

Hancock Prop. Holdings LLC v Kinpit Realty Inc.

2015 NY Slip Op 31183(U)

June 15, 2015

Supreme Court, Queens County

Docket Number: 700910/2012

Judge: David Elliot

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

HANCOCK PROPERTY HOLDINGS LLC,
Plaintiff(s),

Index
No. 700910 2012

- against -

Motion
Date May 27, 2015

KINPIT REALTY INC., et al.,
Defendant(s).

Motion
Cal. No. 65

Motion
Seq. No. 7

FILED
JUN 16 2015
COUNTY CLERK
QUEENS COUNTY

The following papers read on this motion by defendant St. Johns I Associates L.P. (St. Johns), for an order vacating this court's prior order pursuant to CPLR 2221 and 5015 (a) (1).

Papers
Numbered

Order to Show Cause - Affirmation - Exhibits.....	EF122-133
Answering Affirmation - Exhibits.....	EF134-146

Upon the foregoing papers it is ordered that the motion is determined as follows:

On or about February 3, 2015, plaintiff's predecessor, HSBC Bank USA, National Association (HSBC), filed a proposed order to show cause seeking an order: (1) directing that Hancock Property Holdings LLC (Hancock), be substituted as plaintiff herein, inasmuch as HSBC sold and assigned all of its interest in the action and judgment herein; and (2) allowing counsel for HSBC to withdraw as counsel of record. On February 18, 2015, the proposed order to show cause was signed, providing for a return date of March 11, 2015, returnable in the Centralized Motion Part (CMP). On said date, the motion was submitted without opposition in CMP and, subsequently, granted by order dated March 12, 2015.

St. Johns now moves for an order vacating the March 12, 2015 order, stating that the “signed Order to Show Cause struck out the portion of the Order permitting opposition papers” and “[a]s such, [St. Johns] did not submit a formal opposition to Plaintiff’s Motion.” St. Johns also avers that it has a meritorious opposition to the prior motion to substitute.

Initially, to the extent St. Johns’ motion is one made pursuant to CPLR 2221, same is denied, as St. Johns cannot renew or reargue a motion which it did not oppose (*see e.g. Bank of New York v Young*, 123 AD3d 1068 [2014]; *Schenk v Staten Is. Univ. Hosp.*, 108 AD3d 661 [2013]). As to the remaining branch of the motion pursuant to CPLR 5015 (a) (1), in order to vacate its default, St. Johns must demonstrate both a reasonable excuse for its default in opposing the motion and a potentially meritorious opposition thereto (*see* CPLR 5015 [a] [1]; *Thalle Industries, Inc. v Holubar*, 121 AD3d 671 [2014]; *Starakis v Baker*, 121 AD3d 669 [2014]; *Tatarinova v Boo*, 119 AD3d 771 [2014]). Such a motion is addressed to the sound discretion of this court (*see Tatarinova*, 119 AD3d at 771; *Braynin v Dunleavy*, 109 AD3d 571 [2013]).

St. Johns states that it has a reasonable excuse for failing to oppose the motion because it was counsel’s belief that, by the court having stricken that portion of the order to show cause which related to the service of opposition papers thereto, the court, in effect, forbade it from opposing the motion. Further, counsel states that “it was believed that opposition would be heard at the hearing . . . and/or that a briefing schedule would be addressed upon an appearance of the parties.” When counsel understood that the motion was only taken on submission in CMP, counsel submitted an “informal letter to the Court by e-file on March 12, 2015, stating that [St. Johns] risked being severely prejudiced in this action with the substitution of Hancock as the plaintiff, since Hancock has refused to appear and participate in this litigation.” Counsel concludes that, “[d]ue to the discrepancies in this Court’s disallowance of opposition to Plaintiff’s Motion, Defendant has a reasonable excuse for any ‘default’ in failing to submit formal opposition.”

Counsel for HSBC, in opposition to this motion, states that he personally appeared in CMP on the return date of HSBC’s substitution motion and that St. John’s counsel also appeared thereat wherein the latter: (1) failed to submit opposition papers to the motion; (2) failed to request an adjournment of the motion or an extension to oppose it; and (3) “advised the Court in my presence that St. Johns had no opposition to the Substitution Motion” (emphasis in original). HSBC thus states that St. Johns’ attempt to vacate its default and attempt to submit opposition is incongruous with its earlier position. Counsel also states that St. Johns’ excuse is not reasonable as “no attorney reviewing the February 18th Order to Show Cause could reasonably have interpreted the Court’s striking of this language to mean that opposition to the Substitution Motion was prohibited *per se*, as same would clearly violate fundamental due process requirements.”

The court finds that St. Johns' excuse for failing to oppose the order to show cause is not reasonable under the circumstances. The court merely struck the portion of the order to show cause which would have mandated that opposition papers be served upon the movant/applicant by a date certain; it did not by any means prohibit St. Johns from opposing the motion. Indeed, by its terms, the order to show cause provides that any party in interest or their counsel show cause why the relief set forth therein should not be granted. Other than certain procedural differences, the order to show cause was no different than an ordinary notice of motion (CPLR 2214 [d]; Siegel, NY Prac § 248 [5th ed.]). To that end, and "[a]bsent some direction in the order, answering papers may be served at any time up to the argument or submission of the motion" (3 NYPrac, Com. Litig. in New York State Courts § 29:30 [3d ed.]; see *W.I.L.D. W.A.T.E.R.S., Ltd. v Martinez*, 148 AD2d 847 [1989]).

Moreover, counsel for St. Johns has failed to rebut the affirmation of HSBC's counsel wherein the latter stated that he had personal knowledge of St. Johns position – taken in CMP on the return date of the order to show cause – that it had no substantive opposition to HSBC's motion, or even to provide an affidavit of the person in court on behalf of St. Johns on the date of submission of the prior motion. It is further noted that there is no indication that St. Johns requested oral argument or otherwise attempted to clarify issues regarding the submission of opposition papers.

Further, counsel for St. Johns is correct in its assertion that the court did not consider his informal letter e-filed on March 12, 2015 when it issued its order *on the same date* (nor did it consider the responsive letter e-filed by counsel for HSBC e-filed on March 16, 2015), since, *inter alia*: (1) there would be no reason for or requirement that the court peruse the New York State Courts Electronic Filing System website after a motion is submitted without opposition; and (2) the court was never otherwise advised on the submission date that the motion was intended to be opposed.

Finally, it is noted that St. Johns does not take the position that its reasonable excuse for failing to oppose the motion was based on any law office failure (*cf.* CPLR 2005; *1158 Props., LLC v 1158 McDonald, LLC*, 104 AD3d 658 [2013]); rather, same was based upon an apparently genuine belief that this court forbade it from doing so, a position which is unreasonable.

Since St. Johns failed to demonstrate a reasonable excuse for its failure to oppose the prior substitution motion, the court need not determine whether it has set forth a potentially meritorious opposition thereto (*see Rubinstein v Rubinstein*, 128 AD3d 1047 [2015]; *Dobbyn-Blackmore v City of New York*, 123 AD3d 1083 [2014]).

It should be noted that the March 12, 2015 correspondence from St. Johns' counsel indicates that: (1) HSBC still has claims against St. Johns; and (2) St. Johns has already paid Hancock pursuant to the judgment. As to the first assertion, HSBC has admitted it has no legal nor beneficial interest in this action, including claims against St. Johns. Further, it does not appear that the underlying claims were not otherwise transferable before recovery of the judgment (*e.g.* General Obligations Law § 13-103). As to the second assertion, it would appear that St. Johns is less concerned about substitution than it is about recouping monies it paid out to Hancock (monies which were *not* paid by St. Johns to Hancock's predecessor, HSBC). For reasons unknown, St. Johns never attempted to stay execution of the judgment of this court in conjunction with its efforts to vacate said judgment (which efforts proved successful), nor has St. Johns made application pursuant to CPLR 5015 (d), which permits this court to direct a purported judgment creditor to make restitution (*see e.g.* Siegel, NY Prac § 433 [5th ed.]), nor has it attempted to interpose any kind of claim against HSBC or Hancock the judgment against it having been vacated by order dated November 20, 2014.

Accordingly, the motion is denied.

Dated: June 15, 2015



J.S.C.

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