SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS **PART** IAS MOTION 7EFM

Justice

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INDEX NO. 850237/2013

BARBARA DE MARE, ALBERT SIGAL, AS CO-EXECUTORS OF THE ESTATE OF M. MICHAEL KULUKUNDIS,

MOTION SEQ. NO. 004

Plaintiffs,

- v -

BEACHPLUM PROPERTIES, LLC, ANDROMEDA INVESTMENTS CO., LTD., BOARD OF MANAGERS OF THE GLASS CONDOMINIUM, BOARD OF MANAGERS OF 100 UNITED NATIONS PLAZA CONDOMINIUM, ANNA ATHINEOS, and EMANUEL KULUKUNDIS,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 178, 179, 180, 181, 182, 183, 184, 185, 186

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD

Sankel, Skurman & McCartin, LLP, New York, NY (Nicholas Corona, Jr. of counsel), for plaintiffs.
McLaughlin & Stern, LLP, New York, NY (Jonathan R. Jeremias of counsel), for defendant, Emanuel M. Kulukundis.
Smith Gambrell & Russell, LLP, New York, NY (John Van Der Tuin of counsel), for defendant Board of Managers of the Glass Condominium.

Plaintiffs commenced this action on August 15, 2013, against defendants to foreclose a mortgage encumbering two properties: (1) 88 Laight Street, Unit 3, New York, New York (the Laight Street Apartment) and (2) 100 United Nations Plaza, Suite 29-A, New York, New York (the UN Plaza Apartment). The UN Plaza Apartment has been released from the mortgage. The Laight Street Apartment is the subject of this foreclosure action. One defendant, Emanuel M. Kulukundis (defendant), now moves, by order to show cause, to vacate a default judgment under CPLR 5015 (a) (1), (3), and in the interests of justice, and seeks leave to file and serve an answer with counterclaims against plaintiffs.

I. Background

A. The Will

Plaintiffs are the co-executors of the will of M. Michael Kulukundis, defendant's late father (Mr. Kulukundis). Mr. Kulukundis died in 2010 and he was survived by his wife, Tara Kulukundis (Mrs. Kulukundis), and four adult children, including Manuel. Mr. Kulukundis's will was admitted to probate in 2010 and remains the subject of an estate proceeding in Surrogate's Court (the Estate Proceeding). Settlement negotiations in the Estate Proceeding have been conducted through the executor plaintiffs, Joseph M. Weitzman, Esq., the estate's counsel in the Estate Proceeding, and Henry Amoroso, Esq., the estate's business representative.

B. The Foreclosure Action

This foreclosure action was initiated on August 15, 2013, alongside the Estate Proceeding. In an order dated March 16, 2015, and entered March 24, 2015, plaintiffs' motion for a default judgment was granted against defendant. The Judgment of Foreclosure and Sale dated February 8, 2017, was entered on March 2, 2017 (the Judgment). Plaintiffs filed a Notice of Foreclosure and Sale dated June 26, 2017, scheduling a public auction for August 2, 2017. Since the first Notice of Foreclosure and Sale, the public auction has been postponed six times. (NYSCEF Document #156, 9.)

C. Administration of the Will

During the administration of Mr. Kulukundis's estate, the executors and beneficiaries sought to reach a global settlement of various issues involving estate assets. Negotiations resulted in a Settlement and Release Agreement dated November 27-28, 2017 (SRA), signed by Mr. Kulukundis's four children, including defendant (NYSCEF Document #156, 10.) The SRA explicitly stated that it would terminate if Mrs. Kulukundis's consent and signature could not be obtained within 180 days. (*Id.*)

In a letter dated July 10, 2018, the four children were advised that the SRA terminated because Mrs. Kulukundis refused to provide her consent. (NYSCEF Document #157, Exhibit O.) Defendant's counsel was advised in an e-mail of July 10, 2018, that the estate would resurrect the foreclosure action against the Laight Street Apartment. Plaintiffs now seek to sell the Laight Street Apartment, and defendant moves to vacate the Judgment.

II. Defendant's Motion to Vacate the Judgment Under CPLR 5015 (a) (1)

Defendant's motion to vacate the Judgment under CPLR 5015 (a) (1) is denied. He does not raise a reasonable excuse or meritorious defence for his default.

CPLR 5015 (a) (1) is available to a party against whom default judgment was entered, "provided that the defendant can demonstrate both a reasonable excuse for the default and a potentially meritorious defense." (*Caba v Rai*, 63 AD3d 578, 580 [1st Dept 2009].) The determination of what constitutes a "reasonable excuse for a default 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].)

A deliberate or intentional default is not excusable. (*Eretz Funding, Ltd. v Shalosh Assoc.*, 266 AD2d 184, 185 [2d Dept 1999] [holding that an inexcusable intentional default existed where defendants' were aware of their default and failed to take action until plaintiffs obtained a restraining order freezing a bank account]; *Baker v E. W. Howell Co.*, 216 AD2d 242, 244 [1st Dept 1995]; *Murphy v Hall*, 24 AD2d 892, 892 [2d Dept 1965] [holding that defendant's default was not excusable where he deliberately allowed for default and sought to reopen proceedings only when plaintiff, in supplementary proceedings, compelled a corporation where defendant worked to satisfy the debt].)

Defendant argues that he has a reasonable excuse because he and plaintiffs reached an agreement in 2011 by which defendant promised to help effect the sale and assignment of proceeds from two properties, 12 East 67th Street and the UN Plaza Apartment, to his late father's estate in exchange for plaintiffs' promise to convey defendant the Laight Street Apartment (NYSEF Document #152, at 6.) Defendant explains that plaintiffs later advised him not to defend the foreclosure action to allow the Laight Street Apartment to be conveyed with free and clear title (*Id.*) Defendant asserts that plaintiffs continued to advise that defendant would receive the Laight Street Apartment in accordance with the promises after plaintiffs obtained the Judgment (*Id.*) Defendant also asserts that he did not move to vacate the judgment within a year because plaintiffs assured him that their agreement would be incorporated into the omnibus settlement of the Estate Proceeding (*Id.*)

Defendant fails to demonstrate a reasonable excuse because the parties did not reach an agreement and defendant was aware of plaintiffs' progressive efforts to secure a foreclosure of the Laight Street Apartment.

To satisfy the Statute of Frauds, an agreement related to the conveyance of real property must be evidenced by a "note or memorandum … in writing and subscribed by the party to be charged therewith." (General Obligations Law § 5-703.) The record reveals that the parties' negotiations did not result in a documented agreement with all material terms. Although defendant argues that the one-page document dated "October __, 2011" is a writing that sets out the terms of the parties' agreement (NYSCEF Document #144, Exhibit B), defendant contradicts himself when he states that the "document did not fully reflect the original terms agreed to." (NYSCEF Document #144, ¶ 22.) Further, plaintiffs did not sign the document. (*Id.*, Exhibit B.) Defendant also identifies an email from plaintiff Barbara L. de Mare dated June 26, 2013, in which she refers to "a draft of the agreement for the property switch." (*Id.*, Exhibit D.) However, the email fails to state all the essential terms of the purported agreement. Thus, there is no note or memorandum to support the existence of an agreement that satisfies the Statute of Frauds.

There is also no evidence of part performance by defendant "unequivocally referable" to the alleged oral agreement to meet the exception to the Statute of Frauds. (*See Burns v McCormick*, 233 NY 230, 232, 235 [1922] ["What is done must itself supply the key to what is promised. It is not enough that what is promised may give significance to what is done … [t]he most that can be said … is that he made a promise which the law did not compel him to keep,

and that afterwards he failed to keep it."].) Defendant relies on a letter from plaintiff de Mare acknowledging that defendant provided his consent for the owners of 12 East 67th Street to execute documents for the sale of that property. (NYSCEF Doc #144, Exhibit C.) While this letter recognizes defendant's assistance to the estate, defendant's action is not unequivocally referable to the oral promise. Further, defendant does not provide proof of performance regarding the sale of the UN Plaza Apartment. Accordingly, there is no part performance by defendant to bring the parties' oral agreement outside the Statute of Frauds.

Defendant was aware of this lawsuit as early as September 24, 2013. (NYSCEF Document #157, Exhibit A.) Nearly five years passed until defendant filed his order to show cause. Over this period of time, plaintiffs obtained a default order against defendant entered on March 24, 2015, plaintiffs entered the Judgment on March 2, 2017, and defendant paid to republish six Notices of Sale since June 26, 2017 (*Id.*, Exhibit G, Exhibit I.) Defendant deliberately continued his default over almost five years, despite being aware of the foreclosure action and the Judgment, and only sought to appear in the foreclosure action once settlement negotiations failed in the Estate Proceeding. The proposed incorporation of the promises into the 2017 omnibus settlement of the Estate Proceeding also indicates that the parties had not yet agreed to make the promises binding. Although defendant argues that he was not initially represented in the foreclosure action, he was represented by counsel in the Estate Proceeding. Defendant does not allege that his attorneys in the Estate Proceeding failed to advise him about the consequences of the foreclosure. As a result, defendant has not shown a reasonable excuse for his default.

Defendant also does not establish a meritorious defense to the present action. Defendant's Proposed Verified Answer with Counterclaims raises five counterclaims: (1) breach of contract, (2) breach of duty of good faith and fair dealing, (3) promissory estoppel, (4) unjust enrichment, and (5) a preliminary and permanent injunction (NYSCEF Document #144, Exhibit A.) However, the proposed answer fails to provide any defense to the foreclosure action, such as improper service, payment of the mortgage, or the exercise of a right of redemption. (*Id.*)

Defendant also argues that he established a meritorious defense on the basis of (1) plaintiffs' promise to convey the Laight Street Apartment, (2) plaintiffs' insistence that defendant default in the foreclosure action, and (3) plaintiffs' refusal to fulfill the terms of their obligations. Defendant's defense cannot succeed without an agreement to support the parties' mere promises.

Under these circumstances, defendant does not raise a meritorious defense, and his motion to vacate under CPLR 5015 (a) (1) is denied.

III. Defendant's Motion to Vacate the Judgment Under CPLR 5015 (a) (3)

Defendant's motion to vacate under CPLR 5015 (a) (3) is denied for failure to establish fraud, misrepresentation, or other misconduct by plaintiffs.

CPLR 5015 (a) (3) provides that a judgment or order may be vacated "upon such terms as may be just ... upon the ground of ... fraud, misrepresentation, or other misconduct of an

adverse party." Two types of fraud are contemplated by CPLR 5015 (a) (3): extrinsic or intrinsic fraud. Extrinsic fraud consists of "a fraud on the defaulting party that induces them not to defend the case." (*Matter of Renaissance Economic Dev. Corp. v Jin Hua Lin*, 126 AD3d 465, 465 [1st Dept 2015], citing *Shaw v Shaw*, 97 AD2d 403, 403 [2d Dept 1983] [explaining that extrinsic fraud "may be defined as fraud practiced in obtaining a judgment such that a party may have been prevented from fully and fairly litigating the matter"].) A movant seeking relief from judgment because of extrinsic fraud "need not show that he has a meritorious defense or cause of action." Intrinsic fraud occurs when a party claims that "allegations in the complaint are false." (*Wells Fargo Bank Minnesota, N.A. v Coletta*, 153 AD3d 756, 757 [2d Dept 2017].)

While "there is no express time limit for seeking relief from a judgment pursuant to CPLR 5015 (a) (3), a party is required to make the motion within a reasonable time" (*Aames Capital Corp. v Davidsohn*, 24 AD3d 474, 475 [2d Dept 2005]; *accord Molina v Chladek*, 140 AD3d 523, 524 [1st Dept 2016].) Courts assess a reasonable time by looking to whether the movant was aware of the relevant facts. (*Matter of De Sanchez*, 18 Misc 3d 1138 [A], 2008 NY Slip Op 50342 [U], *8, 2008 WL 498090, at *8 [Sup Ct, NY County 2008]; *F Matter of Angela P. v Floyd S.*, 103 AD3d 439, 440 [1st Dept 2013] [holding that a father's almost 4½-year delay in moving to vacate the order of child support, despite his awareness of all relevant facts surrounding the issue, was unreasonable]; *Rizzo v St. Lawrence Univ.*, 24 AD3d 983, 984 [3d Dept 2005] [holding that plaintiff failed to seek vacatur within a reasonable time after his delay of more than two years in making his motion despite awareness of all relevant facts surrounding the issue].)

Defendant does not argue that he moved to vacate the default within a reasonable time. The record reveals that defendant acknowledged service of this action on September 24, 2013. (NYSCEF Document #157, Exhibit A.) Defendant's counsel in the Estate Proceeding was also advised on May 8, 2015 that "the estate is under cash pressure, and if Manu[el] does not quickly show a willingness to cooperate, the estate will probably go ahead with a proceeding in Surrogate's Court enabling it to sell the mortgage, and Manu[el] would have to litigate on uncertain grounds if he wants to try to stop it." (*Id.*, Exhibit K.) Even if defendant claims that he was under the erroneous assumption of the parties' promises at the outset of this action, he should have been aware of relevant facts by May 2015 prompting him to make a motion; namely that plaintiffs were willing to proceed with the foreclosure and sell the Laight Street Apartment. However, defendant did not move to vacate the Judgment until August 10, 2018. Defendant's three-year delay in responding to his default after May 2015 is unreasonable.

Even if defendant had moved to vacate within a reasonable time, he fails to establish any fraud, misrepresentation, or other misconduct by plaintiffs. Defendant argues that plaintiffs obtained the Judgment by fraud when they convinced defendant "that, in order to obtain free and clear title to the Laight Street Apartment, which he was promised in exchange for his services to the Estate, he would have to default in appearing and answering the instant foreclosure action." (NYSCEF Document #152, at 5.) Defendant's allegations that he was induced not to defend this action therefore constitute extrinsic fraud. There was, however, no agreement between the parties upon which any representations could be based. Further, defendant offers little more than broad and unsubstantiated allegations of plaintiffs' fraud. In his moving papers, defendant alleges that plaintiff de Mare assured him that he "should not appear in the [foreclosure] action or interpose a

defense." (NYSCEF Document #144, ¶ 35.) Defendant can point only to one instance, on September 24, 2013, when the estate's counsel allegedly "instructed [him] to do nothing with respect to the foreclosure action in order to obtain free and clear title to the Laight Street Apartment" (*Id.*, ¶ 38.) Defendant does not offer any other evidence, oral or written, that plaintiffs told him to default in the foreclosure action. The evidence defendant adduced fails to show fraud by plaintiffs that induced him not to defend the foreclosure action over a total of five years. Under these circumstances, defendant has not demonstrated that plaintiffs prevented him from fully and fairly litigating in the foreclosure action. As a result, defendant fails to establish any fraud, misrepresentation, or other misconduct by plaintiffs; his motion to vacate under CPLR 5015 (a) (3) is denied.

IV. Defendant's Motion to Vacate the Judgment in the Interest of Justice

Defendant's motion to vacate the Judgment in the interests of justice is denied. A court possesses "the inherent power, in the interest of justice, to vacate a prior order." (*Alvarez v Fiat Realty Corp.*, 157 AD2d 456, 456 [1st Dept 1990].) But "[a] court's inherent power to exercise control over its judgments is not plenary, and should be resorted to only to relieve a party from judgments taken through [fraud], mistake, inadvertence, surprise or excusable neglect." (*McKenna v County of Nassau*, 61 NY2d 739, 742 [1984].)

The interests of justice would not be served by permitting defendant to bring his counterclaims after a prolonged delay without fraud, mistake, reasonable excuse, or a meritorious defense. Although defendant says that he will lose his home if the foreclosure proceeds, defendant had an opportunity to save his home before this action. In his father's will, defendant was offered the first option to purchase the Laight Street Apartment. (NYSCEF Document #157, Exhibit B, 2.) Defendant did not exercise the option to purchase. (NYSCEF Document #158, ¶¶ 3-5.) Accordingly, defendant's motion to vacate the Judgment in the interest of justice is denied.

Accordingly, it is hereby

ORDERED that defendant's motion to vacate the Judgment of Foreclosure and Sale dated February 8, 2017, is denied.

10/10/2018
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE