

Continental Capital Group, LLC v Lazar Bldrs., LLC

2020 NY Slip Op 34281(U)

December 23, 2020

Supreme Court, Kings County

Docket Number: 507817/14

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm 4 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 23rd day of December, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.
-----X
CONTINENTAL CAPITAL GROUP, LLC and WOLF
LANDAU,
Plaintiff,

- against -

Index No. 507817/14

LAZAR BUILDERS, LLC and LAZAR OSTREICHER
a/k/a MORDECHAI ELAZER OSTREICHER,
Defendants.

-----X
LAZAR OSTREICHER a/k/a MORDECHAI ELAZER
OSTREICHER,
Third-Party Plaintiff,

- against -

AARON ROSENFELD,
Third-Party Defendant.

The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>212-220</u>
Opposing Affidavits (Affirmations) _____	<u>224-245</u>

Upon the foregoing papers in this foreclosure action, defendant Lazar Ostreicher a/k/a Mordechai Elazer Ostreicher (Ostreicher) moves (in motion sequence [mot. seq.] nine), by order to show cause, for an order, pursuant to CPLR 5015 (a) (1), vacating and

setting aside the June 26, 2020 default judgment entered against him (Default Judgment).

On August 26, 2014, plaintiffs Continental Capital Group, LLC (Continental Capital) and Wolf Landau (Landau) (collectively, plaintiffs) commenced this action to foreclose a mortgage. On December 1, 2014, plaintiffs amended their complaint. The amended complaint alleges that defendant Ostreicher executed a promissory note on behalf of defendant Lazar Builders LLC as well as a personal guarantee in favor of Continental Capital.

On January 13, 2015, Ostreicher, who was then represented by The Silber Law Firm LLC (Silber Law Firm), answered the complaint. On September 3, 2015, Ostreicher answered the amended complaint and commenced a third-party action against Aaron Rosenfeld (Rosenfeld), alleging that plaintiffs and Rosenfeld, acting in concert, “structured a loan transaction whereby defendant Ostreicher’s signature was forged and Rosenfeld absconded with monies, none of which ever reached [d]efendant Ostreicher.” By a March 23, 2018 order, the third-party action against Rosenfeld was severed from the main action since Rosenfeld had filed a bankruptcy petition. By a November 8, 2019 order, the court relieved the Silber Law Firm as counsel for defendant Ostreicher.

Two months later, on January 17, 2020, this action was scheduled for trial, but defendant Ostreicher failed to appear. On January 17, 2020, an inquest was held in Ostreicher’s absence, and the court granted plaintiffs a judgment against Ostreicher for \$225,000.00 with interest from September 9, 2012. On June 26, 2020, the Default

Judgment was entered in favor of plaintiffs and against Ostreicher.

Ostreicher now moves for an order vacating the Default Judgment, pursuant to CPLR 5015 (a) (1), based on excusable default. Ostreicher submits an affidavit attesting that from September 2019 through late November 2019 he left the country due to a family matter. While Ostreicher was overseas, the court issued the November 8, 2019 order relieving the Silber Law Firm as his counsel. Ostreicher attests that his former counsel at the Silber Law Firm "attempted to serve notice upon me that he had been relieved as counsel[,]" but he did not receive such notice. Ostreicher attests that he received no communications from the Silber Law Firm regarding either its motion to be relived as counsel or the January 17, 2020 trial. Ostreicher attests that he was not aware of the January 17, 2020 trial date, and that he only learned about the Default Judgment when it was served upon him with notice of entry thereof on or about June 29, 2020, approximately six months after the Default Judgment was issued.

Ostreicher asserts that he has a meritorious defense to the action because he never signed the loan documents and his signature was forged. Ostreicher requests that the court consider the following:

"(i) evidence of bogus loan documents; (ii) loan proceeds that are completely unaccounted for; (iii) Plaintiff's unexplained failure to attempt any foreclosure of the subject property instead seeking relief only against a guarantor; (iv) payments by check allegedly made by me on the purported loan which evidence at least three different handwritings; (v) multiple property transfers among different entities before, during and after the purported loan was issued; (vi) a subsequent writing

where Plaintiff disavows the loan and the loan documents and attempts to manufacture a new agreement; (vii) not one but two party writings that make plain the swindle that plaintiffs and third-party defendant knowingly schemed against me; (viii) that Landau (as lender) and third party defendant Rosenfeld (as property owner and true borrower) knew each other and were seen by Affiant Steiner in Rosenfeld's New Jersey office before or at the purported funding of the loan . . . ; (ix) that Rosenfeld was cash-strapped in 2006 and created sham transactions to transfer the mortgaged property to an entity affiliated with me so that Landau would fund the loan, despite knowing that I was at that point, no longer working with Rosenfeld on the subject property; (x) that Landau willingly and knowingly loaned money to Rosenfeld based on documents he knew were forged; (xi) that I received none of the claimed loan proceeds; (xii) that Plaintiff failed to commence – even threaten – a foreclosure action when the loan was not repaid in 2007; (xiii) that this entire scheme enriched third party defendant Rosenfeld when I received nothing from it; and (xiv) that plaintiff acknowledged to third parties that Rosenfeld was the responsible party.”

Ostreicher asserts that “[i]n light of these unusual circumstances Plaintiffs’ claims must not only be reexamined they must [be] scrutinized and the Judgment should be vacated.”

Plaintiffs, in opposition, argue that Ostreicher’s forgery defense is not meritorious because Ostreicher admitted that he signed a related agreement on September 9, 2009. Plaintiffs also argue that Ostreicher’s forgery defense is meritless based on the deposition testimony from two attorneys who attended the loan’s closing. Additionally, plaintiffs submit a report from a handwriting expert who concluded that there is a “strong probability” that Ostreicher signed the loan documents. Landau, a managing member of Continental Capital, submits an affidavit attesting that Continental Capital, a hard money

lender, loaned \$600,000.00 to Ostreicher's company, Lazar Builders, and that Ostreicher personally guaranteed the loan. According to Landau, the mortgage matured on August 10, 2007, and Lazar Builders failed to pay the money owed on the maturity date. Landau attests that "[f]or years, Ostreicher, Lazar Builder's principal, tendered approximately 30 check payments under the (alleged) fraudulent loan" and Ostreicher signed the majority of those checks. Landau asserts that "Ostreicher ratified the fraudulent loan by his continued substantial payments that lasted for three years" even if Ostreicher did not execute the promissory note. Landau denies having any knowledge of a forgery.

A party seeking to vacate a default in appearing pursuant to CPLR 5015 (a) (1) must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action" (*92-18 149th Street Realty Corp. v Stolzberg*, 152 AD3d 560, 562 [2017] [internal quotations omitted]). Furthermore, where a default in appearing results from law office failure, the court may "exercise its discretion in the interest of justice to excuse delay or default . . ." pursuant to CPLR 2005 (*see JP Morgan Chase Bank, N.A. v Russo*, 121 AD3d 1048, 1049 [2014]).

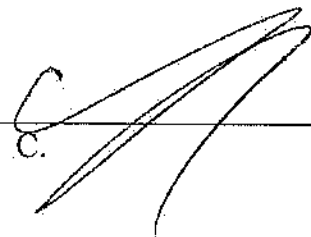
Here, Ostreicher has demonstrated a reasonable excuse for his default because he was out of the country for three months and was unaware that his prior counsel at the Silber Law Firm had been relieved and that a trial was scheduled on January 17, 2020. Ostreicher has established a potentially meritorious defense to this action based on his testimony that his signature was forged on the loan documents, despite the fact that

plaintiffs have produced some evidence to the contrary. In the court's discretion, and in the interest of justice, Ostreicher's motion to vacate the Default Judgment is granted since Ostreicher's failure to appear in court was neither willful nor deliberate, and the validity of the underlying loan should be determined at trial on the merits. Accordingly, it is

ORDERED that Ostreicher's motion (in mot. seq. nine) is granted, and the June 26, 2020 Default Judgment is hereby vacated.

This constitutes the decision and order of the court.

E N T E R,

J. S. C. 

Justice Lawrence Knipel