

**Lawson v Nenni**

2018 NY Slip Op 31144(U)

March 9, 2018

Supreme Court, Dutchess County

Docket Number: 2016-50256

Judge: James V. Brands

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
DUTCHESS COUNTY

Present:

Hon. JAMES V. BRANDS

Justice.

SUPREME COURT: DUTCHESS COUNTY

\_\_\_\_\_  
LINDA LAWSON,

Plaintiff,

-against-

JAMES C. NENNI, SR., NENNI EQUIPMENT  
CORPORATION, NENNI EQUIPMENT CORP., and  
NENNI CONSTRUCTION CO., INC.

Defendants.  
\_\_\_\_\_x

DECISION AND ORDER  
Index No. 2016-50256  
Motion Seq. No. 4

The following papers were read and considered on defendants' motion to vacate the prior default and permitting defendants to serve opposition to plaintiff's prior summary judgment motion. Alternatively, Defendants move to reargue the prior determination dated 10/23/2017.

NYSCEF Docs. No. 79-93, 99-114 filed as Motion Sequence No. 4

BACKGROUND FACTS

Plaintiff commenced this action to recover a money judgment against defendant James C. Nenni, Sr. based upon a breach of a promissory note. Also sought is a judgment against the entity-defendants owned by Nenni Sr. based upon the theory of unjust enrichment.

In the interest of judicial economy, the facts as alleged by plaintiff are set forth in the First Amended Complaint as summarized in the Decision and Order dated 10/23/2017 ("Prior Order"). The Prior Order granted said motion absent any opposition filed by the defendants and directed plaintiff's counsel to submit a proposed Order and Judgment on notice.

Defense counsel also filed a motion to be relieved as Motion Sequence No. 3, which was granted on the court record on 10/7/2017 as noted in the Prior Order. Defendants were provided 30 days to retain new counsel or otherwise appear by 11/8/2017.

Defendants, now appearing by new counsel, filed the instant application by order to show cause. They seek a court order vacating defendants' prior default in failing to oppose plaintiff's summary judgment motion and permitting defendants to serve opposition thereto. It is alleged that

defendants' failure to oppose the prior dispositive motion was a "mistake" arising from a breakdown in communication with prior counsel. It is further alleged that defendants have meritorious defenses based upon privity of contract, statute of frauds, novation, and lack of unjust enrichment.

Alternatively, defendants move to reargue the Prior Order. It is their contention that the promissory note dated 8/4/2011 between Plaintiff and Nenni Equipment Corp. ("2011 Note") was superseded by the promissory note dated 8/21/2014 between Plaintiff and Nenni Sr. ("2014 Note"), it being the intention of the parties to remove the 2011 Note from the corporate books thus enabling Nenni Equipment Corp. to secure a commercial loan to repay plaintiff and other debtors. Defendants also challenge the alleged debt amount, claiming an overage of "at least \$2,484.62" (Nenni Jr. Aff. ¶36) and a failure to credit \$9,693.12 to debtor for MVP insurance premiums paid on behalf of plaintiff (*see* Nenni Jr. Aff. ¶37).

Plaintiff opposes the motion. Counsel contends that defendants failed to proffer any reasonable excuse or meritorious defenses with any evidentiary support to warrant vacatur of the defendants' prior default. Further, counsel argues that defendants failed to identify any misapprehension of law or fact in support of their motion for reargument. It is plaintiff's position that the 2014 Note did not supersede the 2011 Note nor otherwise discharge Nenni Equipment Corp. from liability thereunder. She further contends that Nenni Equipment Corp. is for all intents and purposes Nenni Equipment Corporation. She argues that said entity co-mingled assets with Nenni Construction Co., Inc. which also benefitted from the loan proceeds, thus entitling plaintiff to recover against non-signatory Nenni Construction Co., Inc. under the theory of unjust enrichment.

#### DECISION

To vacate a prior default pursuant to CPLR §5015[a][1], the moving party must demonstrate a reasonable excuse for its default and a meritorious claim or defense. Determination of that which constitutes a reasonable excuse and meritorious defense, for purposes of granting relief from default judgment, is generally within sound discretion of trial court. Indeed, "the [q]uantum of proof required to prevail [on a motion to vacate a order or judgment entered upon the movant's default] is not as great as is required to oppose a summary judgment motion" (*Bilodeau-Redeye v Prefereed Mut. Ins. Co.*, 38 A.D.3d 1277, 1277 [4<sup>th</sup> Dept. 2007]). As often noted, courts give broad deference favoring the resolution of cases on their merits (*see generally Murphy v D.V. Waste Control Corp.*, 124 A.D.2d 573 [2<sup>nd</sup> Dept. 1986], *citing Tugendhaft v Country Estates Assoc.*, 111 A.D.2d 846, 846 [2<sup>nd</sup> Dept. 1985]).

Notably, defendants seek permission to submit opposition to the underlying dispositive motion previously filed by plaintiff, and thus have not fully briefed such opposition absent a court directive permitting same. As such, defendants now bear the lesser burden at this preliminary juncture in accordance with CPLR §5015. This court, having reviewed the motion record, finds that defendants proffered a reasonable excuse for their prior default and potentially meritorious defenses warranting vacatur of their prior default.

Here, defendants proffered a detailed and credible explanation for their prior default predicated upon law office failure (*see* James C. Nenni Jr.'s Affidavit at NYSCEF Doc. No. 82; *see also* *Madonna Mgt. Servs., Inc. v R.S. Naghavi, M.D., PLLC*, 123 A.D.3d 986, 987-988 [2<sup>nd</sup> Dept. 2014][“miscommunications that occurred between defendants, [and] the defendants’ previous counsel...[which] constituted a law office failure”). In fact, the breakdown of communication between the Nenni Defendants and former counsel was the basis for prior counsel’s motion to be relieved from this matter, which was granted by this court.

Defendants also demonstrated potentially meritorious defenses to the underlying action by submitting sworn affidavits from persons with knowledge of the facts attested therein. (*See* Nenni, Sr and Nenni, Jr. Affidavits filed as NYSCEF Doc. No. 81, 82). As it relates to Nenni Construction Co., Inc., defendants contend that there is no privity of contract since Nenni Construction Co., Inc. did not sign the 2011 Note or the 2014 Note so as to impose liability for the debt based on a breach of contract theory. Defendants proffer sworn affidavits of Nenni Sr. and Nenni Jr., both charged with daily operations of the Nenni entities. Those affidavits, in part, challenge plaintiff’s allegation that Nenni Construction Co., Inc. co-mingled assets with the 2011 Note signatory Nenni Equipment Corp. or that Nenni Construction Co., Inc. received financial benefit from the 2011 Note or 2014 Note so as to impose liability based upon the theory of unjust enrichment.

As it relates to Nenni Equipment Corp. and Nenni Sr. as signatories to the 2011 Note and 2014 Note respectively, the sworn affidavits of Nenni Sr. and Nenni Jr., in part, proffer a defense of novation (*see generally* *Old Oak Realty, Inc. v Polimeni*, 232 A.D.2d 536, 537 [2<sup>nd</sup> Dept. 1996], *Wasserstrom v Interstate Litho Corp.*, 114 A.D.2d 952, 954 [2<sup>nd</sup> Dept. 1985][“Requisite elements of novation include previous valid obligation, agreement of all parties to the new obligation, extinguishment of old contract, valid new contract, and valuable consideration given for the new contract.”]). In this case, the novation defense is predicated on the defense argument that the 2014 Note executed by maker Nenni Sr. for a \$120,000 loan was intended to replace the prior 2011 Note executed by Nenni Equipment Corp. for the same monetary loan amount. It appears that both parties acknowledge that Nenni Equipment Corp. Sought to remove the 2011 note obligations from its corporate books to enable it to obtain a commercial loan to pay off its debtors including plaintiff. Notwithstanding, plaintiff’s affidavit denies that the parties’ intent to discharge Nenni Equipment Corp. from any repayment obligations. (*See* Plaintiff Affidavit ¶¶19-¶25, First Amended Complaint ¶¶13-¶15).

Based on the foregoing, it is hereby

ORDERED that defendants’ motion to vacate their prior default pursuant to CPLR §5015 is granted. Defendants have proffered a reasonable excuse for the default and potentially meritorious defenses as herein stated. It is further

ORDERED that the October 23, 2017 Decision and Order is vacated, and it further

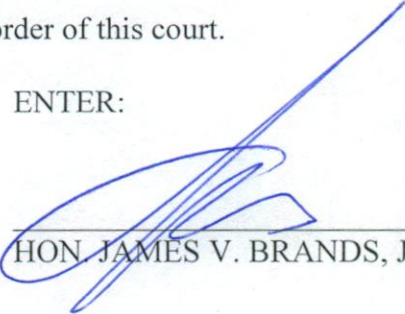
ORDERED that defendants shall file opposition to Motion Seq. No. 2 by March 30, 2018. Plaintiff shall file any reply by April 12, 2018, at which time Motion Seq. No. 2 will be marked fully submitted for determination on papers.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this court.

Dated: March 9, 2018  
Poughkeepsie, New York

ENTER:



HON. JAMES V. BRANDS, J.S.C.

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

**When submitting motion papers to Judge Brands' Chambers, please do not submit any copies. Submit only the original papers.**