

**Kozinoff v Straker**

2020 NY Slip Op 30487(U)

February 11, 2020

Supreme Court, Kings County

Docket Number: 524401/2017

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART DJMP

-----X  
AMOON KOZINOFF,

Plaintiff,

-against-

GERCINE STRAKER,

Defendant.

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Decision and Order

Index No. 524401/2017

Motion Seq. 002

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers

Numbered

Defendant's Order to Show Cause dated November 19, 2019; Affidavit of Gercine Straker, sworn to on October 30, 2019; Affidavit of Hollis Christopher, sworn to on October 30, 2019; Attorney Affirmation in Support of Fern De Jonge, Esq., affirmed on October 31, 2019; Exhibits 1-13.....

1

Plaintiff's Attorney Affirmation in Opposition of Joseph Gillette, Esq., affirmed on January 14, 2020; and Exhibits A-J.....

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**MONTELIONE, RICHARD J., J.**

Plaintiff purchaser commenced this action for specific performance of a real estate contract by filing the summons and complaint on December 19, 2017. Defendant seller was personally served on December 20, 2017. No answer was interposed and plaintiff moved for default judgment on March 21, 2018. On June 7, 2018, the Honorable Lawrence Knipel granted plaintiff's motion for default judgment and directed plaintiff to settle an order on notice. It should be noted that E-filing reflects an E-filed answer by defendant's counsel on April 5, 2018. A notice of settlement with proposed order was filed on June 1, 2018 and the final order and

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judgment was signed on March 18, 2019 without opposition. On November 19, 2019<sup>1</sup>, Defendant brought the instant order to show cause to vacate her default judgment.

Defendant argues, *inter alia*, that she has a reasonable excuse in that her attorney was retained in January 2018 but through a series of mishaps, her attorney did not receive notifications regarding pending court dates and ultimately as a result of this law office failure, default judgment against her was entered. As for a potentially meritorious defense, defendant alleges unclean hands, fraud and fraudulent inducement. Defendant contends, *inter alia*, that plaintiff's agent approached her and her brother<sup>2</sup>, Hollis Christopher, at a time when the property was in foreclosure to purchase the property and insisted that they use an attorney provided by plaintiff's agent, in the drafting and execution of the real estate contract. Defendant believes that her attorney ultimately did not have her best interests in mind. According to defendant, the original closing did not occur as her attorney was "waiting on the buyer" and there were title issues with the property. Defendant also alleges that the contract sales price was below fair market value and believes the relationship between plaintiff's agent and defendant's real estate attorney resulted in a signed contract that did not properly represent her interests.

Plaintiff argues, *inter alia*, that defendant failed to proffer a reasonable excuse or meritorious defense. Specifically, plaintiff argues that defendant failed to explain not only her initial default in answering but also failed to explain "the inordinate amount of time she allowed the default to stand before bringing a second Order to Show Cause." Moreover, plaintiff asserts that the Notice of Settlement was mailed to defendant and her attorney and there was no excuse proffered as to why the present Order to Show Cause was filed months after such notification and after the Honorable Lawrence Knipel had already signed the final Order. Lastly, plaintiff

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<sup>1</sup> Defendant states that an earlier Order to Show Cause was filed on May 5, 2019 but it was returned.

<sup>2</sup> Defendant's brother, Hollis Christopher, also has a Power of Attorney regarding defendant's real estate matters.

argues that defendant did not proffer a meritorious defense as she does not deny signing the contract and to the extent that she had an issue with her attorney, it has no effect on plaintiff's rights under the contract.

Pursuant to CPLR 5015(a)(1), "[a] party seeking to vacate a default in appearing or answering .... and thereupon to serve a late answer, must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action" (*Hamilton Pub. Relations v. Scientivity, LLC*, 129 A.D.3d 1025, 1025, 12 N.Y.S.3d 234; see CPLR 5015[a][1]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the trial court (see *Mid-Hudson Props., Inc. v. Klein*, 167 A.D.3d 862, 864, 90 N.Y.S.3d 264; *White v. Inc. Vill. of Hempstead*, 41 A.D.3d 709, 710, 838 N.Y.S.2d 607, 608).

In the instant case, although defendant's counsel proffered details regarding the series of events that precipitated into the default judgment being entered, there was no explanation as to why no objection to the Notice of Settlement was interposed when the hard copies of the same were served to both defendant and defendant's counsel. Likewise, there was no explanation as to why upon rejection of the first Order to Show Cause, filed in May of 2019. The same was not immediately re-presented for injunctive relief and the instant application was only sought approximately six months later. While the court has the discretion to accept law-office failure as a reasonable excuse, the events in this matter constituted a "pattern of willful default and neglect." (*Roussodimou v. Zafiriadis*, 238 A.D.2d 568, 657 N.Y.S.2d 66 [2nd Dept. 1997]).

Parenthetically, defendant has not demonstrated potentially meritorious defenses.<sup>3</sup>

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<sup>3</sup> Defendant's counsel also asserts that defendant is entitled to a vacatur of the default judgment pursuant to CPLR 317. However, there was no demonstrated proof that defendant did not personally receive the summons and complaint in time to defend as required pursuant to CPLR 317. While defendant's counsel states that defendant was not personally served and cites defendant's affidavit, defendant's affidavit makes no reference to such assertion. In fact, the affidavit of service in this matter indicates that she was personally served.

The doctrine of “unclean hands applies when the complaining party shows that the offending party is ‘guilty of immoral, unconscionable conduct and even then only ‘when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct’” (*internal citations omitted*) (*Kopsidas v. Krokos*, 294 A.D.2d 406, 742 N.Y.S.2d 342 [2nd Dept. 2002]). In the instant case, the assertions of defendant and defendant’s agent, Hollis Christopher, are too speculative to be considered conduct that demonstrates even a potentially meritorious defense under the doctrine of unclean hands (*see Blueberry Inv’rs Co. v. Ilana Realty Inc.*, 184 A.D.2d 906, 585 N.Y.S.2d 564 [2nd Dept. 1992]; *Flowers v. 73rd Townhouse, LLC*, 52 A.D.3d 104, 857 N.Y.S.2d 146 [2nd Dept. 2008]).

Moreover, “[a] claim of fraud will not lie if, *inter alia*, the misrepresentation allegedly relied upon was not a matter within the peculiar knowledge of the party against whom the fraud is asserted, and could have been discovered by the party allegedly defrauded through the exercise of due diligence (*internal citations omitted*)” (*Cohen v. Cerier*, 243 A.D.2d 670, 663 N.Y.S.2d 643 [2nd Dept. 1997]). In the instant case, defendant has not asserted that the misrepresentation allegedly relied upon, i.e., the fair market value of the property, was a matter of special knowledge exclusively possessed by the plaintiff.

Lastly, “[a]s to a defense of fraudulent inducement, in order to sustain such a claim, one must show “misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76, 668 N.E.2d 1370 [1996]). Likewise, defendant has not shown a fact which was false and known to be false

by the plaintiff in the transaction.

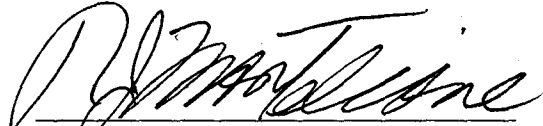
Ostensibly, the court is cognizant of defendant's assertion that the contract itself was unfair; however, defendant failed to proffer any objective measure of proof to corroborate her belief that the property is worth more than the contracted price. "Equity will not relieve parties from bargains simply because they are unreasonable or unprofitable" (*Khayyam v Diplacidi*, 167 A.D.2d 300, 562 N.Y.S.2d 43). Even if the court were to consider whether specific performance would be a drastic or harsh remedy despite the fact that the deed transfer has already occurred due to defendant's default, defendant failed to submit determinative evidence that the sale would be a drastic or harsh remedy (*see Spira v. Acceus*, 114 A.D.3d 663, 979 N.Y.S.2d 836 [2nd Dept. 2014]; *Breskin v. Moronto*, 172 A.D.3d 1296, 102 N.Y.S.3d 88 [2nd Dept. 2019]).

Therefore, based on the foregoing, defendant's motion to vacate the default judgment and to compel acceptance of a late answer is denied.

A copy of this order shall be served on all sides within fifteen (15) days of the notice of entry.

This constitutes the decision and order of the court.

Dated: FEB 11 2020

  
Richard J. Montelione, A.J.S.C.

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