

Ehrlich v Froehlich

2011 NY Slip Op 33675(U)

January 7, 2011

Sup Ct, New York County

Docket Number: 002628-04

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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MEL EHRLICH AND DANIEL EHRLICH,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiffs,

**Index No: 002628-04
Motion Seq. No: 13**

-against-

Submission Date: 11/24/10

**RANDOLPH FROEHLICH, WILLIAM FROEHLICH,
MICHAEL LOTURCO, PAUL V. CRACO,
MARK MERMEL and THE CHRISTOPHER
COMPANIES, LTD.,**

Defendants.

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Papers Read on this Motion:

- Order to Show Cause, Affidavit in Support,
Affirmation in Support and Exhibits.....X**
- Affirmation in Opposition.....X**
- Exhibits to Affirmation in Opposition.....X**
- Reply Affirmation.....X**

This matter is before the court on the Order to Show Cause filed by Defendant Michael Loturco ("Loturco") on October 8, 2010 and submitted on November 24, 2010. For the reasons set forth below, the Court grants the motion.

BACKGROUND

A. Relief Sought

Loturco seeks an Order, pursuant to CPLR § 5015, vacating this Court's Order dated September 16, 2010 ("Prior Order") which granted the motion by Plaintiffs Mel Ehrlich ("Mel") and Daniel Ehrlich ("Daniel") (collectively "Ehrlichs" or "Plaintiffs") for summary judgment.

Plaintiffs oppose Loturco's motion.

B. The Parties' History

Loturco affirms as follows in his Affidavit in Support:

Loturco previously represented himself in this litigation which, he affirms, has been dismissed against all parties except him. He appeared at his deposition on August 9, 2006 and appeared at three court conferences prior to that deposition.

In late August of 2010, Loturco received a document in the mail titled "Notice of Motion" which contained a return date ("Return Date") of September 16, 2010 (Ex. 1 to Loturco Aff.). That Notice of Motion related to Plaintiffs' motion for summary judgment ("Prior Motion"), which the Court granted in the Prior Order. Loturco affirms that he is a contractor by trade who performs extensive work for school districts during the summer months. In light of his busy schedule, and the complexity of the motion papers, Loturco determined that he should retain counsel to address the motion.

Loturco intended to appear in court on the Return Date but, prior to the Return Date, he received a Notice of Discontinuance ("Discontinuance") (Ex. 2 to Loturco Aff.). The Discontinuance relates to a matter that was filed in the Supreme Court of Suffolk County, New York titled *Sandpit Operations Partners Inc., and Daniel Ehrlich, individually and derivatively as a shareholder of Sandpit Operations Partners Inc., and as a partner in the General Partnership between Michael Loturco and himself v. Sandpit Operations Partners, Inc., as a nominal defendant, Michael Loturco, and Randolph Forehlich*, Suffolk County Index Number 027959-07 ("Suffolk County Action"). The Discontinuance, which is dated September 13, 2010 and signed by the same attorney who represents Plaintiffs in the matter *sub judice* ("Plaintiffs' Counsel"), reflects that the Suffolk County Action was discontinued against Loturco without prejudice, and without costs to either party.

Loturco affirms that, when he received the Discontinuance, he mistakenly believed that the matter *sub judice* ("Instant Action") had been discontinued. He did not notice that the Discontinuance contained a different caption, index number and venue than the Instant Action and "just assumed (erroneously) that Mr. Ehrlich decided not to pursue his claim against me" (Loturco Aff. at ¶ 8). Loturco avers that it was never his intention to default in the Instant

Action, and that he has valid defenses to the Instant Action.

Loturco subsequently received in the mail a proposed judgment with Notice of Settlement dated September 23, 2010 that was submitted by Plaintiffs' Counsel in the Instant Action (Ex. 3 to Loturco Aff.). Upon receiving that proposed judgment, Loturco realized that the Instant Action had not been discontinued. Loturco spoke to different attorneys about representing him and ultimately met with Mr. Neary on October 6, 2010, whom Loturco retained to represent him in the Instant Action.

With respect to the parties' agreement ("Agreement") on which the Prior Motion was based (Ex. 4 to Loturco Aff.), Loturco notes, *inter alia*, that the Agreement provides that the parties agreed that they would complete a formal agreement within thirty days of signing the Agreement. Thus, he submits, there exist factual and legal issues regarding the enforceability of the Agreement. Loturco also denies personally borrowing money from the Plaintiffs or making misrepresentations to the Plaintiffs and submits, therefore, that he has a defense to the Instant Action.

Counsel for Loturco submits that Loturco has established that his default was unintentional, and he has a meritorious defense to the action. Counsel for Loturco notes, *inter alia*, that 1) Loturco appeared at his deposition and testified that he did not owe money to the Plaintiffs (*See* Deposition Transcript, Ex. A to Neary Aff.); and 2) Loturco retained counsel as soon as he realized that the Instant Action had not been discontinued.

Plaintiffs' Counsel affirms as follows in opposition to Loturco's application:

The Instant Action was commenced in 2004. Plaintiffs settled their claims against defendant The Christopher Companies, Ltd. and dismissed their claims against that defendant. Following the completion of discovery, all defendants except Loturco moved for summary judgment dismissing the complaint. On May 6, 2008, the Court (Austin, J.) granted those motions and dismissed the complaint against the moving defendants ("Justice Austin's Decision"). Plaintiffs appealed from Justice Austin's Decision and, on April 27, 2010, the Appellate Division, Second Department affirmed Justice Austin's Decision ("Affirmance"). Loturco was served with a copy of the Notice of Entry dated May 19, 2010 with respect to the Affirmance (Ex. A to Frome Aff.).

At or about the same time of the Affirmance, the Court requested a status conference in the Instant Action which had remained dormant since 2008. The Court held that conference on May 7, 2010 and Loturco did not appear at that conference. Plaintiffs' Counsel advised the Court at the conference that Plaintiffs would move for summary judgment. The Court adjourned the conference to June 14, 2010 and directed Plaintiffs' Counsel to notify Loturco of the new conference date via certified mail, return receipt requested. Plaintiffs' Counsel so notified Loturco, as reflected by the certified letter provided (Ex. B to Frome Aff.). Loturco did not appear at the conference on June 14th. The Court permitted Plaintiffs to file a motion for summary judgment and directed that the motion be served on Loturco by certified mail, return receipt requested. Plaintiffs complied with the Court's directive, as reflected by the certified letter provided (Ex. C to Frome Aff.). Loturco failed to appear on the return date of the motion, and the Court granted Plaintiffs' motion.

The Court declines to consider the Reply Affirmation of counsel for Loturco, in light of his failure to obtain the Court's permission to file reply papers with respect to his Order to Show Cause.

C. The Parties' Positions

Loturco submits that the Court should vacate the Prior Order because his default was unintentional and he has a meritorious defense to the Instant Action.

Plaintiffs oppose Loturco's motion. Plaintiffs submit that Loturco's default was wilful, and argue that the Court should reject his claims of confusion regarding the Discontinuance which related to a completely separate matter containing a different caption, index number and venue.

Plaintiffs also contend that Loturco does not have a meritorious defense to this action as his assertions, *e.g.*, that he never made any misrepresentations to Plaintiffs, are unsupported statements that are contradicted by the documentary evidence.

RULING OF THE COURT

A. Vacatur of Prior Order

Pursuant to CPLR § 5015(a), the court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice

as the court may direct, upon the ground of excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry. The moving party must demonstrate a reasonable excuse for his default and a meritorious cause of action or defense. *See Dominguez v. Carioscia*, 1 A.D.3d 396, 397 (2d Dept. 2003); *Absolute Fin. Svcs. v. 535 Broadhollow Realty*, 292 A.D.2d 327, 328 (2d Dept. 2002).

B. Application of these Principles to the Instant Action

The Court concludes that Defendant Loturco has demonstrated a reasonable excuse for his default based on his receipt of the Discontinuance from Plaintiffs' Counsel and in light of his active participation in the Instant Action prior to the issuance of the Prior Order. The Court also concludes that Defendant has asserted a meritorious defense to the action, including his denial of the alleged misrepresentations to Plaintiffs.

In light of the foregoing, the Court grants the motion to vacate the Prior Order.

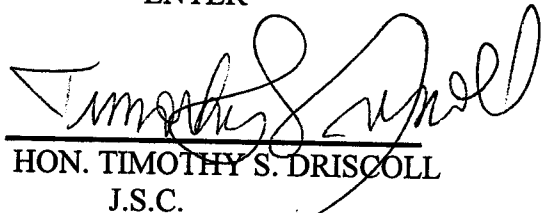
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a conference on February 10, 2011 at 9:30 a.m., at which time the Court will schedule this matter for trial.

ENTER

DATED: Mineola, NY
January 7, 2011


HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JAN 10 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE