

Nanas v Govas

2018 NY Slip Op 32676(U)

September 17, 2018

Supreme Court, Kings County

Docket Number: 518706/2016

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 518706/2016

Seq# 002

Part DJMP

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

NICHOLAS NANAS,

Plaintiff,

against

NIKOLAS GOVAS A/K/A NIKOLAOS GOVAS A/K/A
NICHOLAOS GOVAS,

Defendant.

Papers

Numbered	
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed...	<u>2</u>
Answering Affidavits.....	<u>3</u>
Replying Affidavits.....	<u> </u>
Exhibits.....	<u> </u>
Other	<u> </u>

Upon review of the foregoing papers, defendant's motion to renew and reargue its prior motion to vacate its default is decided as follows:

Plaintiff commenced this action against defendant, pursuant to CPLR 5014, for extension of a judgment lien. As plaintiff alleges in his complaint, on December 22, 2006, he obtained judgment against defendant in the amount of \$270,000 with interest accruing from that date. The 10-year judgment lien was due to expire on December 22, 2016, and so plaintiff seeks judgment extending the lien for another 10-year term. In the absence of an answer or other response to plaintiff's complaint, plaintiff moved for default judgment before the clerk. Rather than granting judgment extending the lien for 10 years, the county clerk gave plaintiff another judgment in the amount of \$270,000, with interest, and an additional \$505 in costs and disbursements.

Defendant moved to vacate his default in this action, and further to vacate the underlying judgment. By order, dated October 26, 2017, this court denied defendant's motion because defendant did not provide a reasonable excuse for waiting eleven years to vacate a confession of judgment.

Defendant now moves to renew and reargue his motion to vacate. A motion to renew must be based on new facts or law, which were unknown to the movant and therefore were not brought to the court's attention (*Semenov v Semenov*, 98 AD3d 962, 963 [2d Dept 2012]). Movant must offer a reasonable justification for its failure to present such facts on the prior motion (*id.*). A motion to reargue must show that there was a point of law or fact that was overlooked by the court, and cannot be based on arguments different from those originally stated (*NYCTL 1998-1 Tr. v Rodriguez*, 154 AD3d 865, 865 [2d Dept 2017]; *Rodriguez v Gutierrez*, 138 AD3d 964, 966–67 [2d Dept 2016]).

As to reargument, defendant makes little attempt to vacate his default in this action, which resulted in the 2016 judgment. In order to vacate his default here, defendant must show a reasonable excuse and a meritorious defense (*Deutsche Bank Nat. Trust Co. v Patrick*, 136 AD3d 970, 971 [2d Dept 2016]). Defendant states in his affidavit that, due in part to his age and lack of proficiency in English, he had difficulty responding to the complaint. However, defendant provided a multi-page affidavit in support of his motion to vacate and this motion to renew and reargue without any statement from a translator showing that defendant needed assistance. Moreover, defendant never argues that he has a meritorious defense to this action, which is merely to extend the judgment lien another ten years. To the extent that defendant argues he has a defense to the underlying judgment, now eleven years old, the defense is not sufficient, as described below.

Defendant predominately objects to merits of the 2006 judgment and this court's decision not to vacate that judgment. In order to object to the merits of a judgment by confession, defendant must bring a plenary action (*Regency Club at Wallkill, LLC v Bienish*, 95 AD3d 879,

879 [2d Dept 2012]). Defendant has not done so, but rather moves to vacate the confession of judgment pursuant to CPLR 5015.

In addition to defendant's procedural error, defendant is out of time to object to the merits of the confession of judgment, as this court previously held. Defendant states in his affidavit that he did not sign the affidavit supporting the confession of judgment, and that he owes plaintiff no money. Any claim for fraud must be brought within six years of the allegedly fraudulent act or within two years of when the alleged fraud could have been discovered through reasonable diligence (*Seidenfeld v Zaltz*, 162 AD3d 929, 934 [2d Dept 2018], CPLR 312[8]). The alleged fraud took place when the affidavit in support of the judgment was signed. Plaintiff provided sufficient evidence, in the form of a communication from a potential buyer, that defendant knew about this judgment as early as January 2015. Accordingly, the court correctly held that defendant's failure to contest the affidavit and judgment for eleven years, or to provide any reasonable explanation for his failure to do so, mandated denial of his motion to vacate the judgment.

Defendant's failure to raise his fraud allegations timely is fatal to his motion to vacate. Further, defendant's remaining contentions on reargument do not warrant reversal of this court's original opinion. First, contrary to defendant's argument, he was not required to be served with the confession of judgment in order for this court to have jurisdiction over him. By virtue of the affidavit in support of the judgment by confession, defendant agreed to the jurisdiction of this court (*Besen v Kelley*, 83 Misc 2d 362, 363 [Sup Ct, Westchester County 1975]). Second, defendant is not entitled to attack the specificity of the judgment (*Regency Club at Wallkill, LLC v Bienish*, 95 AD3d 879, 879 [2d Dept 2012]). Third, defendant's objections to the substance of

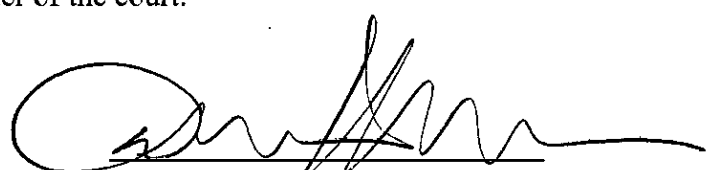
the judgment fail because plaintiff provided significant evidence, in the form of lay and expert testimony, that defendant signed the affidavit in support of the confession of judgment. Thus, defendant did not prove “clear, positive, and satisfactory evidence of any fraud [or] misconduct” (*Scialo v Sheridan Elec., Ltd.*, 153 AD3d 1294, 1295 [2d Dept 2017]). Finally, defendant argues that he should have been able to serve reply papers in support of his motion. Generally, a reply is not permitted on an Order to Show Cause. Additionally defendant drafted the Order to Show Cause and did not originally ask for an opportunity to reply in the Order to Show Cause. Accordingly, it is disingenuous to contend that the court improperly denied defendant an opportunity to reply.

As to renewal, defendant submits additional evidence in the form of affidavits from his daughter and himself, in which they claim that they never conducted a title search when, in 2009, defendant transferred the property that is subject to the judgment lien. As an initial matter, defendant does not sufficiently explain why this information was not disclosed in the underlying motion to vacate (*Semenov*, 98 AD3d at 963). In any event, even if defendant did not conduct a title search in 2009, it does not change that defendant knew or should have known about the judgment in 2015, when he intended to sell the property.

For the reasons stated above, plaintiff’s motion for renewal and reargument is denied. Accordingly, there is also no need to consolidate this action with any potentially related actions.

This constitutes the decision and order of the court.

September 17, 2018
DATE



DEVIN P. COHEN
Acting Justice, Supreme Court

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