Hemmings v Sutton
2012 NY Slip Op 33926(U)
January 19, 2012
Supreme Court, New York County
Docket Number: 601507/08
Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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BEVERLY HEMMINGS,

Index No. 601507/08

Plaintiff,

-against-

LEATRICE SUTTON, as Administratrix of the Estate of Percy Sutton,

Defendant.

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JOAN A. MADDEN, J.:

In this motion, defendant Leatrice Sutton, as Administratrix of the Estate of Percy Sutton, moves for an order pursuant to CPLR 5015(a)(1) vacating the default judgment entered on February 17, 2009, on the grounds that Percy Sutton had both a reasonable excuse for his failure to answer the complaint and a meritorious defense to the action, based on his mental condition at the time in issue. Plaintiff Beverly Hemmings opposes the motion, contending that defendant has failed to establish under New York legal standards that Percy Sutton's mental condition at the time of the underlying transaction and at the time of service of the summons and complaint, warrants vacating the default judgment.

In the complaint, plaintiff alleges that on March 15, 2003, Percy Sutton executed and delivered to plaintiff a promissory note in the amount of $2.5 million dollars ("the Note").[1] On

[1]The Note is not a straightforward promise to pay a sum certain. Specifically, the Note provides, in part, as follows:

> WHEREAS, I, PERCY E. SUTTON . . . am of sound body and discerning mind and fully cognizant of the extent and value of all my worldly possessions, at

May 19, 2008, plaintiff commenced this action to recover under the Note, and alleges service of the summons and complaint in May 2008. On January 27, 2009, the court granted plaintiff's motion for a default judgment based on Percy Sutton's failure to answer, and on February 17, 2009, judgment was entered in the amount of $3,656,451.92, which includes interest in the

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this time of my execution of acknowledgment and promise to pay my indebtedness to, Beverly Hemmings . . . for the highly valuable economic, technological and financial advice and assistance, which she gave to me during the period 1970 to 2002; and,

WHEREAS, this document is executed on this date [March 15, 2003] before a Notary Public to provide said Beverly Hemmings with written evidence of my existing debt to her in the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00); and,

WHEREAS, I do not presently have in my possession, or control an amount equal to Two Million Five Hundred Thousand Dollars ($2,500,000.00), in legal tender, however, I do have in my ownership and control shares of Class A, Class B, and Class C shares of stock in Inner City Broadcasting Corporation, a radio, cable television and entertainment company . . . and such shares do, collectively, represent the controlling shares of Inner City Broadcasting Corporation, and have a total value far beyond the Two Million Five Hundred Thousand Dollars ($2,500,000.00), due and owing to Beverly Hemmings; which shares of stock have been placed by me for sale, on the open market, to the highest bidder; and,

WHEREAS, it is my expectation and belief that such shares, now on the open market, will be sold and the monies received before the 31st day of December 2003; and the indebtedness to Beverly Hemmings shall be paid before the 31st day of December 2003.

NOW THEREFORE, I, PERCY E. SUTTON, do by this document direct that in the event of a disabling event, or death occurring to me, Percy E. Sutton, before the payment of the said Two Million Five Hundred Thousand Dollars ($2,500,000.00), then, in that event, I authorize that the said, Beverly Hemmings, shall present this document of [sic] evidence of my indebtedness to her, to such person or entity as shall be authorized by me, to act on my behalf, during any period of physical or mental disability, or death, before my payment over to her of the aforementioned Two Million Five Hundred Thousand Dollars ($2,500,000.00) in legal tender of the United States; and my above referenced representative shall pay such indebtedness prior to any other indebtedness, arising out of my illness or death.

amount of $1,115,821.92.[2]

An order to show cause to vacate the default was made in October 2009. While that motion was pending, Percy Sutton died and his estate was substituted as defendant. The court extended time periods for discovery including depositions of various physicians and a psychiatrist who treated or examined the deceased, and permitted the parties to submit additional papers. Defendant contends that there is irrefutable proof from at least three physicians that Percy Sutton suffered from Alzheimer's disease when the Note was signed and at the time of service of the complaint in this action. Defendant also contends that there is evidence that the signature on the Note was not Percy Sutton's. Based on these contentions, defendant argues that the default should be vacated so that a jury can determine whether the Alzheimer's disease had progressed so far at the time that the Note was signed so as to invalidate the Note, and whether the signature on the Note is authentic.

Plaintiff opposes the motion on the grounds that the testimony of the three physicians fails to meet New York's legal standard for establishing that the decedent was suffering from dementia or Alzheimer's disease which affected his ability to execute the Note on March 15, 2003, or to timely respond to the complaint filed on May 5, 2008. Plaintiff also asserts that

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[2]The court notes that there may be an issue as to whether plaintiff is entitled to interest as awarded in the judgment. Although defendant has not raised any objection to the award of interest, this court has discretionary power to vacate its own judgment "for sufficient reason [and] in the furtherance of justice," and such power "does not depend upon any statute, but is inherent." Ladd v. Stevenson, 112 NY 325, 332 (1889); accord Goldman v. Cotter, 10 AD3d 289, 293 (1st Dept 2004) (quoting Woodson v. Mendon Leasing Corp, 100 NY2d 62 [2003]); see also 10 Weinstein Korn Miller, NY Civ Prac ¶ 5015.12 at 50-325 ("The enumeration of specific grounds for vacatur in CPLR 5015(a) is not intended to impair the traditional power of a court to grant relief from an order or judgment in the interests of justice."). However, based on the decision herein vacating the judgment, the court need not reach any issue as to interest at this time.

the decedent's public activities and appearances in 2005, 2006, 2007 and 2008, and his business transactions with an investor in 2004 and 2007, show that he was not mentally impaired in 2003 or 2008.

As a general rule, a defendant seeking to vacate his default in answering, must demonstrate a reasonable excuse for the default, and the existence of a meritorious defense. See CPLR 5015(a)(1); Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber Co., Inc., 67 NY2d 138, 141 (1986); Theatre Row Phase II Assocs v. H & I, Inc., 27 AD3d 216 (1st Dept 2006). Public policy, however, favors the resolution of cases on the merits, and courts have broad discretion to grant relief from pleading defaults where the defaulting party has a meritorious defense, the default was not willful, and the opposing party is not prejudiced. See Harris v. City of New York, 30 AD3d 461 (2nd Dept 2006); Heskel's West 38th Street Corp. v. Gotham Construction Co., LLC, 14 AD3d 306 (1st Dept 2005). Moreover, the courts of this state have "adopted a liberal policy with respect to opening defaults so that the parties may have their day in court." Bellomo v. Shiffman, 157 AD2d 590 (1st Dept 1990); see also, Andino v. DeJesus, 15 AD3d 259, 259-260 (1st Dept 2005). Notably, "the quantum of proof needed to prevail on a CPLR 5015(a)(1) motion is not as great as that required to successfully oppose a motion for summary judgment." Winney v. County of Saratoga, 252 AD2d 882, 884 (3rd Dept 1998). Thus, a reasonable excuse for the default has been found where the defendant established "good cause" for the default, even though the excuse was not particularly "compelling." Spira v New York City Transit Authority, 49 AD3d 478 (1st Dept 2008) (citation omitted) (although defendant's excuse for the default, law office failure by reason of understaffing, was not particularly compelling, it constituted good cause nonetheless). Moreover, a defendant need not establish a defense as a matter of law, Tat

Sang Kwong v. Bunge-Wood Laundry Service, Inc., 97 AD2d 691, 692 (1st Dept 1983), but only a "potentially meritorious defense," D & R Global Selections, S.L., v. Pineiro, 90 AD3d 403, 406 (1st Dept 2011)(in a broker's lawsuit for a commission, defendant demonstrated a potentially meritorious defense based on the affidavit of its sales and marketing manager that plaintiff's agreement had expired and all commissions paid); Yu v Vantage Management Services, LLC, 85 AD3d 564, (1st Dept 2011) (a potentially meritorious defense was demonstrated by affidavit).

Here, defendant has submitted the deposition testimony of three physicians: Dr. Harrison Mitchell, a specialist in internal medicine; Dr. Carolyn Britton, board certified in internal medicine and neurology; and Dr. Steven Simring board certified in psychiatry. Dr. Britton testified that she is an associate professor of clinical neurology at Columbia University, has a clinical practice and engages in clinical research. In her general practice she sees patients with a variety of disorders including dementia, which is one of her subspecialities. Dr. Britton described Alzheimer's as

> a degenerative disorder characterized by a progressive loss of memory. First it's progressive. And it's a progressive loss of memory and cognitive function or higher cognitive ability that can vary in terms of rate at which it progresses from rapid to slow to insidious. It is associated with a very specific pathologic finding amyloid present in brain and flax. So flax and tangles is what you have in your brain pathologically.

Dr. Britton testified she first saw Mr. Sutton on May 2, 2003 when he was 82 years old at which time she did a general examination and neurologic assessment. Based on her clinical findings, Dr. Britton diagnosed him with dementia, and although a diagnosis of Alzheimer's was not confirmed; in view of his family history of dementia, she prescribed the drug Aricept to slow the progression of the disease. When Dr. Britton saw Mr. Sutton in 2007, he had "a dramatic

decline... was very tangential, very poor recent memory, after three minutes and couldn't stay on topic." She confirmed the diagnosis of Alzheimer's and in October of 2007 after he had surgery and he came out of the hospital, Dr. Britton found him "much much worse...and rated him severe in terms of dementia." While Dr. Britton was unable to give an opinion as to whether Mr. Sutton could have entered into a contract in March, 2003, she did state that "from 2002," complex concepts may have been difficult for him, and that in late 2007 his severe dementia, his inability to stay on topic, and his poor recent and remote memories, would have impacted on his daily functioning.

Dr. Mitchell testified that he is in private practice and the medical director of St. Mary's Center, Inc., which is located at 526 West 126th Street, New York, New York. Dr. Mitchell first started treating Mr. Sutton in 2001 when Mr. Sutton was 80 years of age. Due to Mr. Sutton's complaints of dizziness, he referred him to Dr. Britton in 2003 for an evaluation. While Dr. Mitchell testified that based on his clinical notes and observations, that nothing in his interaction with Mr. Sutton suggested that he was suffering from dementia, he also testified that as Dr. Briton was a neurologist with expertise in Alzheimer's disease, he accepted her diagnosis of dementia in May 2003, and that the disease could have existed in 2001 and 2002.

Dr. Steven Simring testified that he is a clinical associate professor of psychiatry at Columbia University, is in private practice, and has seen numerous patients with cognitive disorders, including Alzheimer's. Dr. Simring examined Mr. Sutton on two occasions, in his apartment on September 17, 2009 when he was 88 years old, and two months later on November 5, 2009, when he was in St. Luke's Hospital. Dr. Simring was of the opinion that Mr. Sutton suffered from dementia of the Alzheimer's type, that is Alzheimer's disease. He stated that this

was a "clinical diagnosis," that the only way to ascertain if a person has Alzheimer's is by an autopsy of the brain after death to determine if there are pathological changes such "as deposits of amyloid, neurofibrillary tangles and plaques." Dr. Simring explained that "Alzheimer's doesn't develop all of a sudden. It is a slowly progressive illness. Usually there is a 7 to 10- year period of time between the onset of Alzheimer's and death." Dr. Simring opined that Mr. Sutton had severe Alzheimer's when he saw him in 2009; that he would have had severe to moderately severe Alzheimer's in 2008; and that in 2008 he would not have been able to comprehend simple documents, and certainly not a legal document. Dr. Simring further stated that Mr. Sutton had Alzheimer's in 2003 and that Dr. Britton's diagnosis was based on earlier stages of the disease. When asked if Mr. Sutton was capable of understanding the Note in 2003, Dr. Simring stated that although he could not give a definitive conclusion, as the Note was complex, Mr. Sutton's comprehension of the document would have been limited by the onset of Alzheimer's disease.

Based on the foregoing testimony of three physicians, defendant has provided adequate proof that decedent suffered from a mental disability at the time that the action was commenced so as to provide a reasonable excuse for his failure to answer the complaint. See National Union Fire Insurance Co. of Pittsburgh v. Diamond, 39 AD3d 360 (1st Dept 2007) (finding that defendant adequately demonstrated through the sworn affidavit of doctor, a reasonable excuse for his default based on evidence that he suffered severe anxiety and depression during the relevant period). In addition, evidence of the decedent's mental disability at the time that he allegedly executed the Note is sufficient to demonstrate a potentially meritorious defense. See Alert Medical Personnel v. Rera, 203 AD2d 401 (2nd Dept 1994) (court properly exercised discretion to vacate default judgment against defendant who suffered brain damage in an automobile accident

where there were issues regarding the authority of defendant's mother to execute an agreement on defendant's behalf).

Defendant has also demonstrated the existence of a potentially meritorious defense with respect to the genuineness of Mr. Sutton's signature on the Note, based on a report certified by Dennis Ryan, who is identified therein as a "Forensic Document Examiner." In his report, Mr. Ryan states that he compared the signature on a copy of the Note with 38 checks bearing Mr. Sutton's signature, and that "there is evidence to suggest or indications that Percy Sutton may not have signed the Q-1 [the Note] Acknowledgment and Promise to Pay... and that examination of the original may yield a more definitive conclusion.[3]

In opposing the motion, plaintiff argues that defendant's medical evidence is insufficient to satisfy the standards used by New York courts to establish mental incapacity. The cases plaintiff cites, however, involve motions for summary judgment. As noted above, the quantum of proof needed to succeed on a CPLR 5015(a)(1) motion is not as great as the proof needed to succeed in opposing a summary judgment motion. See Winney v. County of Saratoga, supra. Rather, for the purposes of a CPLR 5015(a)(1) motion, it is not necessary for defendant to establish a defense as a matter of law, but merely to set forth facts sufficient to make out a prima facie showing of a potentially meritorious defense. See Tat Sang Kwong v Bunge-Wood Laundry Service, Inc, supra at 692. Plaintiff also submits an affidavit from Wayne Gillman describing meetings with the decedent in 2004 and 2007, concerning an $25,000 investment by Gillman in the decedent's "Synematics business venture." Gillman states that in both 2004 and

[3]The record indicates that defendant requested an opportunity to examine the original Note, but it has yet to be produced.

2007, they "engaged in a normal business discussion," and Mr. Sutton "was alert, communicated clearly, was in good heath and showed no signs of forgetfulness." While that affidavit undermines defendant's position as to the decedent's condition in 2003, in view of the conflicting medical evidence, it is not dispositive and simply raises issues of fact that can only be resolved at trial.[4]

Thus, under the circumstances presented, where plaintiff does not allege any demonstrable prejudice,[5] where the record contains no evidence that the default was willful, and in view of the potentially meritorious defenses and the strong public policy favoring the resolution of disputes on the merits, defendant has made a sufficient showing to vacate the default. See Harris v. City of New York, supra; Theatre Row Phase II Assocs v. H & I, Inc., supra; Heskel's West 38th Street Corp. v. Gotham Construction Co., LLC, supra; Stephenson v. Hotel Employees & Restaurant Employees Union Local 100, 293 AD2d 324 (1st Dept 2002); Navarro v. A. Trenkman Estate, Inc, 279 AD2d 257 (1st Dept 2001).

Accordingly, it is

ORDERED that defendant's motion to vacate the default judgment is granted, and the judgment entered on February 17, 2009 is hereby vacated; and it is further

ORDERED that the defendant shall serve and file an answer within twenty days of the

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[4]In plaintiff's original opposition papers from October 2009, plaintiff argued that Mr. Sutton's claim of mental impairment "conflicts" with his "public appearances" in 2005, 2006, 2007 and 2008, as reported in various newspaper articles and on the internet, as well as his own article published on the internet in May 2007. As with Mr. Gillman's affidavit, in view of the medical evidence, those articles are not dispositive and raise issues of fact for trial.

[5]Even though the Note states that the "indebtedness to Beverly Hemmings shall be paid before the 31st day of December 2003," plaintiff waited until May 2008 to commence this action, and consequently cannot reasonably claim any prejudice resulting from defendant's delay.

date of this decision and order; and it is further

ORDERED that defendant shall forthwith serve a copy of this decision and order with notice of entry on the Clerk of Trial Support, Room 158, 60 Centre Street, and upon such service the Clerk shall restore this matter to the Part 11 preliminary conference calendar for February 16, 2012 at 9:30 a.m.; and it is further

ORDERED that the parties shall appear for a preliminary conference on February 16, 2012 at 9:30 am, in Part 11, Room 351, 60 Centre Street, New York, New York..

The court is notifying the parties by mailing copies of this decision and order.

FILED

JAN 30 2012

NEW YORK
COUNTY CLERK'S OFFICE

DATED: January 19, 2012

ENTER:

J.S.C.

HON. JOAN A. MADDEN
J.S.C.