

Mollica v Ruzza

2017 NY Slip Op 31652(U)

June 6, 2016

Supreme Court, Dutchess County

Docket Number: 50759/2014

Judge: James D. Pagonis

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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CHERYL M. MOLLICA,

Plaintiff,

-against-

DECISION AND ORDER

Index No. 50759/2014

WILLIAM A. RUZZA, JR., CHRISTOPHER C. MOLLICA, SYNERGIX FUNDING GROUP, LLC, RAYMOND STURINO, IVY HILL COMMODITIES CORP., CAPITAL ONE BANK (USA), N.A., OLD DOCK ROAD PROPERTIES LLC, and "JOHN DOE NO. 1 THROUGH JOHN DOE NO. 99," said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

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PAGONES, J D., A.J.S.C.

Plaintiff moves for an order: (1) pursuant to CPLR 2221(d), granting leave to reargue the Court's April 15, 2016, which struck her pleadings; or (2) vacating her default in opposing the defendant's application to strike, pursuant to CPLR §2005 and CPLR 5015.

The following papers were considered:

Order to Show Cause-Affirmation-Affirmation-Affidavit-Exhibits A-R-Affirmation of Service	1-23
Affirmation in Opposition-Exhibits A-C-Affidavit of Service	24-28
Affirmation in Opposition-Exhibits A-M	29-44

Upon the foregoing papers it is hereby ordered that the order to show cause is decided as follows:

By way of background, defendant Synergix Funding Group, LLC, ("Synergix") moved to strike plaintiff's pleadings and defendant Christopher Mollica's cross-claim by Notice of Motion dated March 15, 2016. The motion was made returnable on April 14, 2016 at 9:30 a.m. Contained within the motion papers was a proposed order, granting said motion without opposition. On April 15, 2016, the Court after reviewing the submission signed the proposed order. Unbeknownst to the Court, plaintiff e-filed opposition papers to the motion on April 14, 2016 at 5:51 p.m.

Addressing the merits of the plaintiff's motion, the Court would initially note that a motion to reargue is not the proper vessel in which to move to vacate a default in opposing a motion, rather the motion will be considered pursuant to CPLR 5015(a)(1) (see *Dobbyn-Blackmore v. City of New York*, 123 AD3d 1083 [2nd Dept 2014]).

In order to vacate a default in opposing a motion pursuant to CPLR 5015(a)(1), the moving party is required to demonstrate a reasonable excuse for his or her default and a potentially meritorious opposition to the motion (*id.*). A motion to vacate a default is addressed to the sound discretion of the Supreme Court (see *Dimitriadis v. Visiting Nurse Service of New York*, 84 AD3d

1150 [2nd Dept 2011]).

In support of her motion to vacate, plaintiff's counsel alleges law office failure as a "reasonable excuse". Counsel states that "Believing that the motion return date was April 15, 2016, my office interposed opposition papers on April 14, 2016, at 5:51 PM...Unfortunately, the motion return date was April 14, 2016, one day earlier, and, as such, and upon information and belief, the Court either overlooked or did not consider Plaintiff's opposition papers."

Pursuant to CPLR 2214(b):

"...Answering affidavits and any notice of cross-motion, with supporting papers, if any, shall be served at least seven days before such time if a notice of motion served at least sixteen days before such time so demands..."

Accordingly, it would appear to this Court that counsel's "reasonable excuse" is completely unreasonable. In the event that motion return date was, as counsel thought, April 15, 2016, her opposition papers would still have been late. However, in the interests of justice and given the strong public policy in favor of resolution of matters on their merits, the Court will excuse the default in opposing the motion based upon law office failure (see CPLR §2005). Here, counsel's isolated incident of neglect in filing timely opposition to the motion should not deprive her client of her day in Court in the absence of prejudice to the opponent (see Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2005).

Moreover, the moving plaintiff has demonstrated the existence of a potentially meritorious opposition to defendant Synergix's motion (see generally *1158 Properties, LLC v. 1158 McDonald, LLC*, 104 AD3d 658 [2nd Dept 2013]).

Based upon the foregoing, the Court's order of April 15, 2016 is vacated to the extent that it struck plaintiff's pleadings. The balance of the order shall remain in full force and effect. The Court declines to sign the proposed judgment submitted by defendant Synergix on April 21, 2016. Counsel are directed to appear for a further compliance conference on **June 22, 2016 at 10:00 a.m.** Adjournments are only granted with leave of the Court.

The foregoing constitutes the decision and order of the Court. This decision and order has been filed electronically.

Dated: June 6, 2016
Poughkeepsie, New York

ENTER


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