

Besler v Uzieri

2019 NY Slip Op 30564(U)

March 6, 2019

Supreme Court, New York County

Docket Number: 152864/2018

Judge: Robert D. Kalish

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

ASIMIDA BESLER and BESIANA BESLER
Plaintiffs,
- v -
KRESHNIK UZIERI A/K/A KRESHNIK UZEIRI,
Defendant.
INDEX NO. 152864/2018
MOTION DATE 01/25/2019
MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34

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

Motion by Defendant Kreshnik Uzeiri pursuant to CPLR 5015 to vacate this Court's July 27, 2018 decision and order granting Plaintiffs Asimida Besler and Besiana Besler summary judgment in lieu of complaint is denied. Plaintiffs' request for a hearing on the amount of attorney's fees and costs owed to Plaintiffs from Defendant is granted to the following extent.

BACKGROUND

This Court granted Plaintiffs' motion for summary judgment in lieu of complaint in a July 27, 2018 decision and order and set the matter down for a hearing on Plaintiffs' reasonable attorney's fees on September 12, 2018. That motion, which was filed on March 30, 2018, was marked fully submitted - no opposition on June 4, 2018. Briefly, Plaintiffs alleged that Defendant signed a promissory note obligating him to pay \$500,000.00 in principal and defaulted in repaying it. On August 17, 2018, the Clerk entered a judgment in the amount of \$761,402.64 in favor of Plaintiffs and against Defendant in accordance with that decision and order.

On September 12, 2018, the Court held a hearing in this matter. Defendant appeared at the hearing pro se. The original purpose of the September 12, 2018 hearing was to fix the amount of reasonable attorney's fees to which Plaintiffs would be entitled. As Plaintiffs' counsel had sought and secured an adjournment of the September 12, 2018 date, but Defendant and his wife appeared in Court that day, Plaintiffs' counsel appeared by telephone, and an appearance was held. (NYSCEF Doc No. 17 [Tr].)

As is relevant here, Defendant's wife recalled that Defendant dropped off certain "paperwork" at 60 Centre Street on June 1 or June 2. (Tr at 6, line 8.) The Court indicated that any such papers were not submitted in opposition to the motion—which was marked fully submitted - no opposition—and were not properly before the Court, but that "nothing that was

submitted [] would have changed this Court's opinion." (Tr at 10, lines 6–11.) Further, counsel for Plaintiffs stated that Plaintiffs were never served with any opposition to the motion. (Tr at 11, lines 16–25.)

Defendant would go on to state that he "had the money available in [his] bank for three years," offered Plaintiffs, who are his cousins, the money to be paid back "all the time" but that Plaintiffs "would not agree as a family to take that money." (Tr at 15, lines 14–19.) Defendant further stated that he then spent the money. Defendant indicated that his prior attorney was attempting for a long period of time to settle the matter. Defendant wife indicated that their current issue was that Plaintiffs "want more interest." (Tr at 16, line 13.)

As to the issue of attorney's fees, Plaintiffs' counsel indicated that he would be checking with his clients as to whether Plaintiffs would pursue them. Specifically, the Court indicated that it was not adjourning the hearing but was assuming for the moment that Plaintiffs were not going to seek the additional attorney's fees based upon Plaintiffs' counsel's representations and the statements made at the appearance. (Tr at 14, lines 24–25; at 15, lines 1–4.) The Court indicated that, if Plaintiffs did wish to pursue attorney's fees, they would need to write a letter to the Court and to Defendant within 30 days indicating that intent. (Tr at 15, lines 4–11; at 21, lines 2–5.)

On October 12, 2018, thirty days later, Plaintiffs e-filed a letter requesting a hearing on the amount of legal fees and costs owed to Plaintiffs. That same day, Defendant filed the instant motion seq. 002 pursuant to CPLR 5015 to vacate the Court's prior order in seq. 001 granting Plaintiffs summary judgment in lieu of complaint.

Defendant submits a notarized affidavit in support of his motion. Defendant states that he was served with Plaintiffs' motion for summary judgment in lieu of complaint on April 9, 2018. Defendant then states that he appeared at 60 Centre Street Room 130 on June 4, 2018, "the return date of the Motion" with "correspondence and documents which [he] thought would answer the papers that had been served upon [him]" and "did not realize that [he] needed an attorney to file such a response." (Aff of Defendant ¶ 3.)

Defendant argues, in sum and substance, that the statute of limitations began running on December 15, 2009, when he defaulted in paying the amount owed on the promissory note in full, but that the six-year statute of limitations had run in full prior to the commencement of this action. Defendant states that "[i]f [he] had retained an attorney, this Judgment never would have been entered against [him] and this Court would have been aware that the Statute of Limitations had expired." (*Id.* ¶ 8.) Defendant denies making a payment to Plaintiffs in the amount of \$35,800.00 on or about July 1, 2013, as set forth in Plaintiffs' affidavit in support of their motion for summary judgment in lieu of complaint and avers that all his payments to Plaintiffs were made by check. (*Id.* ¶ 9.) Defendant has annexed copies of checks made out to Asimida Besler as exhibit C. Defendant also requests a stay of enforcement of the judgment.

Plaintiffs argue in opposition that Defendant has failed to demonstrate a reasonable excuse in failing to oppose the motion in seq. 001, only claiming that no one advised him that he may need an attorney. Plaintiffs further argue that Defendant has failed to demonstrate a meritorious defense because his own attorney's letter, annexed to the opposition papers as

exhibit 1 and dated July 9, 2013, lists a cash payment of \$35,800.00 as having been made to “Besler,” as “Lender,” from “Uzeiri,” as “Borrower.” (Asimida Besler aff, exhibit 1 [Manfredonia Letter].) Plaintiffs reiterate that all payments made by Defendant, including the \$35,800 in 2013, were accompanied by a promise to repay the balance due on the promissory note.

The Manfredonia Letter states that it is “For Settlement Purposes Only” and “constitutes inadmissible evidence.” The Manfredonia Letter indicates that Defendant was “ready to pay” on March 1, 2013, and asks Plaintiffs’ counsel whether Plaintiffs agree to a “payoff amount of \$549,175.64.” On page 2, in a section titled “Prior Payments” a “Cash” payment of \$35,800.00 is listed, but there is no date indicating when the payment was made.

Plaintiffs argue that Defendant made payments by check totaling \$28,500.00 in 2009 and cash payments totaling \$35,800 in 2013, each of which were accompanied by a promise to repay the balance due on the promissory note. Plaintiffs further argue that the document Defendant submitted in his motion showing copies of the 2009 checks also has handwritten notations totaling the amount already paid by Defendant of \$64,300 (\$55,300 + \$3000 is visible, and an additional two rows listing the amounts of \$3000 and \$3000 is allegedly not visible on the copy provided to the Court).

In his reply affidavit, Defendant reiterates that he was previously unrepresented, submitted documents in opposition to Plaintiffs’ seeking a judgment against him, and did not know about the statute of limitations. Defendant avers that a “\$38,500.00” payment was going to be made at the time of a settlement but that the settlement never occurred, and the amount was never paid.

DISCUSSION

CPLR 5015 permits a court that rendered a judgment or order to relieve a party from it upon the ground of excusable default. “A defendant seeking to vacate a default under this provision must demonstrate a reasonable excuse for its [default] and a meritorious defense to the action.” (*See Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co., Inc.*, 67 NY2d 138, 141 [1986].)

Pursuant to CPLR 2214, “[i]f a motion is made at least 16 days before the return date and includes a proper demand, then answering papers must be mailed at least seven days before the return date.” (*See Associates First Capital v Crabill*, 51 AD3d 1186, 1187.) “While a court can in its discretion accept late papers, CPLR 2214 and 2004 mandate that the delinquent party offer a valid excuse for the delay. Additional factors relevant when essentially extending the return day by accepting late papers include, among others, the length of the delay and any prejudice.” (*Id.*; *see also Mosheyeva v Distefano*, 288 AD2d 488 [2d Dept 2001];)

Here, Plaintiffs’ motion seq. 001 for summary judgment in lieu of complaint was filed March 30, 2018, with a return date of June 4, 2018. Defendant has admitted that he was served with the motion on April 9, 2018. Plaintiffs’ notice of motion in seq. 001 states that “answering

affidavits, if any, must be served on the undersigned not later than seven days before the return date of this motion.”

Defendant has admitted that, on the return date of the motion, he delivered certain documents to 60 Centre Street Room 130. Plaintiffs’ counsel has stated on the record that Plaintiffs never received these documents. All Defendant needed to do was read the notice of motion he was served with and serve his opposition, if any, on Plaintiffs’ counsel at least seven days before the return date of the motion, which was nearly two months after Defendant admits he was served with the motion. This was not done, and Defendant has failed to submit any affidavit of service of the documents on Plaintiffs or to provide a reasonable excuse for never serving the documents on Plaintiffs. (*See Jiewen Lin v City of New York*, 117 AD3d 913 [2d Dept 2014]; *Risucci v Zeal Mgt. Corp.*, 258 AD2d 512 [2d Dept 1999].) Defendant’s excuse that he did not know that he needed an attorney to file a response to the Plaintiffs’ motion in seq. 001 is unavailing, and this type of excuse has been rejected by the Appellate Division. (*See e.g. U.S. Bank Nat. Ass’n v Slavinski*, 78 AD3d 1167, 1167–1168 [2d Dept 2010]; *General Elec. Tech. Servs. Co. v Perez*, 156 AD2d 781, 783 [3d Dept 1989].)

Further, the motion was marked “fully submitted – no opposition” when delivered to chambers. That papers may have been delivered to Room 130 at some point is of no moment, as where the papers were not served on the opposing party, they were never properly before the Court and would not be considered. Moreover, the Court indicated at the oral argument that nothing in the “documents and correspondence” allegedly submitted to Room 130 would have changed the Court’s determination on the prior motion. It should go without saying that Plaintiffs, who were never afforded the opportunity to review or otherwise reply to any of Defendant’s papers, would have been prejudiced by their consideration in any event. (*See O’Callaghan v Meatto, Russo, Burke & Wallace*, 160 AD2d 414 [1st Dept 1990].)

As such, Defendant has failed to set forth a reasonable excuse for his default, and the Court need not consider whether he has demonstrated a meritorious defense. (*See Hertz Vehicles LLC v Westchester Radiology & Imaging, PC*, 161 AD3d 550 [1st Dept 2018]; *Gecaj v Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600, 607 [1st Dept 2017]; *Village Green Hollow, LLC v Assessor of Town of Mamakating*, 145 AD3d 1134, 1136 [3d Dept 2016].)

As the default will not be vacated, this Court shall appoint a referee to hear and report on the issue of the “costs of collection, including reasonable attorney fees,” to which Plaintiffs are entitled to receive payment from Defendant due to his default on the promissory note. (NYSCEF Doc No. 4 [Promissory Note] ¶ 4.)

CONCLUSION

Accordingly, it is

ORDERED that the motion by Defendant Kreshnik Uzeiri pursuant to CPLR 5015 to vacate this Court’s July 27, 2018 decision and order granting Plaintiffs Asimida Besler and Besiana Besler summary judgment in lieu of complaint is denied; and it is further

ORDERED that Plaintiffs' request for a hearing on the amount of attorney's fees and costs owed to Plaintiffs from Defendant is granted to the extent that it is

ORDERED that the issue of the amount of Plaintiffs' costs of collection, including reasonable attorney's fees, in enforcing the Promissory Note to which Plaintiffs are entitled payment from Defendant is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that counsel for Plaintiffs shall, within 10 days of the date of the decision and order on this motion, serve a copy of this order with notice of entry on Defendant and, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119M), who is directed to place the matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that the date on which the matter is calendared by the Special Referee Clerk shall not be adjourned by the parties for any reason without an order from this Court.

The foregoing constitutes the decision and order of the Court.

3/6/2019
DATE


ROBERT DAVID KALISH, J.S.C.
HON. ROBERT D. KALISH

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE	<input checked="" type="checkbox"/>	