

Gorriti v E. Waters & Assoc., P.C.

2015 NY Slip Op 32657(U)

January 12, 2015

Supreme Court, Westchester County

Docket Number: 60280/2012

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

-----X

ERNEST GORRITI,

Plaintiff,

-against-

E. WATERS & ASSOCIATES, P.C.,

Defendant.

-----X

LEFKOWITZ, J.

DECISION & ORDER

Index No. 60280/2012
Motion Date: Jan 12, 2015
Seq. No. 3

The following papers were read on this motion by defendant for an order dismissing this case with prejudice due to plaintiff's failure to appear at a scheduled conference and for his failure to comply with defendant's request to produce bank records.

- Order to Show Cause -Affirmation in Support
- Exhibits A-D
- Affirmation in Opposition
- Exhibits A-B

Upon the foregoing papers and the proceedings held on January 12, 2015, this motion is determined as follows:

Plaintiff commenced this action on June 29, 2012, to collect on a debt that defendant allegedly owed him pursuant to the terms of a promissory note (the "note"). On August 30, 2012, defendant interposed its answer with counterclaims wherein it admitted the validity of the note but disputed liability and alleged, among other things, a setoff.

In its counterclaims, defendant alleges that from January 1, 2012 until June 20, 2012, it employed plaintiff as a paralegal. Defendant further states that in addition to plaintiff, defendant employed other paralegals who performed various legal services including loan modifications and forensic loan audits under plaintiff's direction. Defendant claims that about \$313,142.00 in fees associated with the performance of these services were misappropriated, embezzled or otherwise misdirected by plaintiff into bank accounts controlled by plaintiff.

By Decision and Order dated August 26, 2013, this court (Lefkowitz, J.), denied plaintiff's motion for an order striking defendant's answer and entering a default judgment. In that decision the court noted that despite having been provided with two court-ordered briefing schedules, plaintiff twice failed to move for a default judgment against defendant. Moreover, even though the Compliance Conference Order dated August 14, 2013, set forth a schedule for the completion of discovery, plaintiff nonetheless moved forward with the motion for a default judgment. In denying plaintiff's motion the court noted plaintiff's persistence in seeking judicial intervention and his refusal to withdraw the motion in light of the discovery schedule set forth in the August 14, 2013 order and directed that plaintiff's counsel make a monetary payment of \$500 to defense counsel pursuant to 22 NYCRR 130.1.

Defendant then brought a motion to dismiss the complaint based upon plaintiff's failure to appear at a conference scheduled for December 5, 2013 and plaintiff's failure to produce bank records demanded by defendant. In opposition to that motion plaintiff argued that he had provided defendant with whatever bank records he possessed and that he missed the conference on December 5, 2013, because he was ill with the flu.¹ Although plaintiff's failure to appear at that conference was sufficient grounds to dismiss the action (*see* Uniform Rules of Trial Court [22 NYCRR] § 202.27[b]), the court (Lefkowitz, J.) by Decision and Order dated February 11, 2014, declined to do so at that time.

On June 6, 2014, a Trial Readiness Order was issued and the note of issue and certificate of readiness were filed on June 26, 2014.

Defendant brings this motion seeking to dismiss plaintiff's complaint on the grounds that plaintiff has failed to appear at several settlement conferences. Specifically, defendant states that plaintiff failed to appear for scheduled conferences on July 7, 2014 and November 3, 2014. Defendant contends that plaintiff has never provided a reason for missing the July 7, 2014 conference. Additionally, defendant contends that plaintiff has not respond to defendant's discovery demands.

In opposition to the motion plaintiff's counsel argues that he was unable to attend the November 3, 2014 conference because he was scheduled to be in Queens County Supreme Court on another matter. In support, counsel has attached a print out from the E-Courts website indicating a settlement conference in the foreclosure part of Queens County Supreme Court for that date. Counsel states that he attempted to contact defense counsel several times during the week prior to the conference to reschedule leaving messages at his office, but that his calls were not returned. Plaintiff does not provide an explanation for not appearing at the July 7, 2014 conference. Additionally, plaintiff states that he has provided all bank records in his possession. Moreover, plaintiff points out that in December, 2013, defendant was provided a briefing schedule

¹ At oral argument of that motion, plaintiff's counsel stated that his office mis-calendared the conference date.

for a motion to compel discovery, but that defendant never filed that motion. Procedurally, plaintiff argues that defendant's filing of the order to show cause at 2:30 p.m. on December 1, 2014 was untimely as the briefing schedule directed that the order to show cause be filed by noon on that day.²

With respect to any outstanding discovery, plaintiff states he has complied to the best of his ability. Additionally, it is noted that the note of issue was filed more than six months ago and although defendant was aware of this discovery prior to the note of issue filing, defendant has not sought to vacate the note of issue in order to obtain that discovery.

Additionally, pursuant to §202.27(b) of the Uniform Rules for Trial Courts, if the defendant appears at a conference and the plaintiff fails to appear, the court may dismiss the action and order a severance of counterclaims. Although, plaintiff's counsel failed without explanation to appear at one conference, in light of the excuse proffered for his nonappearance at the November 3, 2014 conference and his opposition to this motion, the court declines to dismiss the complaint at this time. Accordingly, plaintiff will be given one more opportunity to appear for a conference in the Settlement Conference Part. However, should plaintiff fail to appear at a subsequent court conference without seeking an adjournment according to the DCM Protocol, defendant shall submit an affidavit of noncompliance and a proposed order dismissing the complaint, granting defendant judgment on its counterclaims and directing an inquest on the damages claimed in the counterclaims.

In light of the foregoing it is:

ORDERED that defendant's motion for an order dismissing plaintiff's case is denied; and it is further,

ORDERED in the event plaintiff fails to appear at a subsequent court conference without seeking an adjournment according to the DCM Protocol; defendant shall submit an affidavit of noncompliance and a proposed order dismissing the complaint, granting defendant judgment on its counterclaims, and directing an inquest on the damages claimed in the counterclaims; and it is further,

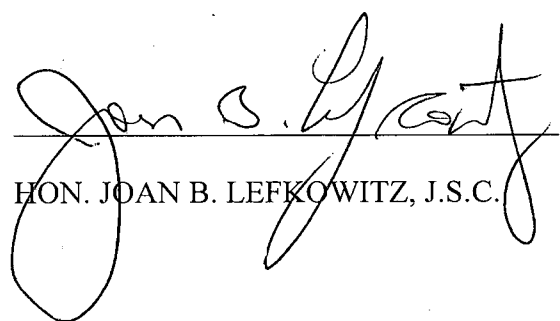
ORDERED that defendant shall serve this order with notice of entry upon plaintiff within seven (7) days of entry of this order; and it is further,

² To the extent that the motion was filed approximately only two-and-a-half hours after the noon deadline and in absence of any prejudice to plaintiff, the court in its discretion deems the late filing de minimus and will consider the motion.

ORDERED that counsel for the parties are directed to appear for a conference in the Settlement Conference Part, Courtroom 1600, on January 27, 2015, at 9:15 A.M.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
January 12, 2015


HON. JOAN B. LEFKOWITZ, J.S.C.

TO :
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cc: Compliance Part Clerk
Settlement Conference Part Clerk