

Skyview Motel, LLC v Grey

2014 NY Slip Op 33465(U)

November 3, 2014

Supreme Court, Westchester County

Docket Number: 50725/2012

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

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SKYVIEW MOTEL, LLC,

Plaintiff

DECISION and ORDER

**Index No. 50725/2012
Motion Date: July 28, 2014
Seq. No. 2**

-against-

JOSEPH GREY and SHANDRIKA GREY,

Defendants

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JOSEPH GREY and SHANDRIKA GREY,

Third-Party Plaintiffs

-against-

UNITED GENERAL TITLE INSURANCE COMPANY,
CONTRACTORS' LINE & GRADE SOUTH, LLC,
VAM DEVELOPMENT CORP.,
ERICA ROBINSON and SEYMOUR WILSON,

Third-Party Defendants

-and-

ADRIAN THOMPSON, NICOLE KIRKLAND,
BEATRICE KIRBY aka BEATRICE WALKER,
LINDA SYLVE and the BANK OF NEW YORK as Co-Trustees of the
CAMILLE SYLVE SUPPLEMENTAL NEEDS TRUST,
FLUSHING SAVINGS BANK, FSB,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,
as nominee for Accredited Home Mortgage Inc.,
ACCREDITED HOME MORTGAGE, INC.,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

as nominee for American Brokers Conduit, and
 AMERICAN BROKERS CONDUIT CORPORATION,

Additional Third-Party Defendants on the
 Third-Party Counterclaims and the
 Third-Party Cross-Claims.

-----x
 LEFKOWITZ, J.

The following papers were read on this motion by third party defendant VAM Development Corporation (hereinafter "VAM") for an order vacating the default judgment rendered against it and granting it leave to file an answer and for such other and further relief as this court deems just and proper.

Notice of Motion
 Affirmation; Exhibits A-I
 Affirmation in Partial Opposition
 Affirmation in Opposition

Upon the foregoing papers this motion is determined as follows:

In the complaint dated January 12, 2012 plaintiff claims that defendants/third party plaintiffs are owners of premises in Yonkers, New York that abuts its premises. Plaintiff claims that defendants/third party plaintiffs wrongfully trespassed and entered its property and erected a dwelling and retaining wall on its property without its permission. In the third party complaint dated February 1, 2013 defendants/third party plaintiffs claim that the alleged trespass is due to the actions of, among others, VAM, which, among other things, improperly conveyed property to them that VAM did not own.

By order dated November 18, 2013 this court (Lefkowitz, J.), granted the motion of defendants/third party plaintiffs for an order granting them a default judgment against VAM on the issue of liability only. The court found that VAM failed to answer the third party complaint. Presently, VAM seeks an order vacating this prior order.

VAM states that defendants/third party plaintiffs never obtained jurisdiction over it. The affidavit of service dated February 8, 2013 states that VAM was served with the third party summons and third party complaint by service upon the Secretary of State pursuant to Business Corporation Law § 306. However, VAM's counsel notes that VAM was dissolved on August 11, 2009 so that the service was ineffective and did not result in personal jurisdiction over it.

Additionally, VAM's counsel states that after it was dissolved it had no involvement whatsoever with the premises that forms the basis of this lawsuit. VAM notes that by deed dated September 25, 2006 it transferred title to the subject premises to defendants/third party plaintiffs.

VAM also claims that it never performed any survey regarding the subject premises and that it relied upon third party defendant Contractors Line and Grade South (hereinafter "CLGS") to survey and subdivide the premises.

VAM further asserts that it relied on representations from CLGS that it would take full responsibility regarding the claims made by defendants/third party plaintiffs and therefore VAM refrained from taking action pending a resolution from CLGS. Despite these assurances, VAM wrote to counsel for CLGS, by letter dated October 2, 2013 asking that counsel for CLGS represent it since VAM was entitled to indemnification from CLGS anyway. According to VAM, it forwarded a copy of the summons and complaint to its insurer. By letter dated November 18, 2013 VAM's insurer disclaimed coverage.

VAM notes that the Order to Show Cause dated September 17, 2013 (relating to the prior motion) directed defendants/third party plaintiffs to serve it with the order and its supporting papers on or before September 20, 2013 and to file proof of service on the court's NYSCEF system on or before October 1, 2013. VAM notes that service of the order was improperly made on the Secretary of State and that it wasn't aware of the motion and that defendants/third party plaintiffs untimely served it on September 23, 2013 and filed proof of service on the court's NYSCEF system one day late on October 2, 2013.

VAM also asserts that it has a meritorious defense to the claims asserted by defendants/third party plaintiffs and that it has valid cross claims against CLGS. VAM states that it does not have to prove its claims it only has to show that the claims are meritorious. VAM concludes that in light of the fact that it has actively prosecuted this matter and given the jurisdictional and procedural defects in this case, the prior order should be vacated.

This motion is partially opposed by CLGS. CLGS is not opposed to the relief now sought by VAM but states that it objects to the baseless allegations made by VAM against it in support of its motion to vacate.

This motion is opposed by defendants/third party plaintiffs. They note that discovery proceedings in this matter have been conducted over the last year and one half and that a note of issue has been filed.¹ They further note that multiple compliance conferences have been held in this matter .

Defendants/third party plaintiffs state that there is no sworn affidavit of a party supporting the claim of a meritorious defense and/or reasonable excuse for the delay. They assert that this in itself dictates denial of the motion.

Defendants/third party plaintiffs also note that VAM, by its own admission, has been aware of the default judgement since November 2013 and waited eight months and until after the

¹ The note of issue was filed on July 17, 2014

note of issue was filed and discovery completed to move to vacate the default.

Finally, defendants/third party plaintiffs state that contrary to VAM's contentions on this motion, service upon a corporation through Business Corporation Law § 306 is valid even though the corporation was dissolved at the time of service if the corporation was an active corporation at the time the claim arose.

A defendant seeking to vacate a default judgment pursuant to CPLR 5015 (a) must demonstrate a reasonable excuse for the default and a potentially meritorious defense (*Capital Source v AKO Med. P.C.*, 110 AD3d 1026 [2d Dept 2013]). In the instant matter jurisdiction was obtained over VAM by personal delivery of two copies of the third party summons and third party complaint to an authorized agent in the office of the Secretary of State. VAM argues that at the time of service it was a dissolved corporation. Indeed its submission of a NYS Department of State information sheet shows that VAM was dissolved on August 11, 2009.

Business Corporation Law § 1006 provides that a dissolved corporation may sue or be sued in its corporate name and process may be served upon it. Personal jurisdiction over a dissolved corporation may be obtained through service upon the Secretary of State (*Bruce Supply Corp. v New Wave Mech. Inc.*, 4 AD3d 444 [2d Dept 2004]). A corporation may be held liable on a cause of action that accrues after dissolution but relates to obligations that arose before the dissolution. The three and one half years between the time of VAM's dissolution and the filing of the third party complaint is a reasonable "winding up of affairs period of time" pursuant to Business Corporation Law § 1006, considering the circumstances of this case, including the fact that the claims against VAM accrued prior to dissolution (*see MMI Trading, Inc. v Nathan H. Kelman, Inc.*, 120 AD3d 478 [2d Dept 2014]; *compare Lance Int'l Inc. v First National City Bank*, 86 AD3d 479, 480 [1st Dept 2011]).

In view of the absence of a reasonable excuse, it is unnecessary to consider whether VAM sufficiently demonstrated the existence of a potentially meritorious defense to the action (*see Capital Source v AKO Med. P.C.*, 110 AD3d 1026 [2d Dept 2013]; *CEO Bus. Brokers, Inc. v Alqabili*, 105 AD3d 989 [2d Dept 2013]).

The court notes that upon its review of VAM's assertions and submissions on this motion it appears that in fact VAM received a copy of the third party summons and third party complaint. In fact VAM admits that it was aware of the pending action against it at least as of October 2, 2013 when it wrote a letter to CLGS's counsel, if not sooner. It also appears that VAM was aware of the default judgment rendered against it soon after it was rendered and yet it waited about eight months before moving to vacate the default judgment. Although CPLR 5015 (a) permits a party a year to move for relief from a judgment or order, in this particular case, plaintiff and the other parties to this action certainly will be prejudiced by a further delay insofar as this matter is now at the post note of issue stage. Although VAM asserts that it relied upon assurances it received from CLGS (for example, that it took full responsibility in this matter) in refraining from taking action sooner, these assertions are contradicted by CLGS. VAM clearly did not move promptly in this matter (*compare Stolpiec v Wiener*, 100 AD2d 931 [2d Dept 1984];

where a default judgment was rendered within two months of the commencement of an action and defendant moved immediately thereafter to vacate it, default was vacated]).

Similarly, to the extent that VAM seeks relief under CPLR 317 it is not entitled to such relief since it failed to show that it did not receive actual notice of the third party summons and third party complaint in time to defend the action (*see Capital Source v AKO Med. P.C.*, 110 AD3d 1026 [2d Dept 2013]). VAM's denials to the contrary are not sufficient to rebut the presumption of proper service raised by the affidavit of service (*Wassertheil v Elburg, LLC*, 94 AD3d 753 [2d Dept 2012]).

Finally, although VAM correctly points out that the Order to Show Cause relating to the motion for a default was served upon it three days late and the related affidavit of service was uploaded to NYSCEF one day late, these delays are de minimis, without consequence and do not support a finding of excusable default in this matter.

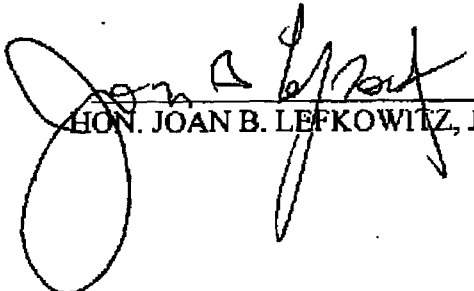
In light of the foregoing, it is,

ORDERED that the motion of third party defendant Vam Development Corporation for an order vacating the default judgment rendered against it on the issue of liability by prior order of this court dated November 18, 2013, is denied; and it is further,

ORDERED that third party defendant Vam Development Corporation is directed to serve a copy of this order with notice of entry upon all parties within seven (7) days of entry and file proof of service on NYSCEF within five (5) days of service.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
November 3, 2014


HON. JOAN B. LEFKOWITZ, JSC