their answer to assert the affirmative defense of lack of capacity, and upon such amendment, to dismiss plaintiff's complaint based upon the fact that plaintiff never passed a town resolution authorizing commencement of this action. Plaintiff had failed to file opposition to this motion.

By Order dated October 5, 2010, this Court granted that branch of defendants' motion to amend their answer to assert the affirmative defense of lack of capacity, and dismissed the action on that ground. The Court found that it was undisputed that no resolution was passed by the Town Board authorizing the Town to commence this action.

Plaintiff has now filed the instant application to vacate the Order of dismissal. Plaintiff argues that the Order was issued during the automatic stay imposed by 11 USC § 362 (a) (1), based upon the bankruptcy filing of the corporate defendant herein. Plaintiff claims that it did not offer opposition to the motion due to the "severe penalties and sanctions it might have faced for violating the automatic stay of the Bankruptcy Court," under 11 USC § 362 (k) (1). Further, plaintiff contends that although defendants' counsel was appointed special counsel herein by the bankruptcy court, such appointment did not lift the automatic stay, which may only be terminated or modified after notice and a hearing pursuant to 11 USC § 362 (d). In the alternative, plaintiff seeks leave to reargue and/or renew defendants' motion, alleging that the Court overlooked the automatic stay when the Order was rendered. Moreover, by way of reply, plaintiff has submitted a resolution passed by the town board on or about February 1, 2011, authorizing commencement of the instant action, *nunc pro tunc*.

In opposition hereto, defendants allege that plaintiff has not proffered a reasonable excuse for its failure to oppose defendants' motion. Despite the existence of the bankruptcy filing, plaintiff sought additional time to oppose defendants' motion, which time was first agreed to by the parties, and then additional time was granted by the Court over defendants' objection. Defendants allege that their counsel was authorized to act on their behalf by Order of the Bankruptcy Judge dated March 23, 2010. Furthermore, defendants argue that even assuming, *arguendo*, that a stay was in effect, the stay would only be limited to the corporate defendant/debtor, not the individual defendant herein. As such, defendants seek a denial of plaintiff's motion in its entirety.

A motion to vacate a default Order may be made upon a showing of a reasonable excuse and a meritorious defense (*see e.g. Kaplinsky v Mazor*, 307 AD2d 916 [2003]; *O'Leary v Noutsis*, 303 AD2d 664 [2003]). The moving party must present an affidavit made by a person with knowledge of the facts that indicates a meritorious defense, containing a specific showing of sufficient legal merit to warrant vacating the default (*see* CPLR 5015 [a] [1]; *Polir Constr., Inc. v Etingin*, 297 AD2d 509 [2002]). The motion is addressed to the sound discretion of the court, and the exercise of such discretion will generally not be disturbed if there is support in the record therefor (*see I.J. Handa, P.C. v Imperato*, 159 AD2d 484 [1990]; *Vista Plumbing & Cooling v Woldec Constr. Corp.*, 67 AD2d 761 [1979]; *Machnick Bldrs. v Grand Union Co.*, 52 AD2d 655 [1976]).

Here, the Court finds that plaintiff has failed to demonstrate a reasonable excuse for failing to oppose defendants' motion. Notwithstanding the bankruptcy filing, plaintiff sought numerous adjournments for the purpose of filing opposition papers, which it failed to do. Specifically, the motion was originally returnable on December 17, 2009, and was adjourned to January 28, 2010, then to March 11, 2010, then to April 15, 2010, then to May 6, 2010, and then to July 29, 2010, the ultimate submit date. Plaintiff cited law office error as the reason for its need for the adjournments, not the bankruptcy filing. The issue of the bankruptcy stay was first discussed at a conference of this matter on September 30, 2010, but the motion had already been submitted unopposed two months prior. In addition, the stay was raised by correspondence from plaintiff's counsel dated October 6, 2010, but the Order was rendered one day prior. Regardless of the foregoing, the stay was never formally brought to the Court's attention and made part of the underlying motion record.

With respect to those branches of plaintiff's motion to renew and reargue, a motion for leave to renew must be based upon new material facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination (*see* CPLR 2221 [e]). If a motion to renew is based upon additional facts that existed at the time the prior motion was made, reasonable justification for the failure to present such facts on the prior motion must be provided (*see* CPLR 2221 [e] [3]; *Crystal House Manor, Inc. v Totura*, 29 AD3d 933 [2006]; *Williams v Lindenberg*, 24 AD3d 434 [2005]; *Hannalyn Realty Co. v McLaughlin*, 10 AD3d 409 [2004]). The Court finds that plaintiff has not provided reasonable justification for the failure to present the alleged stay on the prior motion. The Court finds plaintiff's argument that it may have faced severe penalties and sanctions if it violated the stay unavailing, as plaintiff would have been opposing a motion made by the defendants themselves, not injuring the corporate defendant by willfully violating the stay as contemplated by 11 USC § 362 (k) (1). Among the actions stayed are: the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the bankruptcy case, or to recover a claim against the debtor that arose before the commencement of the case under the Bankruptcy Code, and any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the bankruptcy case (*see* 11 USC § 362 [a] [1], [6]; *In re Prusan*, 2010 Bankr LEXIS 699 [Bankr EDNY 2010]).

A motion for leave to reargue must be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the original motion, but shall not include any matters of fact not offered on the prior motion and may not be used to advance arguments different than those

presented on the prior motion (*see* CPLR 2221 [d] [2]; *Cruz v Masada Auto Sales, Ltd.*, 41 AD3d 417 [2007]; *Barrett v Jeannot*, 18 AD3d 679 [2005]; *Foley v Roche*, 68 AD2d 588 [1979]). As discussed, plaintiff failed to present any facts or law in opposition to the original motion. In addition, it was undisputed that the Town had not passed an authorizing resolution at the time of the Order of October 5, 2010. Although plaintiff has now submitted such an authorizing resolution, this resolution was passed on or about February 1, 2011, approximately four months after the Order. Moreover, plaintiff submitted this resolution in reply to defendants' opposition. New matters raised for the first time in a reply affirmation may not be properly considered (*see Alto v Firebaugh Realty Corp., N.V.*, 33 AD3d 738 [2006]; *Hoyte v Epstein*, 12 AD3d 487 [2004]; *Jackson-Cutler v Long*, 2 AD3d 590 [2003]). Thus, plaintiff has not demonstrated that the Court, in rendering the Order, overlooked or misapprehended the relevant facts presented or any controlling principle of law (*see* CPLR 2221 [d] [2]; *Saggomagno v City of New York*, 29 AD3d 979 [2006]; *Foley v Roche*, 68 AD2d 588, *supra*).

Accordingly, based upon the foregoing, this motion by plaintiff to vacate the Order of this Court dated October 5, 2010, is **DENIED** in its entirety.

The foregoing constitutes the decision and Order of the Court.

Dated: October 13, 2011

HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**