Board of Mgrs. of Great E. Plaza Condominium v Queensrich Plaza Corp.
2016 NY Slip Op 32793(U)
June 14, 2016
Supreme Court, Queens County
Docket Number: 2991/2013
Judge: Frederick D.R. Sampson
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE FREDERICK D.R. SAMPSON IA Part 31
Justice

THE BOARD OF MANAGERS OF GREAT EASTERN PLAZA CONDOMINIUM,

Plaintiff,

-against-

QUEENSRICH PLAZA CORP., NY 41 LLC d/b/a Horizon Pharmacy 4, AFFINITY HEALTH PLAN, AMERIONE ACCOUNTING & TAX, INC., MONA CAFÉ, INC., NEW YORK STATE DEPARTMENT OF FINANCE, NEW YORK CITY PARKING VIOLATIONS BUREAU, JOHN DOE and XYZ CORP.,

Defendants.

Index Number 2991 2013

Motion Date April 13 2016

Motion Seq. No. 4

FILED
JUL 07 2016
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 15 read on this motion by plaintiff for leave to reargue the court's decision dated December 16, 2015, and entered January 4, 2016; and upon reargument to grant plaintiff's motion for a default judgment; and cross motion by Queensrich Plaza Corp. and Affinity Health Plan (herein collectively referred to as "Queensrich/Affinity"), to reargue their prior cross motion for a default judgment against plaintiff as to their counterclaims.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1 - 7
Notice of Cross Motion - Affidavits- Exhibits.....	8 - 10

Answering Affidavits/Reply Affidavits - Exhibits 11- 15

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

Plaintiff commenced this foreclosure action, as holder of a lien for unpaid common charges against nine commercial condominium units ("Units"), in a building at 41-44-46-48 Main Street, in Flushing, New York. Defendant Queensrich Plaza Corp was named as a defendant in the action because it is the owner of the Units. Defendants NY 41 LLC d/b/a Horizon Pharmacy, Amerione Accounting & Tax Inc., Affinity Health Plan, Mona Café, Inc., John Doe and XYZ Corp. were named as defendants in this action because they were and still are occupants or tenants in possession of the Units. Defendants New York City Parking Violations Bureau was named as a defendant because it may have outstanding violations against the owner of the Units.

As herein relevant, plaintiff submits that it properly served defendants 41 LLC d/b/a Horizon Pharmacy and Amerione Accounting & Tax, Inc., Mona Café, Inc., NYC Parking Violations Bureau and John Doe and XYZ Corp, and that these defendants defaulted by failing to appear. Plaintiff submits that it filed its first motion for a default judgment against the defaulting defendants on February 19, 2014, and later withdrew the motion for a default judgment. Plaintiff later filed a second motion for a default judgment on June 3, 2015 and also moved to appoint a receiver to collect rents from the tenants in possession of the Units. Defendants Queensrich Plaza Corp. and Affinity Health Plan were the only defendants that responded to plaintiff's second motion for a default judgment.

On December 16, 2015, the Court dismissed the action against the defaulting defendants holding, in part, as follows:

> "To the extent plaintiff moves for a default judgment against defendants NY 41 LLC d/b/a Horizon Pharmacy 4, Amerione Accounting & Tax, Inc., Mona Café, Inc., NYC Parking Violations Bureau, John Doe and XYZ Corp., same is denied as untimely, and further the complaint against the said defendants is dismissed. 'CPLR 3215[c] in relevant part: Default not entered within one year. If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned. . . unless sufficient cause is shown why the complaint should not be dismissed.' Plaintiff has not properly moved to vacate its default in moving, and further, even if court were to consider granting such relief, plaintiff has not established sufficient cause, in admissible form for the delay."

Plaintiff submits that the court did not make a determination as to the branch of plaintiff's motion which was to appoint a receiver.

CPLR 2221(d) provides: A motion for leave to reargue:
1. shall be identified specifically as such;

2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and

3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

"Motions for re-argument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision" (*Barnett v Smith,* 64 AD3d 669, 670–671 [2d Dept 2009] *citing, E.W. Howell Co., Inc. v S.A.F. La Sala Corp.,* 36 AD3d 653 at 654 [2d Dept 2007]; *see also, Beverage Marketing USA, Inc. v South Beach Beverage Co., Inc.,* 58 AD3d 657 [2d Dept 2009]).

CPLR 3215 provides that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after [a] default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed" (CPLR 3215 [c]). It is not necessary, however, for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215 © (*see Wells Fargo Bank, N.A. v Combs*, 128 AD3d 812 [2015]; *Mortgage Elec. Registration Sys., Inc. v Smith*, 111 AD3d 804, 806 [2013]; *Jones v Fuentes*, 103 AD3d 853, 853 [2013]; *Nowicki v Sports World Promotions*, 48 AD3d 435, 436 [2008]). Nor is a plaintiff required to specifically seek the entry of a judgment within a year. " "[A]s long as "proceedings" are being taken, and these proceedings manifest an intent not to abandon the case but to seek a judgment, the case should not be subject to dismissal' " (*Brown v Rosedale Nurseries*, 259 AD2d 256, 257 [1999], quoting 7-3215 Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 3215.14; *see Wells Fargo Bank, N.A. v Combs*, 128 AD3d 812 [2015]; *Klein v St. Cyprian Props., Inc.*, 100 AD3d 711, 712 [2012]; *Pisciotta v Lifestyle Designs, Inc.*, 62 AD3d 850, 852 [2009]; *Icon Equip. Distribs. v Gordon Envtl. & Mech. Corp.*, 272 AD2d 579, 579 [2000]; *Home Sav. of Am., F.A. v Gkanios*, 230 AD2d 770, 770-771 [1996]). Here, on February 19, 2014, plaintiff moved for a default judgment within one year of the defendants' default and, thus, did not abandon the action (*see* CPLR 3215 [c]; *Wells Fargo Bank, N.A.*

v Combs, 128 AD3d 812 [2015]; *Mortgage Elec. Registration Sys., Inc. v Smith*, 111 AD3d at 806; *Jones v Fuentes*, 103 AD3d at 853; *Klein v St. Cyprian Props., Inc.*, 100 AD3d at 712).

"An applicant for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer or appear" (*U.S. Bank, N.A. v Razon*, 115 AD3d 739, 740 [2014]; *see* CPLR 3215 [f]; *Citimortgage, Inc. v Chow Ming Tung*, 126 AD3d 841, 843 [2015]). Here, in support of its motion, plaintiff satisfied these requirements (*see U.S. Bank, N.A. v Razon*, 115 AD3d at 740). Contrary to Queensrich Plaza Corp. and Affinity Health Plan's contention, since the defendants in this action defaulted in appearing or answering the complaint and have failed to demonstrate grounds for vacating their default, they are precluded from asserting the plaintiff's lack of standing as a defense. Accordingly, it was unnecessary for plaintiff to demonstrate that it had standing to commence this action in order to establish its entitlement to a default judgment (*see Wells Fargo Bank, N.A. v Combs*, 128 AD3d 812 [2015]; *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989, 990 [2010]).

"To defeat a facially adequate CPLR 3215 motion, a defendant must show either that there was no default, or that it has a reasonable excuse for its delay and a potentially meritorious defense" (*Fried v Jacob Holding, Inc.*, 110 AD3d 56, 60 [2013]; *see Wassertheil v Elburg, LLC*, 94 AD3d 753, 753 [2012]). Here, in opposition to plaintiff's motion, defendants failed to allege, let alone demonstrate, that they did not default or that they had a reasonable excuse for their default. Accordingly, the court grants reargument and thereupon grants the branch of plaintiff's motion which was for leave to enter a default judgment against the defendants upon their failure to appear or answer the complaint.

The branch of the motion which requests that the court appoint a receiver is denied without prejudice as plaintiff failed to make the requisite "clear evidentiary showing" of any danger that the property will be injured or destroyed (*Pixel Intl. Network v State of New York*, 228 AD2d 899, 902, 644 NYS2d 377 [1996]; *see* CPLR 6401[a]; *Vardaris Tech. Inc. v Paleros Inc.*, 49 AD3d 631, 632, 853 NYS2d 601 [2008]). It is well-settled that the appointment of a receiver is within the sound discretion of the court and that 'Courts do not appoint receivers merely for the asking, but only on facts, alleged and proved, showing that one is necessary for the preservation of property, or to accomplish some other useful object' (*Mabon v Ongley Electric Co.*, 156 N.Y. 196, 202, 50 N.E. 805, 806; *Savio v Del Bello*, 267 App. Div. 950, 47 N.Y.S.2d 560. Here, in support of that branch of the motion, plaintiff only averred that "payment of presently accruing monthly charges is essential to the preservation of the Units and that, without its payment, the Units will be materially injured."

Accordingly, the motion for leave to reargue the court's decision dated December 16, 2015, and entered January 4, 2016, is granted. Upon reargument, the branch of the motion which is for a default judgment is granted. The branch of the motion which seeks the appointment of a receiver is denied without prejudice and with leave to renew upon the proper showing.

Cross Motion

The cross motion to reargue a prior cross motion dated August 11, 2015, is denied. Defendants Queensrich/Affinity previously cross moved for a default judgment against plaintiff as to their counterclaims. However, the record indicates that these defendants subsequently withdrew the cross motion pursuant to a Stipulation. Accordingly, the cross motion to reargue the same is denied.

Dated: June 14, 2016

J.S.C.