137 Duane Condo, LLC v Wallin
2013 NY Slip Op 33518(U)
November 1, 2013
Supreme Court, New York County
Docket Number: 113029/02
Judge: Saliann Scarpulla

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Scarpulla Justice

PART 19

Index Number : 113029/2002
137 DUANE CONDO, LLC
vs.
WALLIN, AMY
SEQUENCE NUMBER : 026
VACATE STAY/ORDER/JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 11/1/13 which disposes of motion sequence(s) no. 026 and 027

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 11/1/13

Saliann Scarpulla, J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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137 DUANE CONDO, LLC and
DUANE THOMAS, LLC,

Plaintiffs,

-against-

AMY WALLIN,

Defendant.

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Index No.: 113029/02
Submission Date: 6/26/13

DECISION AND ORDER

For Plaintiff:
Borah Goldstein Altschuler
Nahins & Goidel, PC
377 Broadway, 6th Floor
New York, NY 10013

Defendant, *pro se*:
Amy Wallin
137 Duane Street, #2B
New York, NY 10013

Eileen Steginsky, *pro se*:
405 East 56th Street, Suite 7F
New York, NY 10022

Papers considered in review of this motion to vacate default and this motion for contempt:

Notice of Motion 1
Aff in Support 2
Affs in Opp 3
Order to Show Cause 4
Reply Aff/Aff in Opp 5

HON. SALIANN SCARPULLA, J.:

Non-party Eileen Steginsky, Esq. ("Steginsky") moves to vacate this court's January 6, 2012 decision and order, which ordered the immediate release of all funds held by the New York City Department of Finance ("DOF") in connection with a charging/retaining lien asserted by Steginsky against defendant, and her former client, Amy Wallin ("Wallin") (motion seq. no. 026). Steginsky also moves to restore the

underlying motion, and pending a determination of that motion, order Wallin to immediately return to the DOF any and all sums previously held by DOF as subject to the charging lien, and upon restoration to the calender, to deny Wallin's application.

In addition, Steginsky moves to "restrain" Wallin from "persisting in misrepresenting to this Court that her husband, Mark McGowan, is currently, a proper party-intervenor in this action," and deeming the additional claims brought in Mark McGowan's ("McGowan") April 12, 2010 intervenor application null and void. Steginsky also moves to enjoin McGowan from continuing to appear for and participate in proceedings in this matter under the "false pretext" that he is a party-intervenor in this action. Steginsky argues that McGowan failed to comply with the service requirements contained in the order of this court (Edmead, J.) dated August 2, 2010, granting his application to became a party-intervenor, and therefore he should not be allowed to intervene in this fee dispute. In the alternative, Steginsky moves to vacate this court's August 2, 2010 decision and order pursuant to CPLR 5015(a)(1), to restore the underlying motion to the Court's calendar, and deny it in its entirety.

Lastly, Steginsky seeks acknowledgment of Wallin's status as the "prevailing party" within the meaning of RPL 254[1], and to set this matter down for a hearing pursuant

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[1] RPL 254 is titled "Construction of clauses and covenants in mortgages and bonds or notes," and makes no mention of attorneys fees in landlord tenant proceedings. RPL 234, however, is titled "Tenants' right to recover attorneys' fees in actions or summary proceedings arising out of leases of residential property." Therefore, Steginsky's request for relief will be treated as though made pursuant to RPL 234.

to Judiciary Law 474 and 475, to fix the amount of the professional services fees and disbursements due Steginsky as Wallin's former trial counsel.

In opposition, Wallin argues that the notice of lien from Steginsky was followed by over three years of "willful neglect to follow court orders and process." Wallin maintains that over two dozen deadlines were adjourned at Steginsky's request, but that Steginsky failed to put in any opposition to any of the four motions Wallin and McGowan served on her. Wallin also asserts that Steginsky has failed to respond to a court ordered subpoena served over two years ago, and that Steginsky has not responded to requests to return papers held pursuant to the retaining lien, which was vacated by this court on April 1, 2011. Wallin argues that Steginsky's defaults are not the result of an inadvertent mistake, but from repeated neglect, and as a result the court should not vacate the defaults.

In opposition to Steginsky's motion to declare Wallin the "prevailing party," Wallin states that as part of agreeing to the settlement of the underlying action, Wallin asked Steginsky if the $15,000 to be added to the settlement amount would cover her fees, and that Steginsky told her it would. Wallin also maintains that Steginsky did not advise her that she was entitled to seek actual attorney's fees of over $700,000.

Wallin also maintains that any fee hearing should not be held until Steginsky returns her papers and fully responds to the outstanding subpoena, and that any hearing should include a determination as to whether Steginsky's numerous instances of

misconduct should result in forfeiture of attorney's fees and the return of the $10,000 retainer Wallin paid Steginsky.

McGowan also submits an affidavit in opposition, asserting that Steginsky's application to vacate the April 1, 2011 order which directed the initial release of funds from DOF, and August 2, 2010 order which made McGowan a party for the limited purpose of participating in the fee dispute with Steginsky are untimely. McGowan concedes that he did not serve Steginsky with the copy of the decision and notice of entry withing five (5) days of entry as specified in the order, because he did not receive the decision until six (6) days after the motion to intervene was granted. McGowan also acknowledges that the notice of entry was not served until the seventh day after entry, and to correct this deficiency he moved to have the service corrected *nunc pro tunc*. On default, this application was granted at oral argument on October 26, 2011, thereby making him a party to this action for the limited purpose of the fee dispute.

As to Steginsky's motion to vacate the default of this court's January 6, 2012 decision and order, ordering the release of all funds held by the DOF to Wallin, McGowan asserts Steginsky cannot demonstrate a reasonable excuse for default and she has not submitted an affidavit of merit along with her motion. McGowan also argues that Steginsky has exhibited a pattern of neglect which constitutes willful default, and should not be excused.

In motion sequence no. 027, Wallin concedes that she does not oppose a hearing regarding Steginsky's claim to attorney's fees, but moves that such a hearing should not take place until Steginsky complies with the outstanding subpoena and returns all papers to Wallin from the underlying litigation. Wallin moves for contempt should Steginsky fail to do so. In addition, Wallin moves pursuant to CPLR 103(c) to convert Steginsky's request for a fee hearing into a special proceeding to establish who is and is not a party. Wallin argues that the fee dispute should not be maintained under the old action, which was settled as between Wallin and plaintiff/ landlord 137 Duane Condo, LLC ("landlord") by the February 8, 2010 settlement. Wallin asserts that the landlord need not be a party to the fee dispute. In the alternative, Wallin requests that Steginsky be made a party to this action so that both Steginsky and Wallin have the same obligations for service and proof of service.

In opposition, Steginsky asserts that she has experienced some health issues which have impeded her ability to timely prepare a "fully developed response" to the issues raised in Wallin's motion, and requests that the court take her health obstacles into account when considering any shortcomings in her submission. Steginsky also argues that this motion is Wallin's first attempt to seek relief in regard to the subpoena served more than three (3) years ago, and therefore it should be denied based on waiver and laches.

Steginsky also asserts that she was prepared to comply with the subpoena, but upon informing Justice Edmead of a potential bed bug infestation at her home, Justice Edmead prohibited Steginsky from filing any papers with the court. Justice Edmead thereafter ordered Steginsky to serve and file her responsive papers by email or facsimile, which Steginsky maintains was impossible. Steginsky maintains that Justice Edmead refused to allow her to file the papers or to extend the time for her to do so, and instead decided McGowan's applications to intervene on default. Steginsky also maintains that during this time, Wallin began a "campaign of harassment," and that the subpoena is a vehicle for Wallin's fishing expedition to find some basis to defeat Steginsky's fee claim.

Motion sequence numbers 026 and 027 are consolidated for disposition.

Discussion

To vacate a default, the moving party must show (1) an excuse for the default and (2) an affidavit of merits, completed by the party, in which defendant must offer a meritorious defense to the satisfaction of the parties. *See* CPLR 5015(a); Siegel, New York Practice, sec. 108 (4th ed. 2005), *citing Benado v Antonio*, 10 A.D.2d 40 (1960). Under CPLR 5015(a)(1), a party seeking to vacate an order "must move to vacate the order within one year of service of the order with notice of entry." *Taveras v Philibert*, 107 A.D.3d 492 (1st Dep't 2013) (citation omitted).

Here, Steginsky is seeking to vacate both the January 6, 2012, order which, on reargument of this court's April 1, 2011 order, released all funds held by the DOF to

Wallin, and the August 2, 2010 order permitting McGowan to proceed as a party-intervenor. The January 6, 2013 order was served with notice of entry on January 13, 2013, and the August 2, 2010 order was served with notice of entry on August 12, 2010. This motion was made on January 19, 2013. As such, Steginsky motion to vacate the order granting McGowan status as party-intervenor entered on default dated August 2, 2010, over two years before this motion commenced, is denied as untimely.[2]

Steginsky's motion to vacate the January 6, 2012 order, should also be denied as untimely, as it was not made within one year of service of the order with notice of entry. But even if it were deemed timely, Steginsky fails to provide a reasonable excuse for her default, or an affidavit of merit. Lack of either is fatal to a motion to vacate a default. *JP Morgan Chase Bank, N.A. v. Bruno*, 57 A.D.3d 362, 364 (1st Dep't 2008) ("failure to offer any excuse, let alone a reasonable one, for its default in timely answering the action is fatal to its claim that the default is excusable"); *Vierya v. Briggs & Stratton Corp.*, 166 A.D.2d 645, 646 (2d Dep't 1990) ("absence of facts establishing a meritorious defense is fatal to a motion to vacate").

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[2] Steginsky also argues that McGowan failed to comply with the service requirements of the August 2, 2010 order, and for that reason he should not be granted status as a party-intervenor. This argument has no merit, however, as I granted McGowan's application to correct this deficiency *nunc pro tunc*, on default, at oral argument on October 26, 2011, thereby making him a party to this action for the limited purpose of the fee dispute. Accordingly, any attempt by Steginsky in this motion to vacate the October 26, 2011 order entered on default is also denied as untimely.

In her moving affirmation, Steginsky states that her "default was unintentional and excusable. Affirmant will elaborate in a supplemental Affirmation." Steginsky also states that to defend against the allegations of Wallin and McGowan, she has been forced to acquire transcripts of trial proceedings, and to subpoena records. Steginsky maintains that a delay in the arrival of subpoenaed records "coupled with inability to access them once delivered to court contributed to delays." In addition, Steginsky claims that she experienced office equipment failures requiring her to replace her computer and printer, "health difficulties which impeded her ability to finalize the papers and also irregular and unreliable mail service."

In her affirmation in reply, and in opposition to Wallin's motion, Steginsky states that she has suffered some health issues which have prevented her from being able to "timely prepare a fully developed response o the issues raised on these applications." All of the health issues Steginsky's described occurred in 2013, and she claims they impeded her ability to respond to Wallin's assertion on these motions. She does not discuss any health issues which cased her to default on the motion to reargue regarding the release of the funds held by the DOF. Steginsky also alleges that Wallin's behaved improperly and harassed her vis a vis Steginsky's housing court proceedings, but again Steginsky fails to explain how this in any way constituted a reasonable excuse for her default on Wallin's motion to reargue.

These conclusory allegations of law office failure, and vague references to health issues, are not sufficient to establish a reasonable excuse for her default. *Ward v New York City Health & Hosps. Corp.*, 82 A.D.3d 471 (1st Dep't 2011); *In re Nathalie A*, 145 A.D.2d 629, 630 (2d Dep't 1988)

However, even if I were to find that Steginsky had a reasonable excuse for her default, she has utterly failed to establish the existence of a meritorious defense. Steginsky did not submit an affidavit of merit, and upon review of the other papers she submitted, I can not discern any merit to her claim. *See Bustamante v. Green Door Realty Corp.*, 69 A.D.3d 521, 522 (1st Dep't 2010) (motion to vacate that default was properly denied for lack of an affidavit of merit); *Helwig v. Wilkens*, 51 A.D.2d 694, 695 (1st Dep't 1976) ("The denial of defendant's motion to vacate the default was eminently proper in view of his failure to proffer any excuse for the repeated noncompliance with the numerous orders of the court and the lack of a sufficiently detailed affidavit of merit, one not based on mere conclusory assertions.").

Accordingly, Steginsky's motion to vacate the reargument motion is denied.

Steginsky also seeks a determination that Wallin is a prevailing party and for a hearing to ascertain the amount of fees and disbursements she is due from her defense of Wallin in the underlying action. As noted above, Wallin does not oppose a hearing, so long as Steginsky first complies with the outstanding discovery subpoena and

immediately returns all papers help pursuant to the charging lien prior to a hearing being scheduled.

Steginsky maintains in her reply affirmation that her subpoena compliance has been prepared for filing with the court, but that upon learning of a potential bed bug infestation in Steginsky's home, Judge Edmead issued a directive prohibiting Steginsky from filing any papers with the Court. To clarify, this prohibition on filing papers with the court is no longer in effect.[3] Accordingly, Steginsky should comply with the subpoena and submit her responsive papers with the Subpoenaed Records room.

As there is no objection to a hearing to address whether Wallin is a prevailing party, of any fees due and owing Steginsky shall be addressed at a hearing, upon the return to Wallin of her papers from the underlying litigation, and production by Steginsky in response to the subpoena duces tecum dated May 20, 2010, to the Subpoenaed Records Room, the parties will appear for a hearing. At that time, I will also address whether Steginsky's conduct warrants return of Wallin's retainer fee. This case has been pending for more than ten years and the fee dispute has been voluntarily litigated herein by the parties for the past several years. In the interest of judicial expediency, I will not require Steginsky to start a separate action or add Steginsky as a party to this action, but rather deem the parties to have consented to resolve the fee dispute as a part of this action.

In accordance with the foregoing, it is

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[3] Steginsky filed these motion in hard-copy format with the court.

ORDERED that the motion by non-party Eileen Steginsky (motion seq. no. 026) to (a) vacate the Court's January 6, 2012 decision and order, restore the underlying motion, require defendant Amy Wallin to return to the Department of Finance all monies previously released to her, and to deny Wallin's motion for release of funds; (b) restrain Wallin from maintaining that her husband Mark McGowan is a proper party-intervenor and deeming McGowan's intervention application null and void; (c) enjoin McGowan from appearing as a party-intervenor; (d) vacate the court's August 2, 2010 decision and order, restoring the underlying motion, and deny McGowan's application to appear as a party-intervenor; and (e) acknowledge Wallin as a prevailing party in the underlying litigation is denied; and it is further

ORDERED that Steginsky's motion is only granted to the extent that she seeks to have this matter set down for a hearing to address the issue of any fees or disbursements she may be owed in connection with the underlying litigation and it is further

ORDERED that Wallin and McGowan's motion (motion seq. no. 027) is granted only to the extent that Steginsky is ordered to produce her response to the judicial subpoena duces tecum dated May 20, 2010 to the Subpoenaed Records Room, 60 Centre Street, within thirty (30) days of the date of notice of entry of this order, and that Steginsky must also produce to Wallin within thirty (30) days of the date of notice of entry of this order her papers in connection with the underlying litigation, and is in all other respects denied; and it is further

ORDERED that the parties shall appear for a hearing on the issues of whether Wallin is a prevailing party, what, if any, fees Steginsky is owed in connection with the underlying litigation, and for a determination as to whether Steginsky's conduct should result in forfeiture of attorney's fees and the return of the $10,000 retainer, on January 31, 2014 at 9:30 a.m., 60 Centre Street, Room 335.

This constitutes the decision and order of the Court.

Dated: New York, New York
November 1, 2013

ENTER:

Saliann Scarpulla, J.S.C.