101-115 W. 116th St. Realty Corp. v West Harlem Community Org., Inc.
2017 NY Slip Op 31298(U)
June 13, 2017
Supreme Court, New York County
Docket Number: 654546/12
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

101-115 W. 116th STREET REALTY CORP.,

Plaintiff,

Index No.: 654546/12

-against-

Motion Seq. No.: 003

WEST HARLEM COMMUNITY ORGANIZATION, INC., **DECISION & ORDER**

Defendant.

----------X

HON. SHLOMO S. HAGLER, J.S.C.:

Defendant West Harlem Community Organization, Inc. ("WHCO") moves (i) to vacate a judgment entered on March 23, 2016 in the Office of the New York County Clerk in the amount of $630,249.23 (the "Judgment") against WHCO and in favor of plaintiff 101-115 W. 116th Street Realty Corp. (the "Landlord") pursuant to CPLR § 5015(a)(1) on grounds of excusable default; and (ii) for temporary and preliminary injunctive relief pursuant to CPLR § 6301, restraining and enjoining the Landlord from enforcing the Judgment pending the determination of this motion. The Landlord opposes the motion.

BACKGROUND FACTS

WHCO is a non-profit community-based organization which operates a pre-school education and health program (the "Head Start Program") in the West Harlem area. The Head Start Program operates through grant funds dispersed by the New York City Administration for Child Services ("ACS"), which are a combination of federal Head Start funding, New York City Child Care funding, and New York State Universal Pre-Kindergarten funding (Order to Show

Cause, Affidavit of Andrea Hayes [Hayes Affidavit] at ¶¶ 2-4). [1]

On or about October 1, 2001, WHCO entered into a lease with the Landlord (the "Lease"), for a 10,000-square foot space at 101-115 West 116th Street (the "Premises") to be used as a center for the Head Start Program. The Lease provided for an term commencing November 1, 2001 to October 31, 2016.[2] The Lease further provided that rent was payable in equal monthly installments of $19,166.00 (*Id.*, Exhibit "1" [Lease]).

The Lease included a provision allowing WHCO to terminate the Lease without further liability to WHCO ("Tenant") if WHCO ceases to receive government funding. Section "X" of the Lease entitled "Tenant's Right to Terminate" provided:

> "It is mutually understood and agreed that the obligation of Tenant to pay rent hereunder is dependent upon Tenant's continued funding by the City of New York and the agencies thereof for the purpose for which this lease is executed, and should both the Tenant and the program at any time or times cease to be funded by the City of New York or by any of its agencies for said purposes, this lease shall cease and terminate and Tenant's obligation to pay rent hereunder shall be terminated" (*Id.*, Exhibit "1" [Lease], Section "X").

According to WHCO, in or about May 2012, ACS reduced the monies allocated to WHCO. By letter, dated July 24, 2012, WHCO sent a written notice of termination to the Landlord pursuant to the Lease which provided:

> "This letter is to inform you that the West Harlem Community Organization, Inc. will no longer be funded by the City of New York to operate a Head Start center at 101 West 116th Street in Manhattan. This is effective as of October 1, 2012.
>
> Please be advised that pursuant to Section X of the lease agreement, the lease shall cease and West Harlem's obligation to pay rent hereunder shall be terminated" (the

---

[1]Andrea Hayes is the Executive Director of the West Harlem EarlyLearn Preschool & Family Child Care Network, a division of WHCO (*Id.* at ¶ 1).

[2]The Lease is unclear as to whether it runs for a term of fifteen years or for a term of ten years with an option given to the Tenant to renew for an additional five years.

"Termination Notice") (Order to Show Cause, Hayes Affidavit, Exhibit "2").

By email on October 1, 2012, the Landlord notified WHCO that the Landlord had not yet received the keys for the Premises, and stated that WHCO would still be responsible for "rent and additional rent." By email dated October 3, 2012, the Landlord acknowledged receipt of the Termination Notice, and stated that "we have yet to receive keys." The Landlord sought payment "for holdover rent for [sic] month of October" (*Id.*, Exhibit "3"). The Hayes Affidavit provides that WHCO tendered the keys to the Premises on or about October 4, 2012 (*Id.* at ¶ 11). According to the Landlord, it re-let the Premises to another tenant in August 2014 (Affirmation in Opposition at ¶ 55).

In or about December, 2012, the Landlord commenced the instant proceeding against WHCO for breach of the Lease, asserting five causes of action.[3] WHCO claims that at the time, Andre Soleil, Esq. ("Soleil"), Chairman of the Board of Directors of WHCO (the "Board"), advised the Board that he would represent WHCO in this action.

On or about March 21, 2013, the Landlord moved for a default judgment based on WHCO's failure to appear. By Order, dated April 22, 2013, this Court granted the Landlord's motion for a default judgment on the issue of liability, without opposition, and directed the Landlord to file a Notice of Inquest for an assessment of damages.[4] In or about May 2013,

---

[3]Landlord seeks to recover (1) $40,887.48 for rent arrears for the period of August 1, 2012 through October 4, 2012 ("First Cause of Action"); (2) $936,602.52 for rent for the remainder of the lease term through October 31, 2016 ("Second Cause of Action"); (3) $92,519.65 for property tax arrearage and interest, and legal fees related thereto ("Third Cause of Action"); (4) $14,399.38 for water and sewer charges ("Fourth Cause of Action"); and (5) $3,950.00 in legal fees ("Fifth Cause of Action").

[4]Although the Landlord presents proof that the Notice of Entry was served upon WHCO by service upon Soleil (Affirmation in Opposition, Exhibit "B"), WHCO denies being served

WHCO filed an Order to Show Cause seeking to vacate the default judgment (the "2013 OTSC"). WHCO claims that Soleil caused a non-attorney employee of WHCO to file said 2013 OTSC. By Order, dated June 4, 2013, the Court denied WHCO's motion "as movant [WHCO] failed to appear." On or about June 5, 2013, the Landlord served WHCO with a "Notice of Inquest," setting a hearing date of June 17, 2013. It is undisputed that said hearing never occurred. According to WHCO, in November 2014, WHCO demanded that Soleil resign from the Board (*Id.* at ¶ 53).

On or about February 11, 2015, WHCO received notice from the Court that an inquest was scheduled for March 2, 2015 before the Hon. Ira Gammerman, J.H.O. (*Id.*, Exhibit "6 ") (the "Inquest Hearing"). Hayes asserts that she attended the Inquest Hearing on March 2, 2015, and learned from the Landlord's counsel that an inquest had been scheduled on several prior occasions, and on each such occasion, Soleil failed to appear on WHCO's behalf (*Id.* at 27).[5] Judge Gammerman recommended an award to the Landlord in the amount of $40,887.48 for unpaid rent from August 1, 2012 through October 4, 2012 when WHCO vacated the Premises, and an award of $458,524.50 for unpaid rent from October 5, 2012 until the Premises was re-let to another tenant in August 2014, for a total award in the amount of $498,411.98 (Affirmation of William R. Fried in Opposition to the Reply Affidavit of Soleil, Exhibit "B" [sic] [Transcript] at

---

(Order to Show Cause, Hayes Affirmation, ¶ 20).

[5]Landlord's counsel confirmed to Judge Gammerman that the matter had been on the inquest calendar on three previous occasions but that Soleil failed to appear. Judge Gammerman stated on the record that Soleil was still the attorney of record given that there had been no proceedings to substitute attorneys (Affirmation of William R. Fried in Opposition to the Reply Affidavit of Soleil, Exhibit "B" [*sic*] [Transcript] at 3-5).

7:14-10:9, 14:9-10).[6] On October 14, 2015, this Court so-ordered the transcript of the Inquest Hearing and directed the clerk to enter judgment accordingly.

On March 23, 2016, Landlord caused the Judgment to be entered in the amount of $630,249.23 inclusive of post-judgment interest of 9% running from April 22, 2013, in the amount of $131,007.25, and $850.00 in costs (*Id.*, at ¶ 31; Affirmation in Opposition at ¶ 28). On or about May 24, 2016, the Landlord served WHCO with a "Marshal's Notice of Impending Levy & Sale," by which the Landlord sought to levy WHCO's personal property to satisfy the Judgment ("Execution Notice").

Alleged Past Misconduct by Soleil

According to the Hayes Affidavit, throughout Soleil's tenure, Soleil engaged in numerous instances of wrongful conduct and self dealing, and breached his fiduciary duties to WHCO. The Hayes Affidavit alleges that this misconduct led to, among other things (i) a threat by the IRS to shut down WHCO by revoking its status as a non-profit charitable organization, and to seize its remaining assets; (ii) a levy by the IRS in or about November 2013 of WHCO's Head Start bank accounts to satisfy approximately $400,000 in outstanding tax liens; (iii) a threat by ACS to terminate WHCO's contracts; (iv) a demand by the New York City Department of Housing Preservation and Development ("HPD") for a full accounting of sales proceeds of an allegedly unauthorized sale directed by Soleil of one of WHCO's properties; and (v) audits by the IRS, HPD and ACS. The Hayes Affidavit also states that the NYS Attorney General's Office ("AGO") has commenced an investigation into the conduct of Soleil and a WHCO employee

[6]WHCO concedes it owes the Landlord unpaid rent from August 1, 2012 through October 4, 2012 in the amount of $40,877.48, as alleged in the First Cause of Action (Defendant's Memorandum of Law in Support at 7, fnt. 1).

Joednee Copeland (Order to Show Cause, Hayes Affidavit at ¶¶ 34-54).

Malpractice Action

On or about March 27, 2015, WHCO commenced an action against Soleil, and other Board members, entitled *West Harlem Community Organization, Inc. v West Harlem Community Organization Local Development Corporation*, et al. [Hon. Jeffrey K. Oing, J.S.C.] [Index No. 651003/15], for injunctive relief, declaratory judgment, conversion,, breach of fiduciary duty, breach of contract, among other causes of action. By Second Amended Complaint filed in or about July 2016, plaintiff therein asserted a cause of action for professional malpractice against Soleil in connection with this action.

Instant Proceeding

The Hayes Affidavit asserts that, although at the time this action was commenced in December 2012, Soleil advised the Board that he would represent WHCO in this proceeding, he failed to do so as follows: (1) Soleil failed to file an Answer to the Summons and Complaint, or otherwise move to dismiss any of the causes of action; (2) Soleil failed to oppose the Landlord's motion for a default judgment filed on or about March 21, 2013, which was granted as to liability on or about April 23, 2013; (3) Soleil caused a non-attorney employee of WHCO to file an Order to Show Cause on or about April 19, 2013 to vacate the "default judgment" but failed to appear on the return date; the motion was denied for failure of movant to appear; (4) Soleil falsely apprised the Board that he was engaged in settlement discussions with the Landlord, and that the matter would be resolved; and (5) Soleil failed to appear at any of the scheduled dates for the inquest including at the Inquest Hearing itself, but had not sought to be relieved as counsel (*Id.* at

¶¶ 15-28).[7]

DISCUSSION

Motion to Vacate on Grounds of Reasonable Excuse

CPLR § 5015(a)(1) provides a court may grant a motion to vacate a default judgment on the grounds of an excusable default if:

> "[S]uch motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry."

"To obtain relief from a default judgment, a party is required to demonstrate both a reasonable excuse for the default and a meritorious claim or defense" (*Cheri Rest. Inc. v Eoche*, 144 AD3d 578, 579 [1st Dept 2016] [internal citation and quotation omitted]. "What constitutes a reasonable excuse for a default judgment generally lies within the sound discretion of the motion court" (*Rodgers v 66 E. Tremont Hgts. Hous. Dev. Fund Corp.*, 69 AD3d 510, 510 [1st Dept 2010] [internal citations omitted]. "There is a strong public policy that favors deciding matters on their merits in the absence of demonstrable prejudice" (*Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 293 AD2d 324, 325 [1st Dept 2001]; *see New York & Presbyt. Hosp. v American Home Assur. Co.*, 28 AD3d 442 [2d Dept 2006]).

In support of its motion, WHCO argues that Soleil's failure to defend WHCO amounts to law office failure which constitutes a reasonable excuse for WHCO's default under CPLR 5015(a), and that WHCO reasonably relied on Soleil's representations. WHCO further argues

---

[7]By Order, dated December 12, 2016, this Court granted the motion by A.R. Soleil & Company and Soleil to be relieved as counsel for WHCO. The Order provided further that former counsel withdrew the second prong of the motion without prejudice (the second prong sought an Order that "neither A.R. Soleil & Company P.C. nor Andre Ramon Soleil, Esq. ever appeared as counsel for the Defendant").

that it has a meritorious defense to the action given Section "X" of the Lease which entitles WHCO to terminate the Lease upon notice if the City ceases providing funding to WHCO (Defendant's Memorandum of Law in Support at 3-7).

In opposition, the Landlord argues that (i) WHCO's motion made pursuant to CPLR 5015(a) is untimely as it was made more than one year after the Court granted the Landlord's motion for a default judgment; (ii) the failure of Soleil to represent WHCO in this action amounts to not mere law office failure but rather neglect and malpractice, and as such, fails to constitute a reasonable excuse for WHCO's default; and (iii) Section "X" of the Lease allows WHCO to terminate the Lease only when both the tenant and the program cease to be funded by the City, but that the Termination Notice fails to allege that the City would no longer fund the subject Head Start program (Affirmation in Opposition, at ¶¶ 29-62).

Timeliness

Here, the Judgment was entered on or about March 23, 2016, and the Order to Show Cause seeking to vacate the Judgment, was filed on June 10, 2016, well within one year of entry of the Judgment and thus was timely.[8]

Reasonable Excuse

WHCO cites law office failure by Soleil, their former counsel, as a reasonable excuse for its default. "Under certain circumstances, law office failure may provide a reasonable excuse for a default" (*Matter of Rivera v New York City Dept. of Sanitation*, 142 AD3d 463, 464 [1st Dept 2016]. "CPLR 2005 specifically permits the court to exercise its discretion in the interest of

---

[8]The Order to Show Cause provides that the Landlord acknowledges service on the subject date of filing.

justice and excuse a default resulting from law office failure" (*Hunter v Enquirer/Star, Inc.*, 210 AD2d 32, 33 [1st Dept 1994]. Here, WHCO proffers the Hayes Affidavit detailing Soleil's failures to represent WHCO after the subject action was commenced despite his assurances to the contrary. Specifically in connection with this action, the Hayes Affidavit recites that Soleil failed to answer the Summons and Complaint, oppose the motion for a default judgment, appear on the return date of an Order to Show filed by him or at his direction and appear at the Inquest Hearing (and appear at several previously scheduled dates) despite assurances from Soleil at Board meetings that he was in settlement discussions with the Landlord. The Hayes Affidavit also sets forth allegations against Soleil of misconduct and self-dealing, and states that Soleil is being investigated by various agencies. Under the circumstances of this case and given the rampant alleged misconduct of Soleil, this Court in the interest of justice exercises its discretion to conclude that Soleil's conduct constitutes law office failure and, as such, serves as a reasonable excuse for WHCO's default.

Meritorious Defense

In the instant matter, WHCO has shown the "'existence of a possibly meritorious defense'" (*Berardo v Guillet*, 86 AD3d 459, 460 [1st Dept 2011] quoting *Tat Sang Kwong v Budge-Wood Laundry Serv.*, 97 AD2d 691, 692 [1st Dept 1983]). It is undisputed that WHCO sent the Landlord the Termination Notice which informed the Landlord of its decision to exercise its termination right pursuant to Section "X" of the Lease on grounds that WHCO would "no longer be funded by the [City] to operate a Head Start center...effective October 1, 2012" (Order to Show Cause, Hayes Affidavit, Exhibit "2").

The Landlord argues that the Termination Notice fails to strictly comply with the

language of Section "X" of the Lease which permits termination when the "[t]enant and the program" … cease to be funded by the City or its agencies. The Landlord maintains that the Termination Notice fails to allege that the Head Start program would no longer be funded and that the Hayes Affidavit asserts that WHCO exercised its right to terminate under the Lease as a result of only a "reduction in ACS funding" (Affirmation in Opposition at ¶¶ 55-61; Order to Show Cause, Hayes Affidavit at ¶ 9). However, "for the purposes of a motion to vacate a default, the facts alleged by defendant were certainly adequate to demonstrate the existence of a possibly meritorious defense" (*Tat Sang Kwong v Budge-Wood Laundry Serv.*, 97 AD2d 691 at 692).

Motion for Injunctive Relief

In light of the foregoing determination granting WHCO's motion to vacate the Judgment, WHCO's motion seeking injunctive relief pursuant to CPLR § 6301 is denied as moot.

CONCLUSION

Accordingly, it is hereby

ORDERED, that WHCO's motion to vacate the default judgment in this matter pursuant to CPLR § 5015(a) is granted; and it is further

ORDERED, that WHCO shall interpose an Answer within thirty days of service of this Order with Notice of Entry; and it is further

ORDERED, that WHCO's motion for injunctive relief is denied as moot.

Dated: June 13, 2017

ENTER:

J.S.C.
SHLOMO HAGLER
J.S.C.