

Green Park One Corp. v Harris
2018 NY Slip Op 31681(U)
March 27, 2018
Supreme Court, New York County
Docket Number: 152415/2016
Judge: Carmen Victoria St. George
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 34**

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GREEN PARK ONE CORP.,

Plaintiff,

Index No. 152415/2016
Motion Sequence 002, 003

-against-

Decision and Order

KENDRICK D. HARRIS AND DAVID DUVAL,

Defendants.
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CARMEN VICTORIA ST. GEORGE, J.S.C.:

This case involves a dispute over the ownership of real property. In motion sequence number 002, defendant Kendrick D. Harris (defendant) seeks dismissal of the complaint as against him. Plaintiff Green Park One Corporation (Green Park and/or plaintiff herein) cross-moves for default judgment against defendant as well as sanctions, costs and attorney's fees based on the purportedly frivolous motion to dismiss. In motion sequence number 003, defendant moves for an order extending its time to answer and compelling plaintiff to accept the late answer. For the reasons below, the Court denies motion sequence number 002 and its cross-motion, and grants motion sequence number 003.

BACKGROUND

Plaintiff states it has been the owner of a building located at 304 West 137th Street, Block 1960, Lot 53, in New York County, since around March 20, 2007. In the complaint, plaintiff alleges that around December 21, 2015, defendants created a fraudulent deed which purportedly

transferred plaintiff's property to them and that they filed this deed with the Register of the City of New York on January 20, 2016. This action seeks declarations that the December 21, 2015 deed is void ab initio and that defendants and any other person or entity are barred from claiming ownership of the premises. In addition, it seeks a direction to the Register of the City of New York to vacate and cancel the allegedly fraudulent deed. Plaintiff filed the amended summons and complaint on March 29, 2016, and served it on defendant and co-defendant Duval on April 12 and April 15, respectively. Defendant's former counsel filed her notice of appearance on May 12, 2016.

On June 10, 2016, plaintiff emailed defendant stating that his answer was overdue and directing him to answer the following week. On June 23, 2016, plaintiff brought its first motion. Defendant filed a cross-motion to dismiss the proceeding based on lack of personal jurisdiction or, alternatively, to compel plaintiff to accept defendant's answer. Duval has not appeared and did not oppose the motion. On December 1, 2016, Justice Lucy Billings, who previously presided over this case, granted default judgment against Duval only. Plaintiff and defendant signed a stipulation which resolved the remainder of the motion. Plaintiff withdrew its motion as to defendant, and defendant waived his jurisdictional defenses and agreed to answer within 30 days.

On January 3, 2017, defendant brought a pre-answer motion to dismiss, motion sequence number 002, which is currently before the Court. The motion states that although the complaint alleges fraud, it does not allege satisfy the pleading requirements for fraud (citing *VisionChina Media Inc. v Shareholder Representative Serv., LLC*, 109 AD3d 49, 57 [1st Dept 2013]). It further argues that plaintiff has no standing to assert a quiet title claim because the purportedly false transfer was to defendant rather than to plaintiff, that plaintiff has not stated a cause of action at any rate because it does not indicate whether other parties are involved, and plaintiff has no standing because defendant rather than plaintiff is the record deed holder. Defendant further argues

in the motion that plaintiff cannot allege civil conspiracy as an independent cause of action and that because the other causes of action must be dismissed, this must be dismissed as well.

In response, plaintiff cross-moves for default judgment, pointing out that defendant did not file an answer and stating that this failure constitutes a failure to comply with the stipulation of December 1, 2016. Plaintiff also states defendant is in default because the motion was filed on January 3, 2017 rather than December 31, 2016, the latter being the stipulated deadline. Plaintiff also seeks sanctions for defendant's purportedly frivolous motion and raises further objections, including that this is an improper second motion to dismiss. Plaintiff rejected service of defendant's motion. Defendant counters that it had the right to bring this pre-answer motion because it withdrew its earlier motion without prejudice. He additionally states that plaintiff did not counter his substantive arguments, and therefore his motion should be granted.

On July 6, 2017, Justice Lucy Billings heard oral argument on motion sequence 002 as well as motions in a related case. At argument, defendant opposed the default judgment motion, stating that he had a firm good faith belief that his motion to dismiss automatically extended his time to answer. In addition, around three weeks later, defendant brought motion sequence number 003, which is currently before the Court, and which seeks to compel plaintiff to accept his answer. Moreover, defendant notes that his pre-answer motion was only a few days late and the Court should excuse this brief and nonprejudicial delay. He notes that plaintiff has not treated this matter as urgent, as it was out of possession of the property for years before it commenced this action. He also argues that he has meritorious defenses, and in support relies on the arguments in his motion to dismiss and the numerous defenses he asserts in his proposed verified answer. Plaintiff counters that defendant's pre-answer motion to dismiss, motion sequence number 002, is frivolous, that it has now been a year since defendant should have answered, and that defendant violated the terms

of the December 1, 2016 stipulation by re-filing its earlier motion to dismiss. Plaintiff states that the proposed verified answer is frivolous because most of the 24 affirmative defenses lack merit. Plaintiff states there is no affidavit of merit and this necessitates denial of the motion. Defendant replies that he did not bring these motions in bad faith and he reiterates earlier arguments from this motion as well as from motion sequence number 002. He points out that the answer is verified by defendant himself, and this is sufficient to serve as an affidavit of merit.

DISCUSSION

It is “the strong public policy of this State to dispose of cases on their merits” (*Rodgers v 66 E. Tremont Heights Housing Development Fund Corp.*, 69 AD3d 510, 511 [1st Dept 2010] [motion to vacate default judgment]). In considering a defendant’s pre-answer motion to dismiss a complaint, a court must deny the motion “if the facts alleged . . . fit within any cognizable legal theory” (*Tap Holdings, LLC v Orix Financial Corp.*, 109 AD3d 167, 173-74 [1st Dept 2013]). Moreover, courts construe the pleadings liberally, accept the facts alleged as true, and give the plaintiff every favorable inference (*id.* at 174). When a party moves to vacate a default, the Court has the discretion to determine whether a party’s excuse for a default is reasonable and whether the answer has merit (*Rodgers*, 69 AD3d at 510).

The Court denies defendant’s motion to dismiss and plaintiff’s cross-motion for a default judgment, and grants defendant’s motion to compel plaintiff to accept his answer. Defendant’s delay of a few days before moving to dismiss is minimal and plaintiff has not successfully argued prejudice (*see Romero v Alezeb Deli Grocery Inc.*, 115 AD3d 496, 496 [1st Dept 2014]). Nor is the motion barred by the single-motion rule (*see Rivera v Board of Education of the City of New York*, 82 AD3d 614 [1st Dept 2011]). Moreover, contrary to plaintiff’s argument, a verified pleading is sufficient to show merit if the verifying party has personal knowledge of the facts (*see*

Matter of Dellagatta v McGillicuddy, 31 AD3d 549, 549 [2nd Dept 2006] [in context of child support dispute]). Nevertheless, and regardless of whether plaintiff countered defendant's substantive arguments in favor of dismissal, defendant's motion to dismiss fails. To prevail, defendant had to set forth a prima facie case showing that dismissal is appropriate because there are no issues of fact, even accepting all the complaint's allegations as true (*see Tap Holdings, LLC*, 109 AD3d at 173-74). Here, defendant does not draw all reasonable inferences in plaintiff's favor. Instead, his arguments rest on the assumption that the title transfer was valid and plaintiff does not hold title to the property. This issue is in dispute. Thus, defendant has not shifted the burden of proof to plaintiff (*see Alvarez v Prospect Hosp.*, 68 NY2d 321, 324 [1986] [citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 (1985)]). Considering the heated disputes involved in this case and the related case, the Court concludes that issues of fact remain precluding dismissal.

The Court grants defendant's motion to compel plaintiff to accept his answer. This is not a situation in which defendant has failed to litigate. To the contrary, his original counsel filed a notice of appearance shortly after the action was commenced, and she immediately attempted to gain an extension of time in which to file her answer – a request which, as noted, plaintiff would not grant. Following plaintiff's motion for default judgment, defendant's counsel moved to withdraw from representation of defendant. Defendant retained new counsel, who litigated the initial motion for default judgment and cross-motion to dismiss. Within a few days of his stipulated deadline to file an answer, defendant served and filed his motion to dismiss. Moreover, after oral argument, defendant served and filed motion sequence 003 seeking to submit his answer. Defendant has set forth affirmative defenses and substantiated his position in his verified answer. Thus, in its exercise of discretion, the Court grants the motion (*see Rodgers*, 69 AD3d at 510).

In reaching its conclusion, the Court considered the parties' papers in full. Accordingly, it is

ORDERED that motion sequence 002 and the accompanying cross-motion are denied, and motion sequence 003 is granted; and it is further

ORDERED that the parties are to appear in Part 34, 80 Centre Street, room 308 for a preliminary discovery conference on Thursday, May 3, 2018 at 2:15 p.m.

Dated: 3/27/2018

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.
HON. CARMEN VICTORIA ST. GEORGE
J.S.C.