

Matter of Friedus v Gero
2016 NY Slip Op 30935(U)
May 20, 2016
Supreme Court, New York County
Docket Number: 162648/14
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

STEPHEN FRIEDUS, Holder of 50% of Membership
Interest,

Petitioner,

Index No. 162648/14

DECISION/ORDER

For the Dissolution of, and Appointment of, a Receiver
Or Liquidating Trustee, for Bleecker Street Associates
LLC, pursuant to §§ 702 and 703 of the Limited Liability
Company Law,

-against-

LEONARD GERO,

Respondent.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this
motion for : _____

Papers	Numbered
Order to Show Cause and Affidavits Annexed.....	<u>1</u>
Affidavits in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Respondent Leonard Gero brings the instant motion by Order to Show Cause for an Order pursuant to CPLR § 5015(a)(1) vacating an order issued by this court dated February 18, 2015 and granting respondent time to file an answer to the petition and/or accepting the answer that respondent e-filed on February 19, 2015. For the reasons set forth below, respondent's motion is granted.

The relevant facts and procedural history of this proceeding are as follows. In or around December 2014, petitioner commenced the instant proceeding with the filing of a Notice of

Petition and Petition seeking an Order pursuant to Limited Liability Company Law §§ 702 and 703 dissolving and liquidating Bleecker Street Associates LLC ("Bleecker LLC"), appointing a receiver or a liquidating trustee to wind up Bleecker LLC's affairs and awarding plaintiff compensatory damages against respondent based on the alleged breach of his fiduciary duty. Pursuant to a stipulation, the parties agreed to adjourn the return date of the petition until February 19, 2015 but the court did not receive a copy of the stipulation. Thus, in an order dated February 18, 2015, this court resolved the petition, without opposition, insofar as it granted the portions of the petition which sought dissolution of Bleecker LLC and the appointment of a receiver to handle the winding up of Bleecker LLC and denied the portion of the petition which sought compensatory damages (the "February 2015 Order"). Respondent now seeks to vacate the February 2015 Order.

It is well settled that a party seeking to vacate an order issued on default pursuant to CPLR § 5015(a)(1) must establish a reasonable excuse for the default and a meritorious defense to the underlying action. *See Mercado v Allstate Life Ins. Co.*, 193 AD2d 476 (1st Dept 1993); *Arred Enterprises Corp. v Indemnity Ins. Co.*, 108 AD2d 624 (1st Dept 1985).

In the instant action, respondent's motion for an Order pursuant to CPLR § 5015(a)(1) vacating the February 2015 Order is granted. As an initial matter, this court finds that respondent has established a reasonable excuse for his default. Specifically, respondent asserts, and the court agrees, that the February 2015 Order was issued prematurely as the parties had agreed to adjourn the return date of the petition until February 19, 2015.

Additionally, this court finds that respondent has established a meritorious defense to the underlying claim for judicial dissolution of Bleecker LLC. Specifically, respondent asserts that

Bleecker LLC should not be judicially dissolved because the statutory elements of Limited Liability Company Law § 702 have not been satisfied. Limited Liability Company Law § 702 provides for judicial dissolution of a limited liability company as follows:

On application by or for a member, the Supreme Court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company *whenever it is not reasonably practicable to carry on the business* in conformity with the articles of organization or operating agreement (emphasis added).

Here, respondent asserts that his meritorious defense to the claim for judicial dissolution of Bleecker LLC is that it is reasonably practicable to carry on the business, to wit, owning and operating certain property so that such property is fully rented and yielding a net profit. Indeed, respondent affirms that both he and petitioner have regularly received quarterly distribution payments from the rental income from the property owned by Bleecker LLC in the amount of \$10,000.00 each for the last five years without interruption.

Accordingly, as respondent has established a reasonable excuse for his default and a meritorious defense to the underlying proceeding, it is hereby

ORDERED that respondent's motion to vacate the February 2015 Order is granted; and it is further

ORDERED that respondent's answer which was e-filed on or about February 19, 2015 is deemed filed and served *nunc pro tunc*; and it is further

ORDERED that pursuant to the Stipulation signed by the parties dated May 17, 2016, the instant proceeding is referred to a Special Referee to hear and report unless the parties agree that the Special Referee may hear and determine. Within thirty (30) days from the date of this order, counsel for respondent shall serve a copy of this order with notice of entry, together with a

completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date. This constitutes the decision and order of the court.

Dated: 5/20/16

Enter: OK
J.S.C.

CYNTHIA S. KERN
J.S.C.