151 First Ave. Hous. Dev. Fund Corp. v Gorman
2015 NY Slip Op 30006(U)
January 7, 2015
Supreme Court, New York County
Docket Number: 153936/2014
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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151 FIRST AVENUE HOUSING DEVELOPMENT FUND CORPORATION,

Plaintiff,

-against-

ROBERT GORMAN,

Defendant.

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Index No. 153936/2014

Mot. seq. no. 003

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
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For defendant:
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By judgment dated August 29, 2014, I granted plaintiff's motion for a default judgment against defendant, declaring (1) that it properly terminated defendant's proprietary lease to unit 4-F, and cancelled the 250 shares of stock appurtenant to the unit as of December 31, 2013; (2) that defendant's continued occupancy and possession of the unit thereafter was unlawful; and (3) that plaintiff was entitled to possession of the unit. (NYSCEF 39, Exh. A).

By order to show cause dated October 28, 2014, defendant moves for an order vacating the default judgment, and for a temporary restraining order and a preliminary injunction. (NYSCEF 40).

I. PERTINENT BACKGROUND

On November 10, 1987, defendant entered into a proprietary lease with plaintiff.

(NYSCEF 1). By letter dated October 8, 2010, defendant advised plaintiff's vice-president that he would permit access to his apartment for a plumber to inspect for the source of a leak into the apartment below. (NYSCEF 39, Exh. E). In a letter, dated May 5, 2012, defendant expressed his belief that no leak was coming from his apartment, but that he would continue to permit access to his apartment but only upon the plumber's determination that a leak, if it existed, could not be fixed without access to his bathroom. (*Id.*).

On August 1, 2013, plaintiff served defendant with a notice of default, dated July 30, 2013, whereby it alleges instances of defendant's objectionable conduct including failing to remedy the leak, leaving personal items in the basement and in the hallway outside his door, leaving an air-conditioning unit on his fire escape, and owing $24,400 in maintenance charges and other fees. (NYSCEF 46).

On or about November 7, 2013, plaintiff served defendant with a notice of a special meeting to be held on November 21, 2013, at which a vote would be taken on whether to terminate defendant's proprietary lease. (NYSCEF 47). Defendant did not attend the meeting; plaintiff unanimously voted to terminate his lease and cancel the shares appurtenant thereto. (NYSCEF 50). On December 16, 2013, and December 21, 2013, plaintiff served defendant with a notice that his lease would terminate as of December 31 and that proceedings would be commenced to remove him if he remained in possession thereafter. (NYSCEF 48, 49).

On or about April 23, 2014, plaintiff commenced this action against defendant. On May 6, 2014, following numerous unsuccessful attempts to serve defendant personally, plaintiff affixed the summons and complaint to the door of defendant's apartment and sent it by first-class mail. (NYSCEF 1, 8, 43).

By letter dated May 17, 2014 and mailed to plaintiff on May 19, 2014, defendant sought

permission to use the building's hand truck to remove the air-conditioning unit from his fire escape. (NYSCEF 39, Exh. E).

By email dated May 29, 2014, attorney Henry Chun sent defendant a proposed verified answer dated May 16, 2014. (NYSCEF 31, 39, Exhs. B, C). By email response the following day, defendant advised Chun that "[t]here are a number of mistakes in my answer here." He wondered whether Chun would characterize the mistakes as insignificant, stated that he "would have been more comfortable with it if we'd hashed it out a bit," and expressed the hope that "there is room to correct it in case I have to answer for it." He thanked Chun for "getting it in in a timely manner." (NYCEF 39, Exh. C). Three hours later, Chun replied by email, "Make whatever corrections you need to it." (*Id.*).

On June 26, 2014, plaintiff sent defendant, by first-class mail, a notice of commencement of action subject to mandatory electronic filing and the summons and complaint. (NYSCEF 52, 53). By notice of motion dated and served on July 7, 2014, plaintiff moved for an order granting it a default judgment given defendant's failure to answer. (NYSCEF 9, 24).

On September 9, 2014, plaintiff filed and served on defendant the August 29 default judgment with notice of entry (NYSCEF 56), and on September 15, 2014, defendant was served with a notice of eviction. (NYSCEF 32, 42).

By order to show cause dated September 17, 2014, defendant sought an order: 1) temporarily restraining plaintiff from going forward with the eviction; (2) vacating the default judgment; and (3) permitting him to serve a proposed verified answer. (*Id.*). He swore as follows, in pertinent part:

> I never received any court papers of the underlying lawsuit against me (a copy of the summons and complaint are annexed heretofore as EXHIBIT A) . . . I got no summons or

> lawsuit taped to my door. I sought legal representation only after receiving a notice from the Sheriff posted on my door. . . . At no time did I ever receive court papers.

(NYSCEF 39, Exh. D). Annexed to the order to show cause is a proposed answer, dated May 16, 2014, in which it is alleged, as the first affirmative defense of improper service, that "defendant was at the premises at the times stated in the affidavit of service of the Summons and Complaint and did not receive anything by personal service, substitute service, or conspicuous place service." (NYSCEF 31).

On September 19, 2014, I granted defendant's application to the extent of ordering a traverse hearing to be conducted on October 22, 2014. (NYSCEF 42). By letter dated October 16, 2014, Chun sought an adjournment as his client was "unable to appear on October 22." He also requested a conference in an attempt to settle the case. (NYSCEF 59).

On October 20, 2014, new counsel filed a notice of appearance on behalf of defendant (NYSCEF 60), and on October 22, she appeared and orally sought leave to withdraw the motion to vacate and replace it with a new one, claiming that defendant had received the summons and complaint and that in his affidavit in support of the motion to vacate, he was referring to the August 29 decision and order with notice of entry, and not to the summons and complaint. Leave to withdraw the motion to vacate was granted over plaintiff's objection.

II. CONTENTIONS

A. Defendant's explanation of his default

By affidavit dated October 24, 2014, defendant swears as follows:

Upon receiving the summons and complaint, defendant immediately contacted Chun and met with him to prepare an answer.

> Mr. Chun estimated a dollar amount for his services to continue past that ANSWER and bring us up to the discovery stage before trial. That amount was more than I could come up with right away. I said that I doubted I'd get any free representation . . .

Chun and defendant prepared an answer and agreed that it would be timely filed. (NYSCEF 37).

While defendant was attempting to obtain free representation from various providers, he received from Chun, by email dated May 29, 2014, the May 16 proposed verified answer. (NYSCEF 31, 39, Exhs. B, C). By email response the following day, defendant advised Chun that "[t]here are a number of mistakes in my answer here," expressed the hope that the answer would be corrected "in case I have to answer for it," and thanked Chun for "getting it in in a timely manner." Three hours later, Chun replied by email, "Make whatever corrections you need to it." (NYSCEF 39, Exh. C).

Given Chun's estimate that the case would not come to trial for another 18 months, defendant believed that he had no reason to anticipate "anything imminent," although he called Chun some time during the summer out of concern, having heard nothing about the case. When Chun did not return his call, defendant assumed that he was away. Consequently, when defendant received the September 9 eviction notice, he was "blindsided," and "it was only after the Sheriff's posting that [he] was able to collect a certified mailing" containing the August 29 decision and order with notice of entry thereof, the documents he was actually referencing when he told Chun, in preparing the affidavit in support of his first motion to vacate, that he had not received "those documents posted on my door prior to the Sheriff's notice . . ." (NYSCEF 37). Chun explained to defendant that he did not file the answer because defendant had not "come back." Defendant thus assumed that Chun believed that he had obtained representation elsewhere, and now contends that his understanding was otherwise and that he would not have ignored the deadline. (*Id.*).

When he and Chun appeared in court on September 19 for oral argument of the first motion to vacate, defendant assumed that Chun was referencing the August 29 decision and order with notice of entry when he stated that no "documents according to the CPLR" had been received, and claims that had he been permitted to speak on the record, he would have revealed "innocently and unwittingly, that [he and Chun] had long ago formed an ANSWER to the original VERIFIED COMPLAINT filing." (*Id.*).

Thus, defendant denies having lied when he swore in support of his first motion to vacate that he did not receive the pleadings, and he blames Chun for the "blunder" in failing to file the answer and for "making matters worse." He denies having written the phrase "any court documents," and contends that he signed the first affidavit only because Chun presented it to him for signing. He asks rhetorically, "How could I possibly have claimed to have not received something that I'd answered and filed with the court back in May?" and complains that the mail service in the building is inefficient and that he does not "always receive [his] mail in a timely manner." (*Id.*).

By affirmation dated October 24, 2014, Chun states that when defendant came to him in May 2014 to discuss the case, they prepared an answer similar to the one attached to the first motion to vacate, but that neither of them "had the time to grasp the procedural posture of the case because of an impending eviction." (NYSCEF 38). He asserts that defendant received the summons and complaint and that the first motion to vacate does not "explain the entire story." However, because defendant had not decided to retain him, Chun advised him to seek free representation. Given their "misunderstanding" as to representation, Chun did not file the answer. It was only in October, some time before the scheduled traverse hearing, that Chun and defendant reviewed the file and recalled the pertinent facts. He then decided that it was best to

seek a conference with me "to explain the situation and try to resolve the matter," but that plaintiff was not willing to settle. (*Id.*).

Chun also indicates that the email address he used for e-filing had been hacked and that because he was unable to retrieve his e-filing password until August 2014, "just enough time to file a notice of entry in another matter," the default should be vacated due to law office failure, but only if he is "found to have been [defendant's] attorney." (*Id.*).

Counsel alleges that Chun intentionally used the word "lawsuit" instead of "complaint" in defendant's first affidavit in order to prevent him from realizing that he had failed to file the answer. She argues that pursuant to "the adverse interest exception to the imputation of agency," defendant should not be charged with Chun's negligence in drafting the inaccurate affidavit or failing to file the answer, and invokes law relating to public housing in arguing that defendant's status as a long-term, elderly tenant warrants the exercise of my equitable authority to afford defendant an opportunity to cure his violations, and to protect him from the forfeiture of his tenancy. Counsel also implies that plaintiff's ulterior motive is to sell defendant's apartment for "a much higher rate than the initial $250 paid." (NYSCEF 36).

B. Plaintiff's contentions

According to plaintiff, defendant has been disingenuously selective in setting forth the pertinent history of the events and circumstances leading to his default, and that his contradictory affidavits constitute intentionally false statements. It also argues that not paying the retainer means that defendant did not retain Chun, which evidences his intentional failure to file an answer, and it characterizes Chun's submission as designed to protect himself from professional liability given his role in bringing about the default. (NYSCEF 41).

III. ANALYSIS

Pursuant to CPLR 5015(a)(1), an order granted on default may be vacated upon a showing of both a reasonable excuse for the default and a meritorious claim. (*Youni Gems Corp. v Bassco Creations, Inc.*, 70 AD3d 454 [1st Dept 2010], *lv denied* 15 NY3d 863; *Cato v City of New York*, 70 AD3d 471 [1st Dept 2010]; *Campos v New York City Health & Hosps. Corp.*, 307 AD2d 785 [1st Dept 2003]). Relief from a default judgment rests within the sound discretion of the motion court. (*Frenchy's Bar & Grill v United Intern. Ins. Co.*, 251 AD2d 177, 177 [1st Dept 1998]).

The party seeking to vacate a default must provide facts to explain the default (*Ogunmoyin v 1515 Broadway Fee Owner, LLC*, 85 AD3d 991 [2d Dept 2011]; *Matter of Esposito v Esposito*, 57 AD3d 894 [2d Dept 2008]), and an affidavit of merit from someone with personal knowledge of the facts underlying the claim (*Rugieri v Bannister*, 22 AD3d 305 [1st Dept 2005]; *Katz v Robinson Silverman Pearce Aronsohn & Berman, LLP*, 277 AD2d 70, 74 [1st Dept 2000]; *City of New York v Elghanayan*, 214 AD2d 329 [1st Dept 1995]).

Mere neglect does not constitute a reasonable excuse for failing to answer a summons and complaint (*Ogunmoyin*, 85 AD3d at 991, 992), and a default should not be vacated where the party has demonstrated "a lack of good faith, or been dilatory in asserting its rights" (*Cadlerock Joint Ventures, LP v Mitiku*, 45 AD3d 452, 453 [1st Dept 2007]; *Greenwich Sav. Bank v JAJ Carpet Mart*, 126 AD2d 451, 453 [1st Dept 1987]). The court's determination should not be disturbed absent "an improvident exercise of discretion." (*Abel v Estate of Collins*, 73 AD3d 1423, 1424 [2d Dept 2010]). The failure to establish a reasonable excuse warrants denial of the motion notwithstanding the demonstration of a potentially meritorious defense. (*Bendeck v Zablah*, 105 AD3d 457 [1st Dept 2013]; *Caba v Rai*, 63 AD3d 578, 582 [1st Dept 2009]).

A reasonable excuse for a default may be based on law office failure (CPLR 2005), given the interest in preventing an attorney's "isolated neglect" from "depriv[ing] a party of his or her day in court in the absence of prejudice to the opponent," and in light of the strong public policy of resolving controversies on the merits. (Vincent C. Alexander, Practice Commentaries, CPLR 2005; *Franco Belli Plumbing and Heating and Sons, Inc. v Imperial Dev. and Constr. Corp.*, 45 AD3d 634, 637 [2d Dept 2007]).

Here, defendant seeks to excuse the default by blaming Chun who he contends failed to file the answer. Chun, however, asserts that the default resulted from either a "misunderstanding" as to whether he was representing defendant, or from law office failure, but the latter only if he is found to have represented defendant at the time of the default. Although Chun suggests, through his use of the word "misunderstanding" that defendant believed that he was represented by him, defendant's belief, to the extent he suggests that he had retained Chun to file an answer, is not supported by any evidence, is contradicted by defendant's unexplained assertion in his first affidavit that he was not represented before he received the notice from the Sheriff, and is too indirect to be probative of the issue.

That Chun was willing to file an answer does not prove that he had been retained, but to the extent that defendant had reason to believe that Chun would file an answer, the May 30 email correspondence and succeeding events dispel that notion, as defendant concedes that he was attempting, at Chun's suggestion, to obtain free legal services, and nowhere alleges that he advised Chun of his lack of success or of his intent to retain him. Then, when he ignored Chun's request that he correct the answer, Chun had every reason to believe that he was not retained and that he was not expected to file the answer. These inferences are supported by defendant's failure to address the rest of the May 30 email.

In *Abel, supra*, the defendants retained a lawyer when they were served with the summons, and they kept in communication with the lawyer throughout the pendency of the case. (73 AD3d at 1424). Here, by contrast, there is no evidence that Chun was ever retained by defendant. Consequently, it was unreasonable for defendant to sit back and expect that the answer would be filed, especially after he had expressed his discomfort with it and failed to respond to Chun's request that he correct it. Chun was warranted in not filing a document that his client had stated was incorrect. Defendant cannot have it both ways and his attempt to do so reveals that he is at least disingenuous in blaming Chun.

Although defendant claims that he called Chun that summer, he provides no date, thereby permitting inferences that he did so after the time for filing the answer had expired and long enough before the September 15 eviction notice for him to follow up with Chun. Instead, defendant was apparently content to remain passive, thereby evincing willful ignorance of the potentiality of a default. In sum, defendant's conduct warrants only one inference: that it was his failure to respond and follow up with Chun that resulted in the default.

As I find that Chun was not representing defendant at the time of the default, Chun's assertion that law office failure excuses the default need not be considered. In any event, having failed to allege even the approximate time his computer was hacked or to explain why he took no action in the case once he retrieved his password beyond implying that he had no time, Chun's assertion of law office failure lacks sufficient substance. (*See Wells Fargo Bank, NA v Cervini*, 84 AD3d 789 [2d Dept 2011] [conclusory and unsubstantiated allegations of law office failure insufficient]; *47 Thames Realty, LLC v Robinson*, 84 AD3d 746 [2d Dept 2009][vague, unsubstantiated allegation that plaintiff's counsel lawyer unaware of compliance conference because he was "busy attorney" not reasonable excuse]; *Ogunmoyin*, 85 AD3d at 992 [2d Dept

2005] [excuse of law office failure vague and unsubstantiated insufficient to warrant vacatur of default]).

Defendant's recent denial that he was referencing the summons and complaint in his first motion to vacate was interposed on the eve of what promised to be an unsuccessful traverse hearing and coincident with the appearance of new counsel. In addition, it is not corroborated by Chun, it contradicts the allegations set forth in the answer he claims he thought Chun had filed, and it is not borne out by the sworn words of his first affidavit, whereby he denied having ever received "any court papers of the underlying lawsuit against me." Any doubt as to defendant's understanding of his own words is resolved against him given the succeeding explanatory parenthetical informing that a copy of the summons and complaint is annexed.

Although defendant provides an elaborate description of the alleged inefficient mail service in the building, nowhere does he deny receipt of any pertinent document. Indeed, he now concedes that he was in fact "able to collect a certified mailing" of the documents he claims were the subject of his first motion to vacate. Absent any explanation as to how he had been unable previously to collect them, he has in effect conceded service of them and has removed that basis of the instant motion.

The indignation expressed by defendant and his reliance on his own *bona fides* ("How could I possibly have claimed to have not received something that I'd answered and filed with the court back in May?" "Had I been able to speak I would have likely revealed innocently and unwittingly, that we had long ago formed an ANSWER to the original VERIFIED COMPLAINT filing") are self-serving and misplaced. His unsupported claims that he thought that the answer had been filed and that he had denied the receipt of the decision and order with notice of entry and not the pleadings lack good faith, and do not logically follow from the facts

as he himself alleges. (*See Wadsworth v Sweet*, 106 AD3d 1433 [3d Dept 2013] [confusion as to whether defendant's counsel was responsible for responding to summary judgment motion did not constitute reasonable excuse for failure to respond as he was aware of pending motion but failed to act]; *Ateres Hasofrim, Inc. v Kralik*, 78 AD3d 1091 [2d Dept 2010] [defendant's belief that matter being handled by attorneys that handled earlier matter unavailing in absence of evidence attorneys were ever retained for current matter and where evidence indicated that attorneys had not been retained]; *Fieldson Lodge Care Ctr. v Andrews*, 79 AD3d 552 [1st Dept 2010] [defendant offered no evidence to support belief that mother's counsel answered complaint on his behalf]; *Fishman v Beach*, 246 AD2d 779 [3d Dept 1998] [defendant's contention that default due to law office failure not reasonable absent justification for believing that interests adequately represented by counsel's statement that counsel would defend action or assist him in obtaining suitable counsel]; *Woodward v Eighmie Moving & Storage, Inc.*, 151 AD2d 892 [3d Dept 1989] [while defendant states that he received pleadings, gave them to attorney and thereafter believed attorney was defending action, he did not state that he inquired as to status of action or allege basis of belief that attorney was defending action; thus defendant failed to demonstrate that he justifiably believed interests were being protected when in fact they were not]; *see also Figueroa v Luna*, 281 AD2d 204 [1st Dept 2001] [as defendant previously submitted affidavit conceding receipt of summons and complaint, his subsequent contradictory statement insufficient to establish reasonable excuse for default]).

Notwithstanding the strong public policy in favor of disposing of cases on their merits (*Auerbach v Tregerman*, 106 AD3d 633 [1st Dept 2013]), here, defendant's own submissions reflect his disingenuousness, lack of candor, and disregard of notices and legal filings which

form a pattern of dilatory conduct. He has thus failed to demonstrate a reasonable excuse for failing to answer the complaint.

Given this result, I need not address whether defendant has set forth a meritorious claim or whether he is entitled to a temporary restraining order. In any event, plaintiff's allegations about the plaintiff's motives and/or conduct in terminating his lease and shares are insufficient to establish a meritorious defense. (*See 40 West 67th Street Corp v Pullman*, 100 NY2d 147, 155 [2003] [termination of lease not reviewable when cooperative adhered to procedure set forth in lease, when tenant failed to appear at special meeting, when decision based on specific finding as to tenant's objectionable conduct, and in absence of evidence that determination based on impermissible considerations]; *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990] [pursuant to the business judgment rule, a court will defer to the determination of a residential cooperative board]).

While defendant unfortunately faces the loss of his shares, in light of his undisputed history of ignoring notices sent to him by plaintiff, he has only himself to blame for the position in which he finds himself. Defendant's long-term tenancy and age, while warranting concern, do not excuse his lack of candor, and their invocation is better suited to issues relating to public housing. (*See eg, 757 East 169th Street HDFC v Haney*, 171 Misc 2d 965, 966 [Civ Ct, Bronx County 1996] [distinguishing HDFC cooperatives from HPD units or programs owned, managed or supervised by New York City or HPD]). A cooperative depends for its success solely on the cooperation of the shareholders, no matter the length of their tenancy or age. (*See 40 W.67th St. Corp. v Pullman*, 100 NY2d 147, 154, 158 [2003] [cooperative living entails voluntary, shared control over rules, maintenance and composition of community; shareholder-tenant voluntarily agrees to submit to authority of board]). The spirit of neighborly cooperation is nowhere

reflected in defendant's own submissions.

Counsel fares no better with her arguments. She offers no evidence that Chun intentionally drafted the first affidavit as a stratagem to avoid alerting defendant that he had failed to file the answer, and her argument that defendant should not be charged with Chun's failure to file the answer ignores many of the pertinent facts set forth in defendant's first affidavit and the May 30 email. Her invocation of law relating to public housing is off point and she offers no support for her attribution to plaintiff of ulterior motives; defendant does not even assert it. And, her echo of defendant's detailed complaints about mail delivery in the building is irrelevant, absent defendant's denial of receipt of any of the pertinent documentation.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, defendant's motion to vacate the default judgment of August 29, 2014 is denied.

ENTER:

Barbara Jaffe, JSC

DATED: January 7, 2015
New York, New York