

545 Broadway BK LLC v Carnegie Mgt. Corp.
2017 NY Slip Op 30604(U)
March 10, 2017
Supreme Court, New York County
Docket Number: 653108/2015
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

545 BROADWAY BK LLC

—against—

CARNEGIE MANAGEMENT CORP.

Index. No.: 653108/2015

Subm. Date: January 31, 2017

Motion Seq. No.: 002

DECISION AND ORDER

The following papers, numbered 1 to 3 , were read on this motion to vacate order and judgment:

Notice of Motion/Order to Show Cause—Affidavits—Exhibits _____	No(s). <u>1</u>
Answering Affidavits—Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3</u>

Non-party Carnegie Management Inc. (CMI) moves pursuant to CPLR 5015 (a) (1), (3) and (4) to vacate the Court's Order of January 19, 2016, which granted plaintiff's motion for a default judgment, and the resulting declaratory judgment of December 6, 2016.¹ The challenged declaration decreed that a lease agreement entered into by plaintiff 545 Broadway BK LLC (545 Broadway) as landlord and defendant Carnegie Management Corp. (CMC) as tenant "for a portion of the Fourth Floor at the building known as and located at 545 Broadway, New York, New York 11206 [would] expire pursuant to its terms on March 31, 2017." Plaintiff brought this action and effected service via the Secretary of State on CMC, a long dissolved entity that, according to CMI, had no relationship to either the subject leasehold or CMI. CMI alleges that it is the tenant.

Further, CMI argues that plaintiff improperly served all subsequent notices in the proceeding at the incorrect address "545 Broadway, New York, New York 11206," reflecting an

¹ Although the Clerk countersigned, filed and docketed the Judgment on December 6, 2016, the Clerk's filing concerned only the adjustment of costs. The part of the Judgment containing declarative relief was issued on April 22, 2016 and entered by the County Clerk on April 25, 2016.

error in the designation of the borough. The leased premises are located in Brooklyn. This admitted error consistently appears throughout plaintiff's filings, starting with the complaint and ending with the declaratory judgment. The notice of settlement of judgment and a second CPLR 3215(g)(4) notice, served arguably in furtherance of the settlement notice, indicate they were mailed to the correct address. The judgment itself contains both versions of the address.

In opposition, plaintiff argues that the error in the address is harmless as the zip code represented the area in Brooklyn. Further, plaintiff submits for the first time a copy of the lease agreement, which identifies CMC as the tenant in the title and signature line sections of both the lease and the appended rider. In addition, plaintiff submits a copy of the estoppel certificate that it sought to have the tenant sign in May 2015, in connection with plaintiff's purchase of the premises. The signature line in the estoppel certificate is in the name of CMC, as well. Finally, regarding the merits, plaintiff argues that since the rider to the lease provides for only one option to renew the lease for a five-year term from its original expiration date of March 30, 2012, the lease term must then expire no later than March 31, 2017.

In reply, CMI directs the Court's attention to paragraph 57 of the rider, governing provision of legal notices under the lease. It identifies CMI as the tenant. CMI also submitted samples of checks drawn on its account for payment of rent. Further, CMI submits its copy of the rider, which sets the original expiration date in the year 2020, with the exercised option extending the lease to 2025. Plaintiff argues that the conflicting references to CMC were a scrivener's error that both sides apparently overlooked.

Pursuant to CPLR 5015(a)(1), the Court has discretion to vacate a default judgment on motion of any interested person made within a year of service of a copy of the judgment with

notice of entry. Movant must make a showing of an excusable default and a potentially meritorious defense (*e.g.*, *Caba v Rai*, 63 AD3d 578, 580 [1st Dept 2009]). However, where a defendant raises a jurisdictional objection as the basis for vacatur of a default judgment pursuant to CPLR 5015(a)(4), the court must resolve it first, before determining whether a discretionary vacatur is appropriate (*id.* at 581 [citations omitted]).

Here, CMI's jurisdictional arguments boil down to the assertion that the wrong party, CMC, was sued and served. Assuming *arguendo* that CMI is correct, that does not establish lack of jurisdiction over CMC, but rather concerns the merits of plaintiff's claim against it.

CPLR 5015(a)(1) is a more appropriate vehicle for vacatur of the December 16, 2016 judgment. The fact that CMI is a non-party does not bar its application. "To seek relief from a judgment or order, all that is necessary is that some legitimate interest of the moving party will be served and that judicial assistance will avoid injustice" (*Oppenheimer v Westcott*, 47 NY2d 595, 602 [1979] [internal quotation marks and citations omitted]). As CMI alleges to be the actual tenant whose leasehold is the subject of the declaratory judgment, it has sufficient standing on this motion. The two affidavits of CMI's principal and the supporting exhibits make a sufficient showing of both an excusable default and a meritorious defense, raising issues of fact that favor consideration on the merits.

CMI's remaining basis for this motion pursuant to CPLR 5101(a)(3) is academic. To the extent that CMI seeks dismissal of this action against CMC, the Court will consider the issue of the accurate corporate identity of the tenant after close of all discovery, unless the parties resolve this issue earlier on stipulation. At the present time, in the interests of judicial economy and expedience, CMI will join this action as an additional defendant.

Accordingly, it is hereby

ORDERED that the motion of Carnegie Management Inc. is granted to the extent of recalling and vacating the Decision and Order of the Court entered on January 19, 2016 and the Judgment of the Court docketed on December 16, 2016; and it is further

ORDERED that the Clerk of Court shall amend the caption, adding Carnegie Management Inc. as a defendant, and plaintiff's pleading shall be deemed amended to that effect; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that defendant Carnegie Management Inc. shall answer the complaint within 20 (twenty) days from the date of entry of this Order; and it is further

ORDERED that the parties shall appear through counsel of record for a preliminary conference in Room 412, 60 Centre Street, on April 5, 2017 at 2:00 p.m. At the conference, the parties should be ready to discuss remaining issues of document and electronic disclosure and present a joint schedule of dates certain for depositions; and it is further

ORDERED that movant shall serve a copy of this Order with notice of entry upon plaintiff and the County Clerk within 20 (twenty) days from the date of entry of this Order.

This constitutes the Decision and Order of the Court.

Date: March 10, 2017

ENTER:



Ellen M. Coin, A.J.S.C.