

330 E. 72nd St. Condominium v Colmenares

2014 NY Slip Op 31301(U)

May 19, 2014

Supreme Court, New York County

Docket Number: 152660/13

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 8

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330 EAST 72ND STREET CONDOMINIUM,
BY ITS BOARD OF MANAGERS,

Index # 152660/13

Plaintiff,

Decision and Order

-against-

JORGE E. COLMENARES, JP MORGAN
CHASE BANK, N.A., NEW YORK CITY
PARKING VIOLATIONS BUREAU and
MARIELA COLMENARES,

Defendants.

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KENNEY, JOAN, M., J.S.C.

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Papers considered in review of this motion:

Papers	Numbered
Order to Show Cause, Affidavit, Affirmation & Exhibits	1-8
Affidavit and Affirmation in Opposition & Exhibits	9-28

In this foreclosure action, defendant, Jorge Colmenares (Colmenares), moves on the eve of the auction sale for condominium Unit 13, located at 330 East 72nd Street, New York, New York (the apartment); for a stay of the auction and to vacate his admitted default.

The facts of this case are very simple and uncontested. Colmenares admits that he did not make the requisite common charge payments, late fees, assessments, and attorneys' fees for the apartment at issue. The apartment is a three bedroom, three bath home, within a 12 unit building, located on the upper east side of

Manhattan. At no time did Colmenares attempted to sublet the apartment while he was experiencing financial difficulties, in order to defray the mounting common charge arrears. Colmenares avers that after defaulting in payment, and that he intentionally failed to appear in this litigation, because he clearly did not have a defense to the allegations in the complaint, he is "willing (and now able) to pay the full amount of the unpaid common charges."

The total amount owed to plaintiff as of May 1, 2014, was \$127,004.21. This amount includes, *inter alia*, a special assessment that plaintiff had to impose on the other unit owners because of Colmenares' default. The assessments and attendant attorneys' fees were necessary because the condominium's operating expenses exceeded its' cash flow, problems which were created by Colmenares' failure to pay his obligations. Colmenares unreliably represented to the condominium President, on numerous occasions, that he would cure his financial defaults, but always failed to honor the representations. Colmenares intermittently made very small partial payments, but remained in default for approximately two years.

Colmenares' only disputes the amounts this Court previously awarded plaintiff for late fees and attorneys' fees. Colmenares merely states that the fees are unreasonable, and therefore he should be permitted to cure his default by paying the unpaid common

charges. It should be noted that the foregoing were already reduced to a judgment on March 17, 2014, pursuant to this Court's prior Order dated, October 8, 2013. Notably, plaintiff served notice of entry of both the judgment and the Order granting judgment, on Colmenares at the apartment where he has continued to reside since the purchase.

The legal standard for vacating a default judgment is set forth in CPLR 5015. A party seeking vacatur, (1) must bring the application with one year of service of notice of entry of the default, which is not an issue in this case and (2) the moving party must have a meritorious defense to the pleadings. Colmenares' papers do not set forth a credible defense for failing to pay the common charges. "In exercising its discretion, the court is obligated to give balanced consideration not only to the factors of excusable default and meritorious defense, but also to the extent of the delay, the prejudice to the nondefaulting party, and the evidence of intent or lack of intent deliberately to default or abandon the action." *Williams v Robinson*, 2014 WL 1923734, (1st Dept 2014). The assertion that Colmenares is being unjustly charged for the attorneys' fees and late fees imposed by the condominium and granted by this Court, is insufficient to constitute a reasonable excuse for his defaults in answering the complaint and in responding to plaintiffs' motion for entry of a default judgment (see *Galaxy Gen. Contr. Corp. v 2201 7th Ave.*

Realty LLC, 95 AD3d 789 [1st Dept 2012]; *Sanchez v. Avuben Realty LLC*, 78 AD3d 589 [1st Dept 2010]). Notwithstanding the foregoing, Colmenares' papers are silent as to the prejudice that would be suffered by plaintiff in the event he was permitted to vacate his default. *Arred Enterprises Corp. v Indemnity Ins. Co. of North America*, 108 AD2d 624 (1st Dept 1985).

Colmenares also seeks a continued stay of the auction scheduled for on or about May 21, 2014. The standard for seeking a preliminary injunction¹ is as follows: CPLR 6301 sets forth the grounds for preliminary injunction and temporary restraining order:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

A party moving for a preliminary injunction must demonstrate by *clear and convincing evidence* a right to the remedy sought (*W.T. Grant Co. v Srogi*, 52 NY2d 496 [1981]). Furthermore, that party must establish, (1) a likelihood of success on the merits of the

¹ The instant OSC was signed, and a temporary stay granted by another judge, due to an approved absence of this Court.

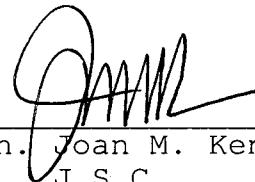
underlying claim; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in its favor (see *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Olympic Tower Condominium v Coccoziello*, 306 AD2d 159 [1st Dept 2003], citing, *Doe v Axelrod*, 73 NY2d 748, 750 [1988]).

This Court finds that Colmenares has failed to satisfy the three-pronged test for the granting of a preliminary injunction nor has he met his burden of proof. Notably, Colmenares has been unable to show that the irreparable harm is "imminent, not remote or speculative" (citations omitted). Moreover, "[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm" (citations omitted). The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court." *Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738 (2nd Dept 2010).

Consequently, the motion is denied. Accordingly it is,
ORDERED that the motion is denied; and it is further
ORDERED that the stay is vacated.

Dated: May 19, 2014

E N T E R:



Hon. Joan M. Kenney
J.S.C.