

Diuccio v Soren

2011 NY Slip Op 34271(U)

May 13, 2011

Supreme Court, Richmond County

Docket Number: 100273/2010

Judge: Philip G. Minardo

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

PETER S. DIUCCIO Individually and as Successor
in Interest to GERARDO DIUCCIO,

Plaintiff,

-against-

STEVEN J. SOREN, KAREN SOREN and
JOHN PARNESE,

Defendants.

-against-

GERARDO SCOTTO DIUCCIO,

Counterclaim Defendant.

DCM 6

HON. PHILIP G. MINARDO

DECISION AND ORDER

Index No.: 100273/2010

Motion Nos. 2752-001
3394-002

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The following papers numbered 1 to 5 were fully submitted on the 17th day of February, 2011.

	Papers Numbered
Defendants' Notice of Motion for for Default, dated August 3, 2010, with Supporting Papers and Exhibits _____	1
Plaintiff's Notice of Cross-Motion, dated October 13, 2010, with Supporting Papers and Exhibits _____	2
Plaintiff's Reply Affirmation in Support of Cross-Motion and in Opposition to Motion for Default, dated December 10, 201, with Supporting Papers and Exhibits _____	3
Defendants' Affirmation in Reply and in Opposition to Cross-Motion, dated November 26, 2010, with Supporting Papers and Exhibits _____	4

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Plaintiffs' Reply, dated December 17, 2010, with Supporting
Papers and Exhibits _____ 5

Upon the foregoing papers, the motion of defendants STEVEN J. SOREN, KAREN SOREN, and JOHN PARNESE (hereinafter "defendants") which seeks a default judgment in favor of defendants as against plaintiff PETER S. DIUCCIO (hereinafter "plaintiff") and counterclaim defendant GERARDO SCOTTO DIUCCIO is granted and the cross-motion of plaintiff PETER S. DIUCCIO and counterclaim defendant GERARDO SCOTTO DIUCCIO which seeks to excuse the default and to grant an extension of time to submit their Answer and Reply, respectively, is denied.

Plaintiff commenced this action against defendants by the filing of a Summons and Complaint dated December 28, 2009. Plaintiff seeks to recover for damages he incurred as a result of alleged breaches by defendants of a lease agreement, including rent arrears, accrued real estate taxes and water charges, and construction costs.

Defendants served their Verified Answer with Counterclaims on plaintiff's counsel on March 19, 2010 and served the counterclaim on defendant GERARDO SCOTTO DIUCCIO (plaintiff's father and hereinafter "counterclaim defendant") by affixing and mailing a copy to the counterclaim defendant's residence on March 26, 2010. Defendants' counterclaims are grounded in allegations that plaintiff and counterclaim defendant fraudulently induced defendants to enter into the subject lease agreement.

It is unquestioned that plaintiff and counterclaim defendant did not interpose a response to defendants' counterclaims within the time period prescribed by CPLR 320 and it is also acknowledged that the plaintiff and counterclaim defendant did not request an extension of time

from defendants in order to do so. Plaintiff did provide defendants with a Verified Answer to the Counterclaim and Verified Reply to the Verified Answer prior to the return date of the subject motion which was rejected and returned by defendants' counsel.

In order to excuse their default, the plaintiff and counterclaim defendant are required to "provide a reasonable excuse for the default and demonstrate a meritorious defense to the action to avoid the entering of a default judgment or extend the time to answer" *Equicredit Corp. Of America v. Campbell*, 73 AD3d 1119, 1120 [2010], quoting *Ennis v. Lema*, 305 AD2d 632, 633 [2003], *MMG Design, Inc. v. Melnick*, 35 AD3d 823 [2006]).

Plaintiff provides the following excuse for his failure to promptly answer defendants' counterclaims: "I delayed responding as I was waiting for my father to return (from Italy) so that we submit our response together" and that there is no "apparent prejudice" to defendants. (Plaintiff's Affidavit in Opposition to Motion and In Support of Cross-Motion, dated October 13, 2010, para. 17). The plaintiff failed to provide any claim that would support a meritorious defense to the counterclaims asserted by defendant.

The counterclaim defendant provides no excuse for his failure to interpose a response other than he disputes that he was properly served with the pleadings and that the defendants would not "suffer any prejudice" if he were allowed to respond to the counterclaims at this time. (Counterclaim Defendant's Affidavit in Opposition to Motion and In Support of Cross-Motion, dated October 13, 2010, paras. 8,9). The counterclaim defendant also neglects to assert any defenses to the counterclaims.

There is also an issue raised as to counterclaim defendant's medical condition. However, the unsworn letters from his physicians provide insignificant probative value as the claims of

"memory difficulties" and "dementia with depression" are clearly inconsistent with the fact that the counterclaim defendant, by his own admission, traveled to Italy unaccompanied within the last year.

As the plaintiff and counterclaim defendant have failed to proffer a reasonable excuse for their failure to serve a reply to the counterclaims and/or demonstrate a meritorious defense, the motion of defendants for judgment against plaintiff and counterclaim defendant are granted and the cross-motion of plaintiff and counterclaim defendant is denied. *See, Twersky v. Kasaks*, 24 AD3d 657 [2005]).

This shall constitute the decision and order of the court.

ENTER

Dated: May 13, 2011


J. S. C.

GRANTED
MAY 18 2011
Stephen J. Marks