

126 Henry St. Inc. v Cater
2016 NY Slip Op 32933(U)
May 13, 2016
Supreme Court, Nassau County
Docket Number: 9000/2014
Judge: Anthony L. Parga
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SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

-----X PART 6
126 HENRY STREET INC., D/B/A
VILLAGE AUTO CLINIC,

Plaintiff,

Action #1
INDEX NO. 9000/2014

-against-

MOTION DATE: 03/31/16
SEQUENCE NOS.: 004.005
XXX

BETTY CATER,

Defendant.

-----X
BETTY CATER,

Plaintiff,

Action #2
INDEX NO. To Be Assigned

-against-

VILLAGE AUTO CLARENCE MURRAY

Defendant.

-----X
Notice of Motion, Affm., Affd., & Exhs..... 1
Notice of Cross Motion, Affm., Affd., & Exhs..... 2

Upon the foregoing papers, the motion by plaintiff, 126 Henry Street Inc. d/b/a Village Auto Clinic (hereinafter "126 Henry"), which seeks an order pursuant to 22 NYCRR§ 202.27(a), granting judgment on default to plaintiff in Action 1 and dismissing Action 2 and the cross motion of the defendant, Betty Cater, which seeks, *inter alia*, an order pursuant to CPLR Rule 5015, vacating the defendant's non-appearance, are determined as follows.

Plaintiff in the instant action is seeking to compel specific performance of an alleged contract entered into between Clarence Murray, the President of 126 Henry and the defendant, Betty Cater, for the sale of the premises known as 126 Henry Street, Hempstead, New York. In his affidavit submitted in support of the motion, Mr. Murray attests that he has been conducting an auto repair business at the subject property for many years, leasing the property from

defendant, Cater.

This Court in its prior Orders dated March 6, 2015 and July 20, 2015, joined the two actions for trial (transferring the landlord/tenant proceeding, Action 2, from the Nassau County District Court) and also permitted defendant, Cater's prior counsel to be relieved and withdraw as Ms. Cater's attorney. In the July 20, 2015 Order, which relieved counsel, the actions were stayed for 60 days in order for Ms. Cater to retain new counsel or to proceed, *pro se*. The July 20, 2015 Order specifically advised the defendant that she must appear for a compliance conference on November 4, 2015, either by counsel or in person and that the failure to appear in court would result in this Court granting a judgment in favor of the plaintiff on default pursuant to 22 NYCRR§ 202.27.

On November 4, 2015, plaintiff's counsel was unable to appear and the defendant did not appear and the Court adjourned the conference to December 2, 2016 and advised plaintiff's counsel to notify the defendant of the new court date. Plaintiff's counsel did notify the defendant, by letter dated November 19, 2015, (US Postal Service Priority Mail receipt annexed as Exhibit), of the adjourned date for the conference. On December 2, 2015 plaintiff's counsel appeared; however, the defendant failed to appear and the matter was adjourned to February 11, 2016. The court advised plaintiff's counsel to move for a default judgment based upon the defendant's failure to appear, but to also notify the defendant of the adjourned conference date.

Additionally, the plaintiff moved, by Order To Show Cause, for a preliminary injunction, restraining the defendant from selling, transferring, assigning or diluting, her interest in the subject property. The Order To Show Cause, with a temporary restraining order (TRO), was to be submitted on January 26, 2016 and the plaintiff notified the defendant of the January 26, 2016 submission date. The defendant did not appear on January 26, 2016, nor did she submit opposition, and the Order To Show Cause with the TRO, was granted, with a return date of February 11, 2016, the same date of the adjourned conference.

On February 11, 2016, plaintiff's counsel appeared and once again the defendant failed to appear. This Court in its Order dated February 19, 2016, which granted plaintiff's request for a preliminary injunction, acknowledged the defendant's failure to appear at the scheduled conferences on December 2, 2015 and February 11, 2016 and advised plaintiff again, to move for relief pursuant to 22 NYCRR§ 202.27. This Court's Order of February 19, 2016 also gave

the case a control date of March 1, 2016, pending the plaintiff's submission of a motion for a default judgment pursuant to 22 NYCRR§ 202.27.

On March 1, 2016 plaintiff's counsel appeared in court and defendant once again failed to appear and plaintiff submitted the subject motion for a default based upon the defendant's failure to appear for the conferences on December 2, 2015 and February 11, 2016.

The failure of defendant Cater to appear for the scheduled court conferences on December 2, 2015 and February 11, 2016, as well as the March 1, 2016 date, is sufficient grounds for this Court to strike the defendant's answer and to also dismiss the summary proceeding [Action 2] (*Iordanou v. AJK Industires, Inc.*, 129 A.D.3d 1028, 10 N.Y.S.3d 884 [2nd Dept. 2015]). The defendant was aware, given the clear and unequivocal language of this Court's Order of July 20, 2015, that her failure to appear at this Court's conference, would result in a judgment in favor of the plaintiff on default. Not only did defendant Cater fail to appear at one conference, she failed to appear at a total of three conferences.

In opposition to the motion defendant Cater has submitted a cross motion to vacate her non-appearance at the conferences and to permit her to amend her answer. "As a general rule, a defendant who seeks to vacate a default in appearing at a compliance conference is required to demonstrate both a reasonable excuse for his default and a potentially meritorious defense." (*Foley Inc. v. Metropolis Superstructures, Inc.*, 130 A.D.3d 680, 11 N.Y.S.3d 873 [2nd Dept. 2015]).

The affidavit of defendant Cater submitted in support of the cross motion fails to establish a "reasonable excuse" for her failure to appear at the scheduled conferences. Defendant Cater states in her affidavit that she had represented herself "in many summary proceedings", so she was clearly aware of the nature of legal proceedings and the importance of appearing for scheduled court proceedings. While defendant Cater further states that she "did not understand the complexity of the discovery process", the default is not based upon her failure to comply with the plaintiff's discovery demands (although she has also failed to comply with the Preliminary Conference Order dated April 15, 2015 as it relates to discovery); rather, it is based upon her failure to appear at the three scheduled court conferences.

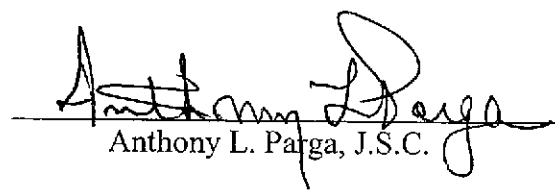
Accordingly, the plaintiff's motion for an order pursuant to 22 NYCRR§ 202.27(a), granting plaintiff a judgment on default in Action 1 and dismissing Action 2, is granted to the extent that the parties shall proceed to a closing on the subject real property in accordance with

the written agreement dated January 25, 2013, said closing to be held within 90 days from the date of this Order. The summary proceeding (Action 2) is hereby dismissed pursuant to 22 NYCRR§ 202.27(b) based upon Ms. Cater's failure to appear at the scheduled conferences.

The cross motion is denied in all respects.

This Constitutes the decision and Order of this Court. Any request for relief not expressly granted herein is denied.

Dated: *May 13*, 2016


Anthony L. Parga, J.S.C.

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ENTERED

MAY 16 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE