

Stewart v Weldon Realty Inc.
2019 NY Slip Op 31633(U)
June 10, 2019
Supreme Court, Kings County
Docket Number: 525172/2018
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

TEO STEWART,

Plaintiff,

-against-

WELDON REALTY INC.,

Defendant.

DECISION / ORDER

Index No.525172/2018

Motion Seq. No. 2

Date Submitted: 5/30/19

Cal No. 57

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion to vacate its default.

Papers	NYSCEF Doc.
Order to Show Cause, Affirmations and Exhibits Annexed.....	<u>21-33</u>
Answering Affirmation and Exhibits Annexed.....	<u>34-37</u>
Reply Affirmation.....	_____

**Upon the foregoing cited papers, the Decision/Order on this application is
as follows:**

This is an action for a declaratory judgment quieting title, for damages and for other relief. Plaintiff claims in the complaint that a deed he signed in 2016, without legal representation, which transferred an investment property of his to defendant, was fraudulently induced. Plaintiff claims he signed the papers after he was led to believe it was for defendant to aid him in attaining "loss mitigation" in connection with a then-pending mortgage foreclosure, but defendant actually left plaintiff still obligated to pay the mortgage loan without the means to negotiate a settlement or a short sale.

Plaintiff's motion for summary judgment was granted on default by this court's order dated April 15, 2019, and the subject deed to defendant was vacated. Plaintiff's

attorney then recorded the court's order and the plaintiff shortly thereafter transferred the property to another entity, 83 Equities LLC.

Defendant now moves by Order to Show Cause dated May 21, 2019 to vacate its default, claiming the default was caused by law office failure in incorrectly calendaring the administratively adjourned return date of the summary judgment motion. Counsel avers that defendant has a meritorious defense, inasmuch as plaintiff's debt on the property exceeded its value at the time he signed the deed to defendant, that he received consideration for the transfer, and, in an inadmissible transcription of an audio recording of the closing, plaintiff acknowledged that he understood the nature of the transaction. Defendant also asks the court to vacate the deed plaintiff gave to 83 Equities LLC.

A "solemn affirmation" is provided from Shandelle Solny, one of the people indicted in the fraud matter described in the Queens DA's press release annexed to plaintiff's opposition papers. Sanford Solny has, according to the court's computer, recently pled guilty to an E Felony and his case is adjourned for sentencing. He was suspended from the practice of law about seven years ago and now will be disbarred. She alleges that she is a "member" of defendant corporation, which is an error, as corporations do not have members. She says she has personal information about the operations of defendant Weldon Realty Inc. She does not mention that it was incorporated two days before plaintiff signed the deed that he claims was fraudulently induced. She states that plaintiff's affidavit in support of the plaintiff's summary judgment motion is "rife with misstatements," in particular that he claims he received no money from the transaction, but he received two checks, for \$4,000 each, and she

provides copies, which are signed by her, on an account that is not the defendant's.

She concludes that the indictment is only an accusation, although Sanford Solny had already pled guilty by the date of her affirmation. She also states "there is no mention of this property" (which is in Brooklyn) in the (Queens) indictment. Ms. Solny was permitted to plead to a violation and received a one-year conditional discharge, but the other half dozen defendants in the fifty-six count indictment are not necessarily getting such a light sentence.

Plaintiff opposes the motion and argues that the claimed law office failure is not sufficiently documented and the evidence in support of the defendant's claimed meritorious defense is specious. Plaintiff further contends that defendant's principal has been involved in a number of questionable transactions of this kind. In his affidavit, plaintiff claims he was defrauded by Sanford and Shandelle Solny of defendant corporation, that he did not receive any money for the transfer, and that the foreclosure action is still pending under Index No. 4288/11. He denies that he attended a closing and disputes that the transcription is of an actual event and states it is just a further fraud by defendant.

To vacate its default in opposing the plaintiff's motion for summary judgment, the defendant is required to demonstrate both a reasonable excuse for the default and a potentially meritorious opposition to the motion (*see Walker v Mohammed*, 90 AD3d 1034 [2d Dept 2011]). "Under appropriate circumstances, a court has the discretion to accept law office failure as a reasonable excuse" (*see SS Constantine & Helen's Romanian Orthodox Church of Am. v Z. Zindel, Inc.*, 44 AD3d 744, 745 [2d Dept 2007]). The court declines to do so here. The court has determined that defendant's attorney

has not made a sufficient showing of an excusable default. Counsel's conclusory and unsubstantiated assertion that the return date was "miscalendared," is unpersuasive in light of the fact that the action is e-filed and he would have received an e-mail from the court with the motion date (see *HSBC Bank USA N.A. v Wider*, 101 AD3d 683 [2d Dept 2012] ["While the Supreme Court has the discretion to accept law office failure as a reasonable excuse, the excuse must be supported by detailed allegations of fact explaining the law office failure"]; *Cantor v Flores*, 94 AD3d 936, 937 [2d Dept 2012] ["appellant's allegation of law office failure was vague, conclusory, and unsubstantiated"]).

In any event, the property was transferred to a subsequent purchaser, 83 Equities LLC, after the subject deed was vacated by the undersigned. This entity, 83 Equities LLC, whose interest in the property would be affected were the court to grant the motion and vacate the prior order as well as the plaintiff's deed to 83 Equities LLC, is entitled to notice. However, jurisdiction has not been obtained over 83 Equities LLC. A third-party action against it would seem to be required for the relief defendant seeks.

Apparently, defendant's tenant, who had rented an apartment at the property, received an eviction notice dated May 10, 2019 from an attorney for 83 Equities LLC. Defendant then served that attorney with this motion. That service was insufficient to obtain jurisdiction over 83 Equities LLC.

Accordingly, it is

ORDERED that the motion is denied in its entirety.

The parties shall appear on July 10, 2019 in the Intake Part for a Preliminary Conference on the remainder of the plaintiff's claims.

This shall constitute the decision and order of the court.

Dated: June 10, 2019

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**