

**Pekic v Rinaldi**

2020 NY Slip Op 31643(U)

May 22, 2020

Supreme Court, Kings County

Docket Number: 519047/16

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, DJMP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22<sup>nd</sup> day of May, 2020

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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DJURO PEKIC AND 461 78<sup>TH</sup> ST., REALTY CORP.,

Plaintiffs,

- against -

Index No. 519047/16  
521301/16 (Closed - EF)

MICHAEL S. RINALDI,

Defendant.

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The following papers numbered 1 to 6 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1, 2, 3
Opposing Affidavits (Affirmations)_____	4, 5
Reply Affidavits (Affirmations)_____	6
_____ Affidavit (Affirmation)_____	
Other Papers_____	

These lawsuits arise from a contract of sale of real property located at 461 78<sup>th</sup> Street in Brooklyn, NY. Defendant agreed to sell to plaintiff the property by contract dated November 2, 2010. In anticipation of the closing, plaintiff apparently performed work on the premises. However,

the closing never occurred. Plaintiff's affidavit blames defendant for not having enough money to pay the liens on the property; defendant's affidavit blames plaintiff for not having the funds to close. Years later by letter dated October 26, 2016, mailed to defendant's attorney and received days later, plaintiff purportedly set a closing date for November 1, 2016. When defendant failed to appear, plaintiff moved for a default judgment. The motion was granted on default by a handwritten short form order dated June 7, 2018, which included provisions stating, *inter alia*, that if defendant did not appear in plaintiff's attorney's office in five days to close, the sheriff would be entitled to sign the deed. Plaintiff indeed secured the sheriff's deed.

The action bearing Index No. 519047/16 was to impose a constructive trust to recover for purported improvements made to defendant's property made in anticipation of closing which did not occur (until years later with the sheriff's sale). Plaintiff commenced an action for specific performance bearing Index No. 521301/2016. Plaintiff was granted a default judgment in the constructive trust action by this court (Borrok, J.), on January 18, 2018. The action for specific performance, as noted above, resulted in a default judgment allowing the sheriff to convey the premises.

Defendant now moves in these respective cases to vacate the orders granting plaintiff a default judgment. The motion in the specific performance case was brought by order to show cause signed by Justice Sweeney which contained a stay restraining plaintiff, *inter alia*, from selling,

transferring, or encumbering the subject premises. By orders dated August 13, 2019, these motions to vacate the default judgment were referred to me. By order also dated August 13, 2019, I signed an order consolidating the specific performance case into the constructive trust case.

In his motion to vacate the default of the action for constructive trust, defendant contends that he immediately went to the office of plaintiff's attorney to discuss the matter, and, by telephone, that attorney told him the only issue was reimbursement. Plaintiff said the matter would be resolved when he sold the property. In effect, defendant is arguing that he thought the matter was resolved, and since he and plaintiff were friends, that was the end of the matter. As for a meritorious defense, defendant argues, *inter alia*, that he did not ask plaintiff to perform any work, there is no fiduciary relationship, and no reliance, and thus plaintiff cannot prove any of the elements of a constructive trust.

In his motion to vacate the default of the action for specific performance, defendant argues, *inter alia*, he had no knowledge of the action, the purported demand for a time of the essence closing years after the contract was arguably abandoned, the motion for default judgment, or the purported sheriff's sale. For a meritorious defense, defendant argues plaintiff's case is improbable and virtually impossible to prove.

"The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion \* \* \* upon the ground of excusable default" (CPLR 5015[a][1]; see

*Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co.*, 67 NY2d 138, 141 [1986]; *HSBC Bank USA v Eliyahu*, 170 AD3d 1130 [2d Dept. 2019]). A defendant seeking to vacate a default judgment must demonstrate a reasonable excuse, the absence of willfulness and a prima facie showing of legal merit (see *Picotte Realty, Inc. v Aragona*, 87 AD2d 955 [3d Dept 1982][an opportunity to defend and a final disposition on the merits are most desirable]). Here, defendant has adequately demonstrated a reasonable excuse for his default and lack of willfulness. He has more than adequately shown potential merit in defending these lawsuits.

Accordingly, defendant's motions are granted. In Index No. 519047/16, the order dated January 18, 2018 is vacated. In Index No. 521301/16 the order dated June 7, 2018 is vacated. In the latter action, for specific performance, the terms of the February 5, 2019 order to show cause, namely the provisions enjoining plaintiff from disposing of, encumbering, selling or transferring the property shall continue until further order of the court.

The foregoing constitutes the decision and order of this court.

E N T E R,

J. S. C.

Hon. Lawrence Knipfel