Marine Bulkheading, Inc. v Mannino
2016 NY Slip Op 32802(U)
February 1, 2016
Supreme Court, Nassau County
Docket Number: 18383/2006
Judge: Karen V. Murphy

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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

MARINE BULKHEADING, INC.,

Plaintiff,

-against-

JOSEPH MANNINO,

Defendants.

Index No. 18383/2006

Motions Submitted: 12/2/15
Motion Sequence: 003, 004

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XXX
Answering Papers.....XXX
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendant Mannino moves this Court for an Order vacating the money judgment in the sum of $30,672.55 entered against him on August 27, 2013 (Motion Sequence 4). Plaintiff opposes the requested relief.

Plaintiff moves this Court for an Order moves this Court for an Order adjudging defendant in contempt for his failure to produce records pursuant to a subpoena for records and to appear for deposition, issued in an effort to satisfy the aforementioned judgment. Plaintiff also requests, *inter alia*, that defendant be fined, and that defendant be directed to produce the records and appear for examination in order to purge himself of his contempt. Defendant opposes the requested relief (Motion Sequence 3).

This action was commenced in 2006. The complaint alleges that plaintiff and

defendant entered into a contract on July 28, 2005. Plaintiff agreed to provide material and services concerning the installation of foundation reinforcing materials for a particular piece of real property located in Brooklyn, New York. Among those materials provided by plaintiff were pilings. Plaintiff further claims that it performed all of the conditions of the contract, and that defendant owed an outstanding balance of $25,550. Plaintiff demanded payment; however, defendant failed to pay the outstanding balance. On October 4, 2005, plaintiff filed a mechanics' lien against the subject property.

Defendant interposed an answer generally denying the allegations made in the complaint, asserted ten affirmative defenses, and alleged three counterclaims. By Decision and Order of the Court (Parga, J.) dated December 14, 2011, the counterclaims were dismissed on the ground that defendant failed to take or move for default within one year of the plaintiff's default in answering. The affirmative defenses remain.

Following the discovery phase, this matter was assigned to this Court for a non-jury trial. The trial commenced on June 27, 2012. During the course of the day's trial proceedings, the matter was settled on June 27, 2012. Both parties were represented by counsel,[1] and the settlement stipulation was placed on the record. The terms and conditions as delineated by plaintiff's counsel, and according to the certified transcript, are as follows:

> The total settlement is $25,000, to be payable as follows: five payments, the first payment commencing August 15, 2012, September 15, 2012, October 15, 2012, November 15, 2012, and December 15, 2012. . . all payments are to be delivered to the office of [counsel], by check, subject to collection. On the fourth payment, to be made on or before November 15, 2012, the plaintiff shall give to the defendant a TR 5, which is a New York City Building Department form, the pile certification and the pile log, and the completed TR 5, all suitable for filing. Following the fifth payment–[defendant's counsel] is directed to hold these documents in escrow and not to release those documents until the fifth payment received from [plaintiff's counsel] is to his law offices and that check being made on December 15, '12, is collected. In the event that such payment is not made in a timely fashion . . . that upon the submission by counsel from [plaintiff's counsel] to [defendant's counsel] at the fax number set forth herein and the

[1]By Order of the Appellate Division, Second Judicial Department dated August 19, 2015, defendant's counsel was suspended from the practice of law for a period of three years commencing September 18, 2015. Defendant's new counsel represents defendant in this matter, and he has submitted further papers with respect to Motion Sequence 4.

> failure to make that payment in that period of time, judgment shall be entered in the full amount of the complaint plus interest, costs, and disbursements, less any payments made on the stipulation . . . giving credit for any payments

Defendant's then-counsel agreed to these terms, further clarifying that, "reference[ ] [to] the delivery of certain documents after the fourth payment, those documents being the pile inspection and certification, pile log and completed New York City Building Department TR 5 forms, . . . those need to be fileable (sic) with is (sic) the New York city Department of Buildings, just for clarity's sake." Counsel also "suggest[ed] that upon the consummation of this settlement and the completion of the last payment the parties execute and deliver stipulations of discontinuance and releases in each other's favor. . ." Plaintiff's counsel agreed, and stated that he would "do him one better. Discontinued with prejudice."

A further statement that this Court would retain jurisdiction "in the event that there are any issues with respect to the stipulation" was also placed on the record by plaintiff's counsel. The Court agreed to retain jurisdiction of this matter, congratulated the parties on working diligently to resolve the matter, and expressed its hope that the parties would move on with their respective endeavors after six years of litigation. This Court also found the allocution of plaintiff's representative, and the settlement, to be satisfactory. Defendant was not present; however, his counsel represented that he had the authority of his client to enter into the stipulation.

Apparently, defendant make three payments of $5,000 each, totaling $15,000. Plaintiff claims that the first payment was made on September 1, 2012, the second on October 1, 2012, and the third on December 27, 2012. Finally, after "attempts to coax Mannino to fulfill his obligation under the settlement proved unsuccessful, [plaintiff's counsel] submitted all of the necessary paperwork to the Nassau County Clerk . . ." Thereafter, a judgment in the amount of $30,672.55 was entered against defendant Mannino on August 27, 2013.

Plaintiff made various efforts to enforce its judgment, including issuing a subpoena duces tecum and for deposition of the judgment debtor. The subpoena was served upon defendant's counsel, and also upon defendant. The subpoena was not a judicially issued subpoena; nevertheless, defendant failed to respond and/or appear on May 21, 2015, the date designated on the face of the subpoena. Defendant never moved to quash the subpoena.

Instead, defendant brought an order to show cause to vacate the judgment entered

against him on August 27, 2013. Defendant's application was denied because he failed to demonstrate that he complied with this Court's Order with regard to service upon plaintiff's counsel.

In regard to the contempt application, this Court thereafter directed counsel of record in this matter to appear on September 2, 2015, for a conference of plaintiff's order to show cause seeking to punish defendant/judgment debtor for contempt. On September 2, 2015, plaintiff's counsel, defendant's counsel of record (soon to be suspended from the practice of law), and defendant appeared for the conference. The contempt application was unable to be resolved on that date, and the matter was adjourned to October 22, 2015 in order for defendant to retain new counsel.

Prior to former defense counsel's suspension, however, he brought a second application to vacate the judgment recorded against defendant. This application was brought on September 14, 2015, four days prior to the commencement of defense counsel's three-year suspension from the practice of law. In that application, defendant contends that the judgment should be vacated on the ground of fraud, misrepresentation, or other misconduct of an adverse party (CPLR § 5015 [a][3]). Specifically, defendant claims therein that he tendered the remaining two payments in one check for $10,000 dated January 10, 2013. Defendant claims that he expected, in exchange, the required "TR-5" and other documents. According to defendant, plaintiff refused to accept the final two payments or to provide the required documents, and instead, sought and obtained a default judgment months after the January 2013 tender. Defendant's then-counsel also sought disqualification of plaintiff's counsel, claiming that plaintiff's counsel previously represented defendant; however, no support for this statement was included with those papers.

On October 22, 2015, plaintiff's counsel and Emily Sgarlato, Esq. appeared for the conference before the Court. Ms. Sgarlato appeared on behalf of defendant Mannino. On that date, the Court issued a so-ordered stipulation directing, *inter alia*, that "Defendant Mannino will appear and submit to a deposition on 11/30/15 and he will produce documents as demanded in plaintiff's previous notice of deposition. Accordingly, Motion Sequence 3 (contempt) is adjourned until December 2, 2015." The stipulation is signed by both counsel, and is so-ordered by this Court. The motion to vacate the judgment was also adjourned to December 2, 2015.

On or about November 4, 2015, defendant executed a consent to change attorney, substituting DeSoscio & Fuccio as counsel in place and stead of Ms. Sgarlato.

According to plaintiff's counsel's affirmation dated December 1, 2015, he, a court

reporter, and Jerald DeSocio, Esq. appeared in the basement of this courthouse for the court-ordered deposition of defendant Mannino. Mr. DeSocio appeared as counsel for defendant. The only person who did not appear was Mr. Mannino. The certified transcript from November 30, 2015, at 9:42 a.m., is submitted by plaintiff. Mr. DeSocio stated on the record as follows: "I came here this morning prepared to do the deposition. I received a phone call from Mr. Mannino about 15, 20 minutes ago saying that he had a medical emergency with his mother and he cannot appear, so I do not have my client present this morning."

Notably, neither defendant nor Mr. DeSocio has provided any documentation of the claimed medical emergency to date; thus, there is no support for his claim that his failure to appear should be excused.

As to the motion to vacate the judgment, plaintiff's counsel submitted opposition papers dated October 16, 2015, prior to the October 22, 2015 conference date when Ms. Sgarlato appeared on defendant's behalf. In view of the complications created by former counsel's suspension and Ms. Sgarlato's brief appearance on defendant's behalf, after DeSocio & Fuccio were substituted as counsel, they were permitted to submit further papers in support of defendant's application to vacate the judgment. Plaintiff's counsel was permitted a further opportunity to respond thereto.

In his further submissions, defendant alleges fraud and bad faith on plaintiff's part, and that the default was wrongfully and inequitably declared. In sum and substance, defendant argues that there was substantial compliance with the stipulation, that plaintiff waived the deadlines for the final payments by accepting the first three late payments, and that plaintiff wrongfully rejected the $10,000 payment (representing the final two payments) allegedly tendered in January 2013, only to proceed months later to declare a default and obtain a judgment against defendant in excess of the remaining $10,000. Defendant also claims that plaintiff's "representation as to the existence of the [engineering] documents and the promise to deliver same was false." Defendant requests, *inter alia*, that, if the documents exist, plaintiff should be directed to produce the originals and be compelled to specifically perform the stipulation by accepting the balance tendered.[2]

In further response, plaintiff contends that the fourth payment of $5,000 was never made; therefore, plaintiff was not required to disclose the engineering documents

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[2]On January 27, 2016, plaintiff's counsel produced for the Court's *in camera* review the original engineering documents consisting of a certification letter, pile installation logs, pile location survey, and a three-page TR 5 report. These documents are dated August, 2005.

pursuant to the stipulation. Plaintiff further contends that defendant's allegations claiming that plaintiff rejected the $10,000 payment are "a sham." Toward that end, plaintiff points to the faxes annexed to the attorney's affidavit in support of the judgment establishing that, as late as April 9, 2013 no further payments had been made.

As to the issue of disqualification raised by defendant's former attorney,[3] the Court notes that defendant's present attorney, and defendant's affidavits (sworn to on June 17, 2015 and November 4, 2014) do not raise this issue. Moreover, the stipulation in question was entered into more than six years after the action was commenced, and the law firm that defendant's prior counsel sought to have disqualified (Alter & Barbaro) represented plaintiff during the 2012 trial that ended in the aforesaid stipulation.[4] Defendant never before raised the disqualification issue until the order to show cause was brought in September 2015. Accordingly, this Court determines that defendant's extremely lengthy delay in moving to disqualify plaintiff's counsel was calculated by his former counsel merely to secure a tactical advantage, and thereby constitutes a waiver of defendant's objection to plaintiff's legal representation (***Hele Asset, LLC v. S.E.E. Realty Associates***, 106 AD3d 692 [2d Dept 2013]).

The Court now considers defendant's application to vacate the judgment. It is undisputed that defendant made three payments of $5,000 each to plaintiff. Each of those payments were made late. The first two payments were each approximately two weeks late. The third payment was approximately two-and-one-half (2 ½) months late.

It is also undisputed that plaintiff negotiated the checks for each of the three late payments and thereby collected $15,000 in payments from defendant. It is the remaining balance of $10,000, in essence, that gives rise to the instant motions.

"[A]bsent any notice of intention to require prompt payment in the future after consistent receipt and acceptance of late and intermittent payments, a vendee is protected from any forfeiture of his rights under an installment contract (citations omitted)" (***Snide v. Larrow***, 93 AD2d 959, 960 [3d Dept 1983]; ***Madison Avenue Leashold, LLC v. Madison Bentley Associates LLC***, 30 AD3d 1 [1st Dept 2006]; ***Lake Park 135 Crossways Park Drive LLC v. Wheatley Capital Inc.***, 36 Misc.3d 1228(A), 2012 NY Slip Op 51539 (U) [Dist Ct Nassau County 2012]).

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[3]Former counsel claimed that plaintiff's counsel "represented Defendant in the past and prior to this action." No further details were alleged.

[4]John N. Cuomo, Esq. presently represents plaintiff in an of counsel capacity to Alter & Barbaro.

As noted above, the stipulation placed on the record on June 27, 2012 provided that the payments were to be made on the fifteenth of each month, commencing in August 2012 and ending with the last payment on December 15, 2012. As stated by Mr. Alter and agreed to by defendant's then-counsel, "in the event such payment is not made in a timely fashion . . . failure to make that payment in the period of time, judgment shall be entered in the full amount of the complaint plus interest, costs, and disbursements, less any payments made on the stipulation."

The stipulation does not bar extensions of time for payment from being made, whether orally or in writing, or by performance. Furthermore, the stipulation does not call for a notice of default/opportunity to cure to be sent to defendant.

"The issue presented in the case at bar is the classic battle between the right to insist upon timely payment of monthly installments and the right to default another upon failure to make timely payments versus waiver to default another after failure to make timely payments where there is a history of accepting late payments" (***Lake Park 135 Crossways Park Drive LLC, supra*** at 2012 NY Slip Op 3).

In this case, "[t]he history between the parties demonstrates acceptance of the late payments by [plaintiff] without any proof that objection was made to the late payments over the course of dealing between the parties" (***Lake Park 135 Crossways Park Drive LLC, supra*** at 2012 NY Slip Op 3).

A copy of defendant's check dated January 10, 2013, in the sum of $10,000 and made payable to Mitchell Alter as attorney, has been submitted by defendant. It is undisputed that it was never negotiated by plaintiff. Whether or not it was actually tendered/sent/delivered to plaintiff, but was rejected at or about that time, remains unclear. Plaintiff's counsel neither confirms nor denies receiving the check in or about January 2013. Plaintiff does not state whether or not it was rejected at that time.

Defendant states in his affidavit sworn to on November 4, 2015 that he believed that his then-counsel tendered the check to plaintiff in January 2013.

Plaintiff's counsel's affidavit submitted in support of the judgment states that Mr. Alter made "many oral requests to defendant's counsel, Damian Pietanza, Esq. for the final two payments, [but] no money was forthcoming from defendant" (Affidavit, ¶ 7). The specific number, timing and method of those requests is not set forth in the affidavit.

Nonetheless, the affidavit submitted in support of the judgment establishes the fact that plaintiff's counsel sent defendant's then-counsel (Pietanza) a facsimile on March 14,

2013 stating that, "unless the $10,000 is paid by tendering that entire sum to me in hand on or before March 25, 2013, plaintiff will seek to enter the judgment for the full sum in the complaint plus interest costs and disbursements less any sums previously paid." In that facsimile, plaintiff's counsel also noted that "defendant Mannino has paid three (3) installments, totaling $15,000 to date, leaving a balance of $10,000 unpaid."

Accordingly, it is established that the three late payments were accepted, and that plaintiff was willing to accept the final two payments, not only as a single payment, but more than three months after the last payment was due on December 15, 2012.

Thus, when defendant's counsel sent a fax to plaintiff's counsel on April 9, 2013 stating that he "was out yesterday," it is reasonable to conclude that plaintiff's counsel had attempted to contact defense counsel on or about April 8, 2013. Furthermore, defendant's counsel wrote in the fax that his "client has authorized [him] to release funds in exchange for final documents required to be provided by [plaintiff]. Please confirm the same are available."

Plaintiff's counsel apparently did not confirm the availability of the engineering documents; instead, he responded to the fax on the same day by handwriting on defense counsel's fax, "4/9/2013 Damian, Time is up. I am going for a full default. I warned you upteen (sic) number of times. B.M. Alter" (emphasis in original).

Clearly, defendant did not make the $10,000 payment by March 25, 2013; however, it appears to the Court that, until the moment when defendant's counsel received the handwritten fax response, defendant was under the impression, based upon the past course of conduct between the parties, that plaintiff was willing to accept late payments, even as late as three months or more.

Although plaintiff did not make application for a default judgment until on or about August 27, 2013, that application was made to the Nassau County Clerk, and not by application to this Court. Pursuant to the terms of the stipulation entered into on the record on June 27, 2012, the parties to this action agreed that this Court would retain jurisdiction over this matter "in the event there are any issues with respect to the stipulation." Despite the fact that plaintiff's counsel made this request, and issues of late payments and alleged non-payment arose after June 27, 2012, plaintiff's counsel disregarded the terms of the stipulation and bypassed this Court by applying directly to the County Clerk for a money judgment against defendant.

Moreover, CPLR § 3215 (g)(1) provides in pertinent part that, "whenever application is made *to the court or to the clerk*, any defendant who has *appeared* is

entitled to at least five days' notice of the time and place of the application. . ." (emphasis added). There is no proof submitted herewith that plaintiff gave the required notice to defendant that it was applying for a default judgment, aside from the April 9, 2013 handwritten missive from plaintiff's counsel, which does not satisfy the statute because it does not provide the time and place of the application.

"Providing such notice gives a defendant who has appeared in the action an opportunity to move to be relieved of his or her underlying default prior to the entry of judgment, as well as to raise objections to the sufficiency of the proof offered in support of the motion for leave to enter a default judgment and to the proposed judgment itself" (***Paulus v. Christopher Vacirca, Inc.***, 128 AD3d 116, 120 [2d Dept 2015]). "The requirement than an appearing defendant be given notice is consistent with the mandates of CPLR 2103 (e), which generally requires that a paper served on any party to a litigation also be served on a party who has appeared in the action whether or not such party has subsequently defaulted (citations omitted)" (***Id.***).

"[F]ailure to provide a defendant who has appeared in an action with the notice required by CPLR 3215 (g)(1), like the failure to provide proper notice of other kinds of motions, is a jurisdictional defect that deprives the court of the authority to entertain a motion for leave to enter a default judgment" (***Id.*** at 127; *see also* ***Deutsche Bank Natinal Trust Company v. Gavrielova***, 130 AD3d 674 [2d Dept 2015]).

While the plaintiff in this case has not brought before this Court a motion for default, the letter and intent of CPLR § 3215 (g)(1) applies. As noted, this Court retained jurisdiction over "issues" arising with respect to the stipulation; nonetheless, plaintiff applied for the default judgment directly to the Clerk, and there is no proof that plaintiff provided the required notice of its intention to so apply, thereby violating CPLR § 3215 (g)(1) and circumventing the authority of this Court.

It is undisputed that defendant appeared in this action long ago, and that defendant was continuously represented by counsel. Accordingly, defendant was entitled to notice of plaintiff's August 2015 application for a default judgment. Plaintiff having failed to provide the required notice, defendant's motion is granted, and the default judgment obtained against defendant on August 27, 2015 is hereby vacated (Motion Sequence 4).

In view of the foregoing, plaintiff's application seeking to hold defendant in contempt is denied as academic (Motion Sequence 3). The Court, however, cautions defendant that he is not free to flout the Orders issued by this Court without incurring dire legal consequences, including an adjudication of contempt, and, if duly established, issuance of a warrant for his arrest.

Inasmuch as the engineering documents exist and are in plaintiff's possession, and defendant requests specific performance of the of the balance of the settlement stipulation upon production of those documents (Affirmation of James B. Fuccio, Esq., ¶ 21), it is hereby

ORDERED that counsel for all parties, with their respective clients, appear before this Court on February 23, 2016, at 10:00 a.m., and it is further

ORDERED that defendant bring the sum of $10,000, in the form of a certified bank check made payable to plaintiff, and it is further

ORDERED that plaintiff bring the original engineering documents (a copy of which the Court retains from its *in camera* review), and it is further

ORDERED that the parties shall exchange the payment and the documents on that date, at that time, in the presence of this Court (*see* ***Mader v. Mader***, 101 AD2d 881 [2d Dept 1984]).

The foregoing constitutes the Order of this Court.

Dated: February 1, 2016
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED

FEB 04 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE