

<b>Kelly v 486 St. Nicholas Ave. Hous. Dev. Fund Corp.</b>
2019 NY Slip Op 30018(U)
January 4, 2019
Supreme Court, New York County
Docket Number: 150488/17
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ

PART 13

Justice

TIMOTHY KELLY as a shareholder of 486 ST. NICHOLAS AVENUE HOUSING DEVELOPMENT FUND CORPORATION,

Petitioner

INDEX NO. 150488 /17

MOTION DATE 12-19-2018

- Against-

MOTION SEQ. NO. 003

486 ST. NICHOLAS AVENUE HOUSING DEVELOPMENT FUND CORPORATION, LARRY G. JOHNSON, ELISHA RANDOLPH and VANESSA KABA,

Respondents.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 8 were read on this motion to punish Respondents for contempt of court and cross-motion to vacate default and dismiss proceeding.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-2, 3-4

Answering Affidavits — Exhibits \_\_\_\_\_

5-6

Replying Affidavits \_\_\_\_\_

7, 8

Cross-Motion:  Yes  No

Upon a reading of the foregoing cited papers, it is ordered that this motion to punish Respondents for contempt of court for their failure to comply with this court's order dated August 1, 2017 and to turn over to petitioner the documents in their possession enumerated in this court's August 1, 2017 order, is granted.

Petitioner commenced this proceeding against the Respondents in March 2017- by the service of a summons with notice and an Order to Show Cause-to obtain a preliminary and/or permanent injunction, enjoining Respondents from taking any action on behalf of the corporation, from collecting maintenance payments from shareholders, from destroying any financial records of the corporation, and from listing, selling or leasing any apartment units owned by the corporation. Petitioner also sought an order directing Respondents to make all financial documents of the corporation available for inspection by Petitioner's auditor . Annexed to the motion papers was a copy of the Summons with detailed notice of the relief requested, as well as a detailed three (3) page factual affidavit from Petitioner, Timothy Kelly, stating with specificity the reasons for bringing this proceeding and why this court should grant the relief.

Respondents were served with a copy of the summons with notice on March 15, 2017. Respondents did not serve a notice of appearance or demand a copy of the complaint. Respondents, including Vanessa Kaba, were served on April 4 and April 6, 2017 with a copy of the Order to Show Cause seeking injunctive relief. The motion was scheduled for oral argument on May 24, 2017. Respondents failed to appear on the return

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

date of the motion and on May 25, 2017 this court, by short form order, granted the motion on default and requested the Petitioner to Settle Order on Notice. On July 10, 2017 Petitioner served Respondents, including Vanessa kaba, with Notice of Settlement of Order which contained a copy of the proposed order being submitted to the court, and a copy of the short form order granting Petitioner's relief on default. At that point Respondents did not submit a counter-order or move to vacate their default. This court signed the proposed settled order on August 1, 2017 and Respondents, including Vanessa Kaba, were served with Notice of Entry of the order on August 2, 2017. After receipt of the court's order in August the Respondents did not move to vacate their default.

This court's August 1, 2017 order directed the Respondents to, within 30 days of service of the order with notice of entry, provide for inspection by Petitioner all corporate books of the corporation as detailed in the order, provide Petitioner with the most recent accounting of the corporation and to provide the records listed in Item C of the order, in possession of Respondents or their agents. Respondents have failed to comply with this court's August 1, 2017 order and are in contempt of court.

On August 15, 2018 Petitioner brought this motion by Order to Show Cause to hold the Respondents in Contempt of Court for failure to comply with this court's August 1, 2017 order. The motion was made returnable on September 19, 2018. On September 18, 2018 counsel for the Respondents, John James, Esq., contacted Petitioner's counsel, Albert Ghunney, Esq., to request an adjournment of the motion "so we can discuss settlement." Mr. Ghunney answered the adjournment request by asking for a letter of representation. Mr. James filed a Notice of Appearance and Mr. Ghunney told him that he would not be opposing Mr. James request for an adjournment ( see e-mail exchange between counsel). On September 19, 2018 Leslie M. Gale-Brown, Esq., appeared in this court on behalf of Mr. James, representing the Respondents, and requested an adjournment of the motion----stating that the adjournment was being requested because Mr. James wanted to discuss possible settlement with Plaintiff's counsel ( see Affidavit of ms. Gale-Brown). This court adjourned the motion to December 5, 2018 to afford the parties an opportunity to settle the matter.

On December 4, 2018, the day before the motion was to be heard, Mr. James uploaded an "Affirmation of Engagement"-he was not on trial or conducting a hearing, he needed to appear in Supreme Court Kings County on a motion for summary judgment-requesting a final two week adjournment, implying that he needed the time to get the matter settled. Instead of settling the matter as the Petitioner and the court were led to believe, Mr. James filed a cross-motion on behalf of the Respondents seeking to dismiss this proceeding for Petitioner's failure to serve a complaint within the time required by the CPLR after receipt of Mr. James' Notice of Appearance.

This court did not grant Mr. James an adjournment to make a cross-motion, as that was not the reason for the request and Mr. Ghunney, Petitioner's counsel, did not expect him to make one. The cross-motion took the court and Petitioner's counsel, who had not served a complaint because he had been led to believe that Mr. James was looking to settle this proceeding, by surprise.

The cross-motion seeks to dismiss the proceeding for failure to serve a timely complaint after the service of a Notice of Appearance.

CPLR 320(a) requires that a defendant appear by serving an answer or a notice of appearance within twenty days after service of the summons. CPLR 3012(b) requires a plaintiff to serve a complaint within twenty days after service of a notice of appearance when the complaint is not served with the summons.

Respondents' attorney did not file a Notice of Appearance until after Respondents had defaulted in appearing, after the court had issued an order enjoining them and directing that they provide Petitioner with the requested documentation, and only after their attorney sought an adjournment of the motion to hold Respondents in contempt. Furthermore, Petitioner's counsel was lulled into inaction and was led to believe that a settlement was forthcoming. Under these circumstances it would be against the interest of justice to reward Respondents behavior with a dismissal of the case ( see Yaffe v. Lindenbaum, 246 A.D.878, 284 N.Y.S. 849 [3<sup>rd</sup>. Dept. 1936]). Petitioner has a reasonable excuse for not serving a complaint within twenty days after service of Respondent's counsel's notice of appearance. Finally, Petitioner's detailed factual affidavit demonstrates a meritorious cause of action ( see Norrish v. Pacini, 29 A.D.3d 1063, 814 N.Y.S.2d 385 [3<sup>rd</sup>. Dept. 2006]; Bal v. Court Employment Project, Inc., 73 A.D.2d 69, 424 N.Y.S.2d 715 [1<sup>st</sup>. Dept. 1980]; Sladsky v. Mormile & Sons, Inc., 66 A.D.2d 779, 410 N.Y.S.2d 664 [1978]).

The cross-motion seeks to vacate the Respondents' default under CPLR §§ 5015(a)(1) and (4).

CPLR§§5015(a) allows the court which rendered a judgment or order to relieve a party from it upon such terms as may be just, upon the ground of (a) excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or (4) when the court lacks jurisdiction to render the judgment or order. Under CPLR 5015(a)(1) vacatur is at the discretion of the court.

The Respondents move to vacate their default more than one year after the court rendered the order and more than one year after they were served with written notice of the order's entry. The Respondents-except for Respondent Kaba- do not allege that they did not receive proper notice of this proceeding, or proper notice of the entry of the court's order. They allege as an excuse that they hired an attorney who was negligent in their representation. "A party seeking to vacate an order entered upon his or her default in opposing a motion must demonstrate both a reasonable excuse for the default and a potentially meritorious opposition to the motion. The determination of what constitutes a reasonable excuse for default in opposing a motion, as an element for vacating an order entered on default, lies within the trial court's discretion ( Eugene Di Lorenzo, Inc., v. A.C. Dutton Lumber Co., 67 N.Y.2d 138, 492 N.E.2d 116, 501 N.Y.S.2d 8 [1986]). Mere neglect by counsel is not a reasonable excuse for a default in opposing a motion, as an element for vacating an order on default (Torres v. Rely on Us, Inc., 165 A.D.3d 731, 84 N.Y.S.3d 268 [2<sup>nd</sup>. Dept. 2018]; Ki Tae Kim v. Bishop, 156 A.D.3d 776, 67 N.Y.S.3d 655 [2<sup>nd</sup>. Dept. 2017]). "Failure to establish lack of actual notice of the proceeding or to demonstrate a reasonable excuse for the default warrants denial of Respondents' cross-motion to vacate their default ( Dwyer Agency of Mahopac, LLC, v. Dring Holding Corp., 164 A.D.3d 1214, 82 N.Y.S.3d 118 [2<sup>nd</sup>. Dept. 2018]).

When a [party] seeking to vacate a default raises both a jurisdictional objection pursuant to CPLR 5015(a)(4) and seeks discretionary vacatur pursuant to CPLR 5015(a)(1), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015(a)(1). Where the party seeking to vacate the default on jurisdictional grounds fails to allege specific facts to rebut the statements in the affidavit of the [petitioner's] process server, she does not rebut the [petitioner's] prima facie showing that she was validly served and the motion to vacate the default would be properly denied( *HSBC Bank USA, National Association, v. Miller*, 121 A.D.3d 1044, 995 N.Y.S.2d 198 [2<sup>nd</sup>. Dept. 2014]). Respondent Kaba has failed to allege specific facts to rebut the Petitioner's process server's affidavit. The affidavit shows that Respondent Kaba was served with a copy of the Order to Show Cause and was provided with proper notice on April 4, 2017 ( see *Wieck v. Halpern*, 255 A.D.2d 438, 680 N.Y.S.2d 599 [2<sup>nd</sup>. Dept. 1998]).

On a motion for leave to enter a default the movant is required to submit proof of service of the summons and complaint, proof of facts constituting the claim and proof of the defaulting party in answering or appearing ( *Atlantic Casualty Insurance Company v. RJNJ Services, Inc.*, 89 A.D.3d 649, 932 N.Y.S.2d 109 [2<sup>nd</sup>. Dept. 2011]; *Triangle Properties 2, LLC v. Narang*, 73 A.D.3d 1030, 903 N.Y.S.2d 424 [2<sup>nd</sup>. Dept. 2010]; *Zelnik v. Bidermann Industries U.S.A., Inc.*, 242 A.D.2d 227, 662 N.Y.S.2d 19 [1<sup>st</sup>. Dept. 1997]). Petitioner's motion for a default order met the requisite evidentiary elements and was accompanied by a detailed factual affidavit from the Petitioner, Timothy Kelly, establishing sufficient facts to enable the court to determine that a viable cause of action existed as required to support his motion for a default ( *State v. Williams*, 73 A.D.3d 1401, 901 N.Y.S.2d 751 [2010]; *Interboro Insurance Company, v. Tahir*, 129 A.D.3d 1687, 12 N.Y.S.3d 688 [4<sup>th</sup> Dept. 2015]). Therefore the court's order was properly granted on default.

Accordingly, Respondents Cross-motion is denied.

N.Y. Judiciary Law §753(3) provides in pertinent part:

"A court of record has power to punish, by fine or imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced by... (3) A party to the action or proceeding... for any...disobedience to a lawful mandate of the court."

It is evident that the Respondents have not complied with this court's August 1, 2017 order. Respondents have violated the court's clear and unequivocal mandate to comply with the court's order within 30 days from the date of service on them of a copy of the court's August 1, 2017 order with notice of entry, and have thereby prejudiced Petitioner's rights in this proceeding ( see *Astrada v. Archer*, 71 A.D.3d 803[2<sup>nd</sup>. Dept. 2010]; *Town of Huntington v. Reuschenberg*, 70 A.D.3d 814 [2<sup>nd</sup>. Dept. 2010]).

Accordingly it is ORDERED that the motion to hold Respondents in Contempt of Court is granted, and it is further

ORDERED, that 486 ST. NICHOLAS AVENUE HOUSING DEVELOPMENT FUND CORPORATION, LARRY G. JOHNSON, ELISHA RANDOLPH and VANESSA KABA are held in contempt of court and may purge their contempt by turning over to Mr. ALBERT GHUNNEY, ESQ., Petitioner's attorney, within 30 days from the date of service on their attorney of a copy of this order with notice of entry, all of the documents ordered by this

court to be provided to Petitioner in its August 1, 2017 order, and it is further

ORDERED, that upon 486 ST. NICHOLAS AVENUE HOUSING DEVELOPMENT FUND CORPORATION, LARRY G. JOHNSON, ELISHA RANDOLPH and VANESSA KABA failure to comply with the terms of this order after service on their attorney of a copy of this order with notice of entry, they shall be found to have wilfully and contumaciously violated a second court order and shall be made to pay a fine individually of TWO HUNDRED and FIFTY( \$250.00) dollars to the Petitioner, for their violation of this order, and it is further

ORDERED, that upon failure of 486 ST. NICHOLAS AVENUE HOUSING DEVELOPMENT FUND CORPORATION, LARRY G. JOHNSON, ELISHA RANDOLPH and VANESSA KABA to purge their contempt they shall be made to pay all reasonable attorneys fees and costs in connection with these proceedings, which attorneys fees and costs shall be determined at a hearing, and it is further

ORDERED, that upon failure of 486 ST. NICHOLAS AVENUE HOUSING DEVELOPMENT FUND CORPORATION, LARRY G. JOHNSON, ELISHA RANDOLPH and VANESSA KABA to purge their contempt Petitioner may move ex-parte for a warrant directing the arrest of LARRY G. JOHNSON, ELISHA RANDOLPH and VANESSA KABA , and their commitment to the Sheriff, and it is further

ORDERED that within 20 days from the date of entry of this order Petitioner serve by personal service upon LARRY G. JOHNSON, ELISHA RANDOLPH and VANESSA KABA, at their last known address, a copy of this order with notice of entry, and it is further

ORDERED that Respondents' cross motion to dismiss this proceedings and to vacate their default is denied.

Enter:

MANUEL J. MENDEZ  
J.S.C.

Dated: January 4, 2019

  
\_\_\_\_\_  
Manuel J. Mendez  
J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST                       REFERENCE