

**500 Eighth Ave. Ltd. Liab. Co. v Resource Training
Ctr. Inc.**

2019 NY Slip Op 32120(U)

July 18, 2019

Supreme Court, New York County

Docket Number: 160028/2016

Judge: Kathryn E. Freed

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED

PART

IAS MOTION 2EFM

Justice

-----X

INDEX NO.

160028/2016

500 EIGHTH AVENUE LIMITED LIABILITY COMPANY,

MOTION SEQ. NO.

002

Plaintiff,

- v -

RESOURCE TRAINING CENTER INC. and DONNA MAE
DEPOLA,**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to

VACATE DECISION

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this landlord-tenant dispute, defendant Resource Training Center Inc. ("RTC") moves, pursuant to CPLR 5015(a), to: (1) vacate its default which resulted in this Court granting plaintiff 500 Eighth Avenue Limited Liability Company's summary judgment motion (motion sequence 001); (2) vacate this Court's prior decision and order rendered on April 10, 2018, which granted plaintiff's summary judgment motion; (3) vacate the entry of judgment; and (4) for a stay of the execution of the judgment pursuant to CPLR 5519(c). Plaintiff opposes the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion is **granted**.

On March 29, 2012, plaintiff and defendants RTC, as tenant, and Donna Mae Depola ("Depola"), as guarantor, executed a lease agreement for property located at 500 Eighth Avenue in Manhattan. (See Docs. 32 at 1; 37; 46 at 5.) Plaintiff is the owner of the property at issue. (Doc.

43 at 2.) The ten-year lease term commenced on January 1, 2012, and was to last through December 31, 2021. (*Id.*)

On July 22, 2016, as a result of RTC having failed to pay over \$24,000 in rent, plaintiff commenced a nonpayment proceeding in Civil Court. (Doc. 42 at 2.) RTC vacated the premises on August 1, 2016, and paid the arrears that were owing. (*Id.*) Once RTC vacated the premises, plaintiff discontinued the nonpayment proceeding. (*Id.*) However, in order to pursue damages caused by RTC's early vacatur of the premises and breach of the lease agreement, plaintiff commenced the instant action on November 30, 2016, by filing a summons and complaint. (Doc. 34.) RTC filed its answer on March 16, 2017 (Doc. 35), and Depola filed her answer on May 4, 2017 (Doc. 42 at 3). On August 11, 2017, Depola was released from the instant action pursuant to a stipulation of discontinuance as to her only. (Doc. 7.)

Plaintiff subsequently moved for summary judgment against RTC (motion sequence 001) on August 30, 2018. (Doc. 33 at 2.) Although RTC's prior attorney was able to adjourn the motion twice via stipulation, unbeknownst to RTC, the prior attorney did not submit any opposition papers to plaintiff's motion. (*Id.*) RTC admits that "[t]he reason for said attorney's failure to submit opposition remains unknown to the Defendant [RTC]." (*Id.*)

This Court granted plaintiff's summary judgment motion in a decision rendered on April 10, 2018. (Doc. 36 at 3–4.) In its decision, this Court specifically noted that, in the absence of any opposition to the summary judgment motion, it "ha[d] no occasion to consider whether a liquidated damages clause consisting of the entirety of the remaining payments, with no provision to discount those payments to their present value, constitutes an improper penalty." (*Id.* at 3.) The judgment entered against RTC amounted to a sum of \$1,249,511.37 (Doc. 40), which reflected the balance of rent for the remainder of the lease (*see* Doc. 42 at 5).

Pursuant to CPLR 5015(a), RTC now moves (motion sequence 002) to: (1) vacate its default which resulted in this Court granting plaintiff's summary judgment motion; (2) vacate this Court's prior decision and order which granted the summary judgment motion; (3) vacate the entry of judgment; and (4) for a stay of the execution of the judgment pursuant to CPLR 5519(c).

In support of its motion, RTC argues that it has an "excusable default" because it "was under the impression that there was no liability, based upon the prior settlement of the prior Nonpayment Proceeding, as well as [Depola's] reliance on the actions of [RTC] in that regard, as well as the fact that there was a retained attorney who was to handle this matter on her behalf." (Doc. 33 at 5.) Depola, although no longer a party to this action, has further submitted an affidavit claiming that she relied on the prior attorney to handle the matter once the action was discontinued as to her: "Although we kept in touch with said Attorney, periodically requesting updates, said attorney failed to unbeknownst [sic] to [RTC] and myself, any defense to Plaintiff's motion. In fact, we only learned that said motion was granted when we were served with the Judgment." (Doc. 32 at 5.)

RTC also maintains that it has meritorious defenses to the action. It insists that this action is improper because the lease was terminated prior to plaintiff commencing the instant action when RTC submitted a check marked as "Final Rent Payment & Tax" and when plaintiff discontinued the nonpayment proceeding. (Doc. 33 at 6.) RTC further asserts that the liquidated damages clause in the lease is unenforceable as a penalty because it is "unreasonably disproportionate to [the] foreseeable losses." (*Id.*) Last, because RTC is a non-profit organization that helps to treat alcohol abuse, RTC argues that execution of the judgment should be stayed so that it can continue doing its work. (*Id.* at 7.)

This Court, in its discretion, grants the motion to vacate the prior order. A CPLR 5015(a) motion to vacate an order of default may be granted if the movant can establish that the default was excusable and that a meritorious defense to the action exists. (*See 38 Holding Corp. v City of New York*, 179 AD2d 486, 487 [1st Dept 1992].) When deciding such motions, courts must be cognizant that there “exists a strong public policy in favor of disposing of cases on their merits.” (*Gecaj v Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600, 602 [1st Dept 2017].) It is also within the sound discretion of the trial court to determine what constitutes a reasonable excuse. (*See Perellie v Crimson’s Rest.*, 108 AD2d 903, 904 [2d Dept 1985].)

The reason that RTC has proffered for its “excusable default” is that Depola was under the impression that there was no liability based on the fact that the nonpayment proceeding had settled. (Doc. 32 at 2–3.) The facts strongly suggest that RTC had no intention of abandoning its legal positions in this action. For example, in her affidavit, Depola states that she “was always under the impression that this matter was being properly handled by the retained attorney” (*id.* at 3) and that defendants only learned of plaintiff’s summary judgment motion when they were served with the prior order (*id.*). Indeed, she further testifies that she was periodically requesting updates from the prior attorney (*id.*), and RTC represents that it does not know why that attorney failed to submit opposition papers to the underlying summary judgment motion (Doc. 33 at 2). Moreover, plaintiff has not alleged that there has been a pattern of delay or misconduct by defendants throughout this action. (*See Latha Rest. Corp. v Tower Ins. Co.*, 285 AD2d 437 [1st Dept 2001]; *Edwards v Feliz*, 28 AD3d 512 [2d Dept 2006].) Taking these facts into account, this Courts determines that RTC and Depola should not be prejudiced by their prior attorney’s failure to address the underlying motion, especially given Depola’s representation that she was relying on the former attorney to continue representation of RTC. (*See Spyropoulos v Hirsh*, 21 AD3d 818, 818 [1st Dept 2005]

(declining to impute the attorney's conduct to the client where the attorney did not engage in a pattern of misconduct).)

This Court further concludes that RTC has presented a meritorious defense to the action. Defendants argue that the liquidated damages clause contained in the lease is an unenforceable penalty. (Doc. 33 at 6–7.) While an acceleration clause in a lease to collect future rent is not per se invalid, defendants may have a viable contention that the “undiscounted acceleration of all future rents constitutes an unlawful penalty.” (*172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc.*, 24 NY3d 528, 532 [2014] (“Defendants should have . . . the opportunity to present evidence that the undiscounted accelerated rent amount is disproportionate to [the plaintiff's] actual losses, notwithstanding that the landowner had possession and no obligation to mitigate.”).) Because defendants have established a meritorious defense in addition to an excusable default, the motion is granted and the execution of the prior judgment is stayed.

In accordance with the foregoing, it is hereby:

ORDERED that the motion by defendant Resource Training Center Inc. to vacate this Court's prior order granting plaintiff 500 Eighth Avenue Limited Liability Company summary judgment and to stay the execution of the judgment is granted; and it is further

ORDERED that defendants' counsel is to serve a copy of this order, with notice of entry, on all parties and on the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within 30 days after the entry of this order onto NYSCEF; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the parties are to appear for a preliminary conference on October 1, 2019, at 2:15 PM in Room 280 at 80 Centre Street; and it is further;

ORDERED that this constitutes the decision and order of this Court.

7/18/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

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CASE DISPOSED

GRANTED

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

☐

OTHER

APPLICATION:

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SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE