

Renaissance Economic Dev. Corp. v Jin Hua Lin

2013 NY Slip Op 34164(U)

June 3, 2013

Supreme Court, New York County

Docket Number: 102313/11

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

RENAISSANCE ECONOMIC DEVELOPMENT
CORPORATION,

Plaintiff,

- against -

Index No.
102313/11

**DECISION
and ORDER**

JIN HUA LIN, owner in fee of premises commonly
known as: 44-46 Madison Street, #10A, New York,
NY 10002; and Madison Tower, 148 Madison Street,
9A, New York, NY 10002,

Mot. Seq. 03, 04

FILED

Respondent.

~~JUN 10 2013~~ X

HON. EILEEN A. RAKOWER

NEW YORK
COUNTY CLERK'S OFFICE

On December 23, 2010, Petitioner Renaissance Economic Development, Corp. ("Petitioner") docketed a judgment against Respondent Jin Hua Lin ("Respondent") in the amount of \$208,951.06.

Petitioner commenced this action by filing a Notice of Petition and Petition dated February 22, 2011 in which Petitioner, in an effort to satisfy the outstanding judgment against Petitioner, sought the Court's permission pursuant to CPLR §5240 for permission to sell Respondent's properties located at: 44-46 Market Street #10A, New York, New York 10002, and 148 Madison Street, 9A, New York, New York 10002. In that Petition, Petitioner "respectively requested that the judgment of Renaissance be satisfied in whole or in part by the sale of the said real properties, subject to the Homestead exemption - if applicable."

Respondent did not interpose an answer to Petitioner's Petition or otherwise appear. By Order dated January 23, 2012, the Court granted Petitioner's relief, and ordered the sale of Respondent's properties. That Order also provided, "Ordered, Adjudged, and Decreed that Jin Hua Lin's has not and does not own and occupy the Premises as her principal residence, and is therefore not entitled to the Homestead Exemption N.Y. CPLR 5206."

On August 20, 2012, the Sheriff auctioned the properties off and Petitioner had the winning bid and took fee simple absolute title to the properties at issue.

Respondent now moves by Order to Show Cause for an Order (Mot Seq. 1): (1) directing Petitioner to pay Respondent "her homestead exemption in the amount of \$150,000 and credit \$70,000 towards her judgment from the \$220,000 proceedings from the \$220,000 proceeds from the sales of petitioner of respondent's homesteads of 44-46 Market Street, #10A, New York, NY 10002 and Madison Tower, 148 Madison Street, 9A, NY pursuant to CPLR §5206(e)"; (2) enjoining Petitioner from transferring, disposing, encumbering, liquidating, or enforcing any of its interests in Respondent's homesteads; (3) and directing that judgment be granted in the amount of \$220,000 against Petitioner.

Respondent subsequently moved for an Order pursuant to CPLR §5015(a)(3) and CPLR §317 "combining the herein Motion to Vacate Judgment with the Order to Show Cause . . . to compel Petitioner to pay Respondent her homestead exemption in the amount of \$150,000 and credit \$70,000 towards the money judgment obtained by petitioner." In the alternative, Respondent seeks an Order vacating the Order on Default and judgment on the grounds that it was obtained by Petitioner's "misrepresentation, fraud, and misconduct, and that no notice of the Order on Default and judgment were served upon the respondent and that her first notice of said order and judgment was on March 22, 2013."

CPLR §5015(a)(3) states:

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:

(3) fraud, misrepresentation, or other misconduct of an adverse party.

CPLR §317 states, in relevant part:

A person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action

within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense. If the defense is successful, the court may direct and enforce restitution in the same manner and subject to the same conditions as where a judgment is reversed or modified on appeal. This section does not apply to an action for divorce, annulment or partition.

As noted by the First Department, CPLR §317 “is available only to a defendant who (1) was served by a method other than personal delivery, (2) moves to vacate the judgment within one year of learning of it (but not more than five years after entry), and (3) demonstrates a potentially meritorious defense to the action” (*Caba v. Rai*, 2009 NY Slip Op 5252, *2 [1st Dept. 2009]). Importantly, CPLR §317 does not require that the defaulting party demonstrate “excusable default,” as is required on a §5015(a)(1) motion (*see Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co.*, 67 N.Y.2d 138 [1986]).

Here, however, Respondent admits that she received actual notice of the Notice of Petition and Petition, when she attests as follows in her affidavit:

“I did not appear when Petitioner Renaissance . . . commenced the herein petition pursuant to CPLR 5206(e) . . . because I have defaulted on my mortgages . . . and I believed they were exempt properties. Photocopies of the petition by Renaissance . . . are attached hereto as Exhibit “A.” Other than the Notice of Petition and Petition, I did not receive any other papers regarding this matter.”

The Petition upon which the Order was granted, which is located at Exhibit A of Respondent’s affidavit, states, “It is respectfully requested that the judgment of Renaissance be satisfied in whole or in part by the sale of the said real properties, subject to the Homestead exemption - if applicable.” Respondent did not thereafter appear or oppose Petitioner’s application. Having had actual knowledge of the Petition and Notice of Petition and failing to appear and oppose the Petition, there is no basis to now vacate the Court’s January 23, 2012 Order pursuant to CPLR §317.

Furthermore, there is no evidence of any "fraud, misrepresentation, or other misconduct" on Petitioner's part to warrant vacatur under CPLR §5015(a)(3).

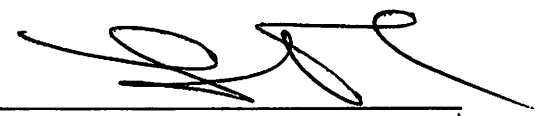
Based on the foregoing, it is hereby

ORDERED that Respondent's motions are denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED:

6/3/13



EILEEN A. RAKOWER, J.S.C.

FILED
JUN 10 2013
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