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| Chakmakian v Maroney |
| 2014 NY Slip Op 30264(U) |
| January 16, 2014 |
| Supreme Court, Suffolk County |
| Docket Number: 34934/2009 |
| Judge: Emily Pines |
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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

***Present:* HON. EMILY PINES**

J. S. C.

Original Motion Date: 07-23-2013

Motion Submit Date: 08-06-2013

Motion Sequence No.: 006 MOTD

_____ X

EDMUND C. CHAKMAKIAN,

Plaintiff,

-against-

**MATTHEW MARONEY, CHRISTINA
 PIETRO-MARONEY and MELVO, LLC,**

Defendants.

_____ X

Attorney for Plaintiff

Law Offices of Edmund C. Chakmakian
 200 Motor Parkway, Suite A3
 Hauppauge, New York 11788

Attorney for Defendants

Maroney Associates, PLLC
 445 Broad Hollow Road, Suite CL 25
 Melville, New York 11747

ORDERED that the plaintiff's motion (Mot. Seq. 006) for an order, among other things, vacating the judgment entered in this action on January 4, 2013, is granted in part and denied in part, as set forth herein.

Background

Following a non-jury trial, this Court (Pines, J.) issued its decision dated September 4, 2012 ("Decision"), in favor of the defendants and against the plaintiff in the amount of \$108,728.18, plus interest. The Decision directs the parties to "[s]ettle [j]udgment on [n]otice."

On November 30, 2012, the defendants served a Notice of Proposed Judgment on the

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plaintiff, together with a proposed Judgment, Affirmation, and Bill of Costs. The Notice of Proposed Judgment states:

“PLEASE TAKE NOTICE, that the within is a true copy of a Proposed Judgment and Bill of Costs and Disbursements served on the Office of the Clerk of the within named Court on November 30, 2012.”

On December 21, 2012, the Plaintiff submitted a Proposed Counter-Judgment to this Court. The Court held Plaintiff’s Proposed Counter-Judgment in anticipation of receiving a proposed judgment from Defendants. The Court was not aware that Defendants had submitted their Proposed Judgment directly to the Suffolk County Clerk.

On January 4, 2013, unbeknownst to the Court, the Suffolk County Clerk signed Defendants’ proposed Judgment and entered same in favor of Defendants and against the Plaintiff in the total sum of \$148,822.34.

On January 23, 2013, the Defendants served the Judgment on Plaintiff with notice of entry.

On January 25, 2013, Plaintiff contacted this Court’s Principal Law Clerk and advised that he had been served with Judgment with Notice of Entry by Defendants. Plaintiff sent a letter to the Court that same day requesting “the opportunity to address with the court the differences set forth in [his] counter-proposed judgment, especially the date of accrual of interest.”

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In accordance with the Plaintiff's request, the Court reviewed and considered the Judgment, as signed by the Clerk, and the Plaintiff's Proposed Counter-Judgment and, during the first week of February 2013, the Court orally advised the parties that it would have signed Defendants' Proposed Judgment had it been submitted to the Court rather than directly to the Suffolk County Clerk and, therefore, there was no need to vacate or modify the Judgment as signed by the Clerk.

The Plaintiff now moves to, among other things, vacate the Judgment as abandoned on the ground that it was not properly or timely settled in accordance with Uniform Rules for Trial Courts § 202.48 (22 NYCRR § 202.48). The plaintiff principally contends that by making their proposed judgment returnable before the Clerk of the Court instead of the Court, Defendants failed to comply with the directive in the Court's Decision to "settle judgment on notice" in accordance with Uniform Rules for Trial Courts § 202.48. Plaintiff argues that the Judgment was never settled and that he was not afforded an opportunity to have his Proposed Counter-Judgment reviewed. Plaintiff also contends that the Judgment should be vacated because the Defendants failed to submit their Notice of Proposed Judgment within 60 days after the signing and filing of the Court's Decision, as required by Uniform Rules for Trial Courts § 202.48(a). Defendants oppose the motion.

Discussion

The Court's direction to settle judgment contemplated notice to the opposing party with a copy of the proposed judgment and the opportunity to submit a counter proposal (*see Belfiore v*

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Belfiore, 57 AD3d 597 [2d Dept 2008]). Here, although submitted to the Suffolk County Clerk and not to the Court, the Plaintiff received notice as he admits that Defendants served him with the Notice of Proposed Judgment and a copy of the proposed Judgment. The record contains proof of service on Plaintiff on November 30, 2012. Thus, Plaintiff had an opportunity and did, in fact, submit a Proposed Counter-Judgment. After Plaintiff specifically requested “the opportunity to address with the court the differences set forth in [his] counter-proposed judgment, especially the date of accrual of interest,” this Court reviewed the Judgment, as signed by the Clerk, and Plaintiff’s Counter-Proposed Judgment and concluded that it would have signed Defendants’ Judgment as proposed had it been submitted to the Court rather than the Clerk because it was in all respects proper and in accordance with this Court’s Decision. Thus, contrary to the Plaintiff’s contention, the Judgment was settled by this Court, even though settlement occurred after the Judgment had been signed by the Clerk. Under the circumstances, this Court will not exalt form over substance as Plaintiff has failed to demonstrate that he has been prejudiced in any way. Plaintiff’s time to appeal the Judgment had not yet expired when settlement of the Judgment occurred during the first week of February 2013 and the parties were advised that the Court would not modify the Judgment as signed by the Clerk. Accordingly, that branch of Plaintiff’s motion seeking to vacate the Judgment and dismiss this action as abandoned is denied.


However, that branch of Plaintiff’s motion seeking to vacate the restraining notice served upon Capital One is granted. Pursuant to CPLR 5222(d), a judgment creditor who serves a

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restraining notice on a third-party must serve the judgment debtor with a copy of both the restraining notice and a "Notice to Judgment Debtor or Obligor" in the form prescribed in CPLR 5222(e), by personally delivery or first class mail within four days of the service of the restraining notice on the third-party. Here, in his affidavit in support of the motion, Plaintiff states that he was never served with a copy of the restraining notice and that he received a faxed copy from his bank over 30 days after it was served on the bank. In opposition, Defendants have not submitted evidence of compliance with CPLR 5222(d). Therefore, the restraining notice is hereby vacated.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: January 16, 2014
Riverhead, New York



EMILY PINES
J. S. C.