

Fulton & Dutch L.P. v FRA Assoc., LLC

2014 NY Slip Op 30815(U)

March 24, 2014

Sup Ct, New York County

Docket Number: 652515/2011

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

FULTON & DUTCH LIMITED PARTNERSHIP,

Plaintiff,

INDEX NO. 652515/11

- against -

MOTION SEQ. NO. 001

FRA ASSOCIATES, LLC,

Defendant.

The following papers were read on this motion by defendant to vacate a default judgment and dismiss the complaint pursuant to CPLR §§ 3215 and 5015.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

This is an action brought by Fulton & Dutch Limited Partnership (plaintiff) to recover unpaid real estate taxes pursuant to a commercial lease. Before the Court is a motion by FRA Associates, LLC (defendant), pursuant to CPLR 3215(c) and (g), to vacate a default judgment entered against it on August 21, 2013 in the amount of \$116,214.01. Defendant also seeks an order pursuant to CPLR 5015(a) vacating the aforementioned judgment upon the ground of excusable default and a meritorious defense. Defendant contends that since plaintiff filed the motion for default judgment more than one year from defendant's alleged default, plaintiff was required to notify defendant about said filing, and that plaintiff's failure to do so requires vacatur of the judgment. Plaintiff is in opposition to this motion.

STANDARDS

CPLR 3215 provides in relevant part:

(c) Default not entered within one year. If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

(g) Notice. 1. Except as otherwise provided with respect to specific actions, whenever application is made to the court or to the clerk, any defendant who has appeared is entitled to at least five days' notice of the time and place of the application, and if more than one year has elapsed since the default any defendant who has not appeared is entitled to the same notice unless the court orders otherwise. The court may dispense with the requirement of notice when a defendant who has appeared has failed to proceed to trial of an action reached and called for trial.

Under CPLR 5015(a)(1) "a party seeking to vacate a judgment on the basis of excusable default must demonstrate both a reasonable excuse and a meritorious defense" (*Benson Park Assoc., LLC. v Herman*, 73 AD3d 464, 465 [1st Dept 2010]; see also *Eugene Di Lorenzo, Inc. v A. C. Dutton Lumber Co.*, 67 NY2d 138, 141 [1986]; *Goldman v Cotter*, 10 AD3d 289 [1st Dept 2004]). The determination of the sufficiency of the offered excuse rests within the sound discretion of the court (see *Goldman*, 10 AD3d at 291).

DISCUSSION

Plaintiff served defendant with process on September 15, 2011 and according to plaintiff's counsel, upon agreement of the parties, the defendant had until December 20, 2011 to answer or otherwise respond to the complaint. On December 12, 2012, plaintiff submitted a proposed default judgment to the Judgment Clerk for the unpaid real estate taxes, which was within one year from defendant's default in failing to answer or appear in this action. The proposed default judgment was returned for correction by the Judgment Clerk on January 16,

2013 because “the leases and modifications in this action are expressed in percentages and not in specific amounts, the clerk cannot entertain this action”, and counsel was instructed that a Judge’s order directing the Clerk to enter judgment would be necessary (Affidavit in Opposition, exhibit B). In accordance with the Clerk’s instruction, counsel submitted an ex parte order for a default judgment and inquest which was signed by Justice Cooper on February 7, 2013. Subsequent thereto, an inquest was held before the Hon. Martin Schoenfeld on June 11, 2013, and a judgment in the amount of \$116,214.01 was entered in favor of the plaintiff and against the defendant on August 21, 2013.

In reviewing the record, the Court declines to grant the portion of defendant’s motion to dismiss the action. It has been recognized that “[a]s long as ‘proceedings’ are being taken, and these proceedings manifest an intent not to abandon the case but to seek a judgment, the case should not be subject to dismissal” (*Brown v Rosedale Nurseries*, 259 AD2d 256, 257 [1st Dept 1999]). Here, plaintiff’s submission of a proposed default judgment to the Judgment Clerk within one year of defendant’s default constituted “taking proceedings” and manifested plaintiff’s intent to pursue the case and seek a judgment. Moreover, the submission of the ex parte Order to a Justice of the Court, within weeks of the instruction by the Clerk, further evidences plaintiff’s intent not to unreasonably delay the termination of the action (see *McKinney’s Cons Laws of NY*, Book 7B, Legislative Studies and Reports to CPLR 3215, p 884; see also *Giglio v NTIMP, Inc.*, 86 AD3d 301, 307 [2d Dept 2011] [“The policy behind CPLR 3215(c) is to prevent parties who have asserted claims from unreasonably delaying the termination of actions, and to avoid inquests on stale claims”]).

Moreover, the Court also finds that the defendant does not meet its burden of proof to vacate the default judgment entered against it pursuant to CPLR 5015(a) because defendant fails to set forth an excuse for its default in answering the complaint (see *Benson Park Assoc.*,

LLC, 73 AD3d at 465).

However, the judgment against defendant in the amount of \$116,214.01, generated as a result of an ex parte inquest held before the Hon. Martin Schoenfeld on June 11, 2013, is vacated as the Order signed by Justice Cooper which directed an inquest and assessment of damages was brought more than one year from defendant's default and without notice to defendant. As such, the parties are directed to appear for a new inquest for the assessment of damages against defendant.

CONCLUSION

Accordingly, it is hereby,

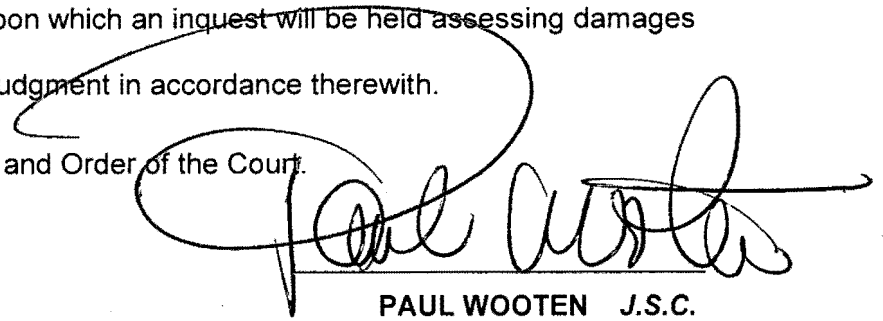
ORDERED that defendant's motion is hereby granted to the extent that the judgment entered against defendant on August 21, 2013 in the amount of \$116,214.01 is vacated, but is otherwise denied; and it is further,

ORDERED that the plaintiff is directed to serve a copy of this Order with Notice of Entry upon the Clerk of the Court who is directed to vacate the judgment dated August 21, 2013; and it is further,

ORDERED that the plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendant and upon the Clerk of the Trial Support Office who shall restore this case to the active calendar and set a date upon which an inquest will be held assessing damages against the defendant and entering judgment in accordance therewith.

This constitutes the Decision and Order of the Court.

Dated: 3-24-14


PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE