

McKenzie v Mays

2014 NY Slip Op 32890(U)

November 13, 2014

Supreme Court, New York County

Docket Number: 110346/2011

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ROY A. MCKENZIE, as Assignee of the Interest of
2146 Better Homes HDFC,

Index No: 110346/2011

DECISION & ORDER

Plaintiff,

-against-

FREDERICK D. MAYS, LUBERTA MAYS,
THE LIVING TRUST OF FREDERICK D. MAYS, JR.
AND LUBERTA MAYS, THE THORGOOD LAW FIRM,
and SHAMSEY T. OLOKO,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff Roy A. McKenzie moves to confirm the report of Special Referee Louis Crespo dated October 2, 2013 (Dkt. 19) (the Report).¹ Defendants Frederick D. Mays, the Estate of Luberta Mays,² and the Living Trust of Frederick D. Mays and Luberta Mays (the Trust) (collectively, the Mays Defendants) oppose and cross-move (1) to vacate the court’s granting of a default judgment on liability against them in an order dated December 19, 2012 (Dkt. 14) (the

¹ The instant motion is Motion Sequence 3. Motion Sequence 4, filed by defendants the Thorgood Law Firm and Shamsey T. Oloko (the Law Firm Defendants), which was granted without opposition in an order dated July 17, 2014 (Dkt. 69), confirmed the Report’s finding that the Law Firm Defendants were not duly served. The order granting the Law Firm Defendants’ motion was filed under the wrong motion sequence number. The court is correcting that error.

² Pursuant to orders dated July 28 (Dkt. 72) and September 19, 2014 (Dkt. 74), Luberta Mays’ estate was substituted as defendant. The Mays Defendants’ counsel, however, has not made the requisite filings to formally amend the caption. This shall be done promptly. The Mays Defendants counsel is again reminded of the importance of following the court’s rules and avoiding ambiguity about who she represents. Her late filing of a memorandum of law and her inadvertent indication in her cross-motion that she does not represent all of the Mays Defendants caused significant confusion. While her cross-motion is being granted in the interest of justice, this court’s *sua sponte* rulings are no substitute for counsel. Counsel is urged to focus on the merits (or lack thereof) of plaintiff’s claim rather than proffer countless inapposite arguments, such as the sufficiency of plaintiff’s notice of entry.

Default Order); (2) to reargue plaintiff's motion for a default judgment; and (3) for leave to file a late answer. For the reasons that follow, plaintiff's motion is denied, the Mays Defendants' cross-motion is granted in part, and the court *sua sponte* vacates the Default Order as against the Mays Defendants.

I. Procedural History

McKenzie commenced this action on September 12, 2011. His complaint asserts a single cause of action for fraud against defendants for making allegedly false representations at a real estate closing, discussed below. The Mays Defendants retained their son, Michael Mays, to represent them. On July 12, 2012, McKenzie moved for a default judgment due to defendants' failure to file an answer or move to dismiss.³ On August 13, 2012, Michael Mays filed an affirmation in opposition to the motion on behalf of the Mays Defendants. *See* Dkt. 5. In his affirmation, he admitted that the Mays Defendants were *actually* served but baldly asserted, without factual or legal explanation, that such service was improper under New York law. No answer was filed. The court, therefore, granted a default judgment against the Mays Defendants due to their failure to submit an affidavit of someone "with personal knowledge regarding an excuse for default or the sufficiency of service." Default Order at 2, citing *NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459, 460 (1st Dept 2004) (a claim of improper service requires the submission of "a sworn non-conclusory denial of service by a defendant"); *see Commerce Bank, N.A. v Executive Settlement Servs. 1 LLC*, 66 AD3d 526, 527 (1st Dept 2009) (attorney affirmation or affidavits from individuals without personal knowledge of the disputed service are insufficient to establish an excusable default); *Lynch v N.Y.C.T.A.*, 12 AD3d 644, 646 (2d Dept

³ The procedural history as it pertains to the Law Firm Defendants, who were not validly served, is set forth in the Report and is not relevant to this motion.

2004) (same); *see also Olesniewicz v Khan*, 8 AD3d 354 (2d Dept 2004) (reversing trial court's denial of motion for default judgment because "defendants failed to submit a sworn denial of service [and] the affidavit of [a nonparty is] insufficient to rebut the plaintiff's showing [of proper service]"). Consequently, this case was referred to a Special Referee to conduct an inquest on damages.

On February 13, 2013, Referee Crespo elected to hold the traverse hearing regarding the Law Firm Defendants' service first and conduct the inquest regarding the Mays Defendants afterward. The traverse hearing was completed on March 19, 2013, and the inquest was scheduled for March 21, 2013. McKenzie requested an adjournment to April 29, 2013. At the request of the Mays Defendants, the inquest was further adjourned to June 4, 2013.

On June 4, 2013, McKenzie appeared, but Michael Mays did not. Instead, another attorney appeared to request an adjournment on behalf of the Mays Defendants because, pursuant to an order of the Appellate Division dated May 30, 2013, Michael Mays was suspended from the practice of law. *See Matter of Michael P. Mays*, 2013 NY Slip Op 75482(U) (2d Dept 2013). Referee Crespo issued an interim order staying the inquest for 30 days and ordered that the Mays Defendants were to be notified of their son's suspension and given an opportunity to retain new counsel. *See* Dkt. 18. Referee Crespo further ordered that a new date for the inquest would be set after the stay expired. On July 26, 2013, the parties were notified that the new date for the inquest would be September 16, 2013. McKenzie promptly served the Mays Defendants with a notice informing them of this appearance.

On September 16, 2013, McKenzie appeared before Referee Crespo. The Mays Defendants did not. Nor did the Mays Defendants request an adjournment. Referee Crespo

deemed them to be in default and conducted an inquest in their absence.⁴ Referee Crespo took extensive testimony and later issued the Report, a comprehensive 26-page written decision. While, for the reasons explained below, the Default Order is being vacated as against the Mays Defendants, hence mooted a substantive review of Referee Crespo's damages decision, it should be noted that the Report is comprehensive and, other than minor issues (e.g., granting pre-judgment interest on a fraud claim), the Report is supported by the record. Indeed, Referee Crespo's credibility findings are particularly noteworthy, such as his finding that McKenzie's process server was not credible. Moreover, as Referee Crespo noted, McKenzie improperly sought damages to which he clearly has no legal entitlement (i.e., his attorneys' fees in the underlying real estate transaction which he gave up in exchange for the interest he received in this action). *See* Report at 13. Regardless, damages will not be awarded to McKenzie because, based upon the record submitted on this motion, McKenzie's fraud claim has no merit.

II. Factual Background

The alleged fraudulent representations were made in connection with the sale of real estate located at 2148 Amsterdam Avenue in Manhattan (the Property). On November 23, 2009, the Trust⁵ entered into a contract (the Contract) to sell the Property to a company called 2146 Better Homes HDFC (the Purchaser) for \$550,000. McKenzie represented the Purchaser in connection with the sale. The Contract's rider provides that "[i]f the premises are not delivered vacant[,] Seller at closing will escrow \$3,000 with the attorney for the Purchaser. Purchaser may

⁴ The Mays Defendants now claim they defaulted due to medical problems, such as Frederick Mays undergoing a surgical procedure on August 7, 2013 (more than one month before the inquest). The Mays Defendants did not submit any evidence, such as a doctor's affidavit or a medical record, of that surgery or its impact on their inability to attend the inquest, retain new counsel, or request another adjournment.

⁵ The proceeds of the sale were transferred to the individual Mays Defendants, not the Trust,

use this [\$]3,000 in Purchaser's sole discretion to cause the Premises to become vacant." *See* Dkt. 51 at 9. The Purchaser made a down payment of \$27,500, and the balance was due at closing.

The closing was initially scheduled for January 10, 2010. The Purchaser did not attend. Three days later, the Purchaser requested a new closing date of March 1, 2010, which was agreed upon. The Purchaser, again, did not attend. Another closing date was scheduled for April 15, 2010, which the Purchaser also did not attend.

The sale finally closed on November 18, 2010. At closing, the Purchaser expressed concern about a holdover tenant at the Property. The Mays Defendants, allegedly, made three representations to the Purchaser to assuage its concern: (1) "there were no unexpired leases relating to the Premises"; (2) "there was a single tenant whose lease had expired"; and (3) "the Trust ... was actively pursuing a summary eviction proceeding against the tenant and **had obtained a final judgment and warrant of eviction.**" *See* Complaint ¶ 12 (emphasis added).

The Mays Defendants also agreed to place \$15,000 into escrow to cover potential eviction expenses. Additionally, and most critically, the Mays Defendants provided the Purchaser with a "Stipulation of Settlement" dated February 9, 2010 (the Stipulation) executed in a non-payment proceeding commenced in Civil Court against the tenant. *See* Dkt. 57. The Stipulation provides that the tenant would pay an agreed-upon amount of back-rent by April 15, 2010. The Stipulation further provides, as is typical of such stipulations resolving non-payment proceedings, that a warrant of eviction shall issue but is stayed pending the payment deadline and, if payment in full is timely made, the "warrant is vacated." Nonetheless, while McKenzie maintains the Mays Defendants represented that the Stipulation was "valid and enforceable" (it

which is why they are named as individual defendants.

was), he alleges the Mays Defendants supposedly committed fraud by representing that the Stipulation was a “final judgment and warrant of eviction.” But this representation was true because the Stipulation was a final judgment and contained a warrant of eviction. However, as McKenzie, a New York licensed attorney, ought to know, the Stipulation does not guarantee that the tenant will be evicted. On the contrary, the Stipulation expressly provides that the tenant will not be evicted if she timely pays her back rent. Ergo, McKenzie cannot claim reasonable reliance.

Nonetheless, McKenzie avers that the Seller defrauded the Purchaser by continuing to accept rent payments from the tenant after the Stipulation was executed, causing the warrant to be vacated and extending the tenancy. This is precisely what the Stipulation expressly provides. McKenzie does not allege that the Mays Defendants lied about the tenant making her back rent payments, nor, if such representation were made, would McKenzie’s reliance be reasonable without independently verifying the matter (i.e., no due diligence, no reasonable reliance). The rush to close on a deal does not render reasonable a failure to conduct due diligence.

Moreover, McKenzie’s contention that the Seller lied about the tenant’s lease having expired also is not actionable fraud. The lease, by its terms, expired in 2005. The parties dispute whether there was another valid lease in existence. Regardless, the fact that the Civil Court proceeding was for *non-payment*, at a minimum, put McKenzie on notice that a valid lease may have been in effect. To wit, that the Stipulation expressly contemplates the tenant remaining at the premises after April 15, 2010 and is incompatible with McKenzie’s belief that the tenant had no legal basis to remain there.

Additionally, though McKenzie put off the closing at least three times (supposedly) because of his concerns about the tenant, McKenzie does not even *allege* that he conducted any

due diligence regarding the status of the tenancy or the validity of the lease that the tenant believed to be in effect. In any event, the tenant's continued presence on the premises, and not the validity of the lease, is the reason McKenzie suffered damages.⁶ The court takes judicial notice of the fact that a residential tenant in New York City cannot be swiftly evicted. Hence, delay in procuring the tenant's removal would have occurred even if the tenant was a holdover or residing under a valid lease.

In sum, nothing allegedly represented to the Purchaser at closing was false nor, if there was any ambiguity, was there any fact about the tenancy that could not have been discovered by carefully reviewing the Stipulation or conducting basic due diligence about the status of the tenancy. Simply put, there is no fraud here and, certainly, no reasonable reliance.

As a result, the damages allegedly suffered by the Purchaser (e.g., cost of evicting the tenant and additional financing costs caused by the delay in procuring a vacant property) are not recoverable against the Mays Defendants. Nonetheless, the court must address how, procedurally, this result can occur given the Mays Defendants' defaults in this action.

III. Discussion

It is well settled that this court has the inherent power to vacate its own orders "in the interests of substantial justice." *Goldman v Cotter*, 10 AD3d 289, 293 (1st Dept 2004), quoting *Ladd v Stevenson* 112 NY 325, 332 (1889); see *Nash v Port Auth. of N.Y. & N.J.*, 22 NY3d 220,

⁶ The Purchaser eventually paid the tenant \$35,000 to vacate the premises by April 30, 2012. The Purchaser was originally scheduled to close on a mortgage refinancing for the Property on February 16, 2011, but the refinancing was delayed until May 2012 as a result of the tenant's continued presence. This resulted in the Purchaser incurring additional bridge loan expenses.

225-26 (2013).⁷ The interests of substantial justice militate strongly in favor of vacating the Default Order because McKenzie has not alleged a valid cause of action.

“[A] plaintiff seeking a default judgment under CPLR § 3215 must present prima facie proof of a cause of action, and while a default admits all factual allegations of the complaint and all reasonable inferences therefrom, **it does not admit legal conclusions which are reserved for the court’s determination.**” *Cohen v 1999 Pontiac, VIN No. 1G2WJ52M1XF237001*, 42 Misc3d 401, 404 (Sup Ct, Suffolk County 2013) (emphasis added), citing *McGee v Dunn*, 75 AD3d 624 (2d Dept 2010). “Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default.” *Id.*, citing *Litvinskiy v May Entm’t Group, Inc.*, 44 AD3d 627 (2d Dept 2007). Indeed, a defendant’s default does not “give rise to a ‘mandatory ministerial duty’ to enter a default judgment against it. Rather, [plaintiffs are] required to demonstrate that they at least ha[ve] a viable cause of action.” *Resnick v Lebovitz*, 28 AD3d 533, 534 (2d Dept 2006) (citation omitted); see *Guzetti v City of New York*, 32 AD3d 234, 235 (1st Dept 2006), quoting *Joosten v Gale*, 129 AD2d 531, 535 (1st Dept 1987) (“CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action”). Moreover, while the “quantum of proof” required on a motion for a default judgment “is not exacting,” enough facts must be presented to “enable (the) court to determine that a viable cause of action exists.”” *Guzetti*, 32 AD3d at 235-36, quoting *Resnick*, 28 AD3d at 534.

In the interest of justice, the court *sua sponte* recalls and vacates the Default Order and denies McKenzie’s motion for a default judgment. For the reasons discussed above, the

⁷ The court cannot vacate its own order when that order has been ruled on by an appellate court.

allegations in the complaint do not amount to fraudulent representations, and even if they do, McKenzie cannot allege reasonable reliance. *See Stuart Silver Assocs., Inc. v Baco Dev. Corp.*, 245 AD2d 96, 99 (1st Dept 1997) (“[w]here a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant’s misrepresentations”).

Under these circumstances, it would be highly inequitable for McKenzie to recover from the Mays Defendants. The very reason McKenzie has an interest in this case is that the Purchaser refused to pay him due to his oversights. While the Mays Defendants have suffered from negligent representation in this litigation, the equities strongly lie with them. Frederick is 84 years old; Luberta passed away while this motion was *sub judice*. Their neglect to make this action their first priority is understandable, even if the same cannot be said of their counsel. The court cannot justifiably hold them liable for fraud when they clearly have not committed fraud. The default judgment against the Mays Defendants, therefore, is vacated, and the Mays Defendants may answer or move to dismiss by the date set forth below. Accordingly, it is

ORDERED that the court *sua sponte* vacates its order dated December 19, 2012 as against defendants Frederick D. Mays, the Estate of Luberta Mays, and The Living Trust of Frederick D. Mays and Luberta Mays (the Mays Defendants), and the motion by plaintiff Roy A. McKenzie for a default judgment against them (Seq. 001) is hereby denied; and it is further

ORDERED that the Mays Defendants’ cross-motion to vacate the report of Special Referee Louis Crespo dated October 2, 2013 is granted to the extent that the inquest on damages against them is vacated (the Report’s findings regarding service on defendants the Thorgood Law Firm and Shamsey T. Oloko remain confirmed), plaintiff’s motion to confirm the Report’s

Kenney v City of New York, 74 AD3d 630. That is not the case here.

damages inquest is denied, and the balance of the Mays Defendants' cross-motion is denied as moot; and it is further

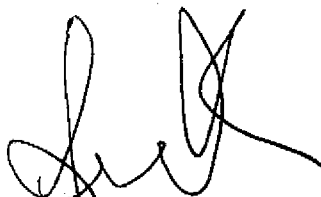
ORDERED that the Mays Defendants shall answer the complaint or move to dismiss by December 12, 2014; and it is further

ORDERED that counsel for the Mays Defendants shall promptly cause the caption in this action to reflect the substitution of the Estate of Luberta Mays; and it is further

ORDERED that counsel for the Mays Defendants shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office, Room 158, who are directed to amend their records to reflect such change in the caption.

Dated: November 13, 2014

ENTER:



J.S.C.