

Randazzo v Kovacevic
2021 NY Slip Op 32022(U)
March 24, 2021
Supreme Court, Bronx County
Docket Number: 23073/2013E
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
-----X

Index No.: 23073/2013E
Motion Sequence No(s). 5,6
Motion Date: 1/19/21 &
2/22/19

JOHN RANDAZZO,

Plaintiff(s),

-against-

FRANCESCA KOVACEVIC, MANUEL MENA

Defendant(s).
-----X

DECISION/ ORDER
Present:
Hon. Wilma Guzman
Justice of the Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion and cross motions:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation and Affidavit in Support and Exhibits annexed thereto.....	1
Affirmation in Opposition and Notice of Cross Motion, Affirmation in Support and Exhibits Annexed thereto.....	2
Affirmation in Opposition and Notice of Cross Motion, Affirmation in Support and Exhibits Annexed thereto.....	3
Affirmations in Reply.....	4, 5
Notice of Motion, Affirmation and Affidavit in Support and Exhibits annexed thereto.....	6
Affirmation in Opposition and Notice of Cross Motion, Affirmation in Support and Exhibits Annexed thereto.....	7
Affirmation in Reply.....	8

Motion decided as follows: Upon deliberation of the application duly made by Plaintiff JOHN RANDAZZO (hereinafter "Plaintiff") herein by **NOTICE OF MOTION** and all the papers in connection therewith for an Order pursuant to CPLR § 3215 granting default judgment in favor of Plaintiff is heretofore denied.

Upon deliberation of the application duly made by Defendant MANUEL MENA (hereinafter "Defendant Mena") herein by **NOTICE OF CROSS-MOTION** and all the papers in connection therewith for an Order pursuant to CPLR §§ 3012(d), 2004, and 2005 for leave to file and serve an Amended Verified Answer is heretofore granted.

Upon deliberation of the application duly made by Defendant FRANCESCA KOVACEVIC (hereinafter "Defendant Kovacevic") herein by **NOTICE OF CROSS-MOTION** and all the papers

in connection therewith for an Order pursuant to CPLR §§ 3012(d), 2004, and 2005 to compel Plaintiff to accept Defendant Kovacevic's late Answer is heretofore granted.

Upon deliberation of the application duly made by Defendant Mena herein by **NOTICE OF MOTION** and all the papers in connection therewith, for an Order pursuant to CPLR § 6401(a) appointing a temporary receiver is heretofore denied.

Upon deliberation of the application duly made by Plaintiff herein by **NOTICE OF CROSS-MOTION** for an Order pursuant to CPLR § 2214, §2215 and NYCRR § 130-1.1 awarding Plaintiff costs and sanctions against Defendant Mena and his attorney and for an Order pursuant to CPLR § 5104 holding Defendant Mena and his attorney in civil contempt of Court is heretofore denied in part and granted in part.

Background

Plaintiff and Defendant Kovacevic were owners as tenants in common of the property described as 723 East 140th Street, Bronx, New York (hereinafter "the Subject Premises"). In 2008, Defendant Kovacevic transferred her fifty (50) percent share of the Subject Premises to Defendant Mena. The instant action was commenced by Plaintiff, via Summons and Complaint, on August 21, 2013 seeking relief in the form of a judgment declaring (1) the transfer of the Subject Premises void, (2) that Plaintiff enjoys the right of first refusal in regards to any sale of the Subject Premises by Defendant Kovacevic and (3) that Defendant Mena has no legal rights to the Subject Premises. Defendants Kovacevic and Mena jointly filed an Answer on December 2, 2013 and amended their Answer on December 27, 2013. On December 6, 2019, Plaintiff filed an Order to Show Cause seeking leave to amend the Original Complaint, to include claims of fraudulent conveyance, and both Defendants opposed. In the Order to Show Cause, Plaintiff also requested a preliminary injunction enjoining Defendants from terminating the tenancy of Morell Brown Corporation (hereinafter "MBC"), the tenant of the Subject Premises. On May 18, 2020 the Honorable Wilma Guzman signed an Order granting leave to Plaintiff to file an Amended Complaint, denying the request for preliminary injunction as moot and restraining the Defendant's from selling, reletting or otherwise transacting with the Subject Premises without Plaintiff's consent. Furthermore, the Court also, *sua sponte*, ordered Defendant Mena to pay for taxes, water charges and insurance on the Subject Premises in a total amount of \$77,545.50. Plaintiff filed an Amended Complaint on June 22, 2020. On July 20, 2020, Defendant Kovacevic filed an untimely Answer to the Amended Complaint, which Plaintiff rejected on July 24, 2020. Defendant Mena has filed a new motion seeking appointment of

a temporary receiver and commenced a new action against Plaintiff, seeking partition and sale of the Subject Premises, under index number 33958/2020. Defendant Mena has not filed an Answer to the Amended Complaint.

Plaintiff's Motion for Default Judgment

In support of his motion, Plaintiff argues that the time for Defendants to Answer or move with respect to the Amended Complaint expired on July 19, 2020. Plaintiff argues that, as of the date of this instant motion, Defendant Mena has not answered and Defendant Kovacevic failed to answer in a timely manner. Plaintiff argues that Defendants' time to answer has not been extended, and that they are both now in default. Plaintiff argues that, pursuant to CPLR § 3215, he is entitled to a judgment for the amount demanded in the complaint, which is not less than \$1,000,000.00 for each Cause of Action.

In opposition, Defendant Mena argues that Plaintiff's motion should be denied as it is defective. Defendant Mena argues that Plaintiff never submitted any proof of service of the Amended Complaint, rendering the motion insufficient pursuant to CPLR § 3215. Furthermore, Defendant Mena argues that Plaintiff failed to adequately allege facts to support his claims, arguing that Plaintiff's attachment of his Amended Complaint is insufficient to enable the Court to determine if a viable Cause of Action exists against Defendants. For these reasons, Defendant Mena argues that Plaintiff's motion should be denied.

Both Defendants Mena and Kovacevic have filed cross-motions seeking Orders pursuant to CPLR §§ 3012(d), 2004, and 2005. In support of his cross-motion, Defendant Mena argues that undersigned counsel never received a good faith letter, email or phone call from Plaintiff's counsel regarding the outstanding alleged default. Defendant Mena further argues that undersigned counsel was actively involved in negotiations with Plaintiff, has appeared since the inception of this matter in 2013 and there had been a mis-calendar of the deadline to respond. Furthermore, Defendant Mena argues that the delay was brief and Plaintiff has not demonstrated any prejudice as a result of this delay. Lastly, Defendant Mena argues that he has potentially meritorious defenses. Defendant Mena argues that he has annexed his Amended Verified Answer and that a prior motion for summary judgment against Defendants made by Plaintiff on this matter has been denied. For these reasons, Defendant Mena urges the Court for an Order granting leave to file and serve an Amended Verified Answer. In support of her cross-motion, Defendant Kovacevic argues that, on or about March 20, 2020,

Governor Cuomo suspended the time limits for legal actions via Executive Order 202.8, as a result of the COVID-19 pandemic. Defendant Kovacevic then mentions that on or about March 22, 2020, the New York State on Pause Program began, in response to the COVID-19 pandemic, requiring all non-essential workers to remain at home. Defendant Kovacevic argues that, as a non-essential business, undersigned counsel and his staff remained at home. Defendant Kovacevic argues that, on the alleged default date of July 19, 2020, the executive order continued to be in effect. Defendant Kovacevic argues that the Amended Answer was filed on July 20, 2020 and that, during this time, undersigned counsel had only sporadic access to his office, due to the COVID-19 Pandemic and the "Occupy City Hall" protests, occurring daily directly in front of his office. Defendant Kovacevic argues that another executive order extended the time limit of legal action to January 29, 2021. Defendant Kovacevic argues that, at most, her Answer was one day late and Plaintiff has failed to show any prejudice should the late Answer be accepted, as this case has not been certified for trial and discovery is still outstanding. For these reasons, Defendant Kovacevic moves the Court for an Order compelling Plaintiff to accept Defendant Kovacevic's late Answer.

In reply and opposition to Defendant Kovacevic's cross-motion, Plaintiff argues that the cited executive orders do not apply to Answers to a Complaint, that Defendant Kovacevic's attorney's affirmation is plagiarized from Defendant Mena's attorney's affirmation, and that Defendant Kovacevic failed to provide a reasonable excuse or the delay. In reply and opposition to Defendant Mena's cross-motion, Plaintiff argues that the affidavits submitted by Plaintiff make out a sufficient Cause of Action. Plaintiff further argues that all service had been done via E-file, and the email addresses of all attorneys on this case are on the record, therefore proof of service is not necessary. Plaintiff further argues that the affirmation of attorney Mr. Zimnoch is not applicable, as he is not the attorney on the record for Defendant Mena, and Defendant Mena failed to state who in the office had mis-calendared the deadline to respond. Plaintiff argues that, therefore, Defendant Mena failed to provide a reasonable excuse for the delay. Plaintiff further argues that Defendant Mena failed to mention that attorney Mr. DeVries replaced Mr. Zimnoch as his attorney, and failed to mention his new motion for a temporary receiver, his new action commenced against Plaintiff, or any explanation of Defendant Mena's failure to pay the outstanding \$78, 023.52 due to Plaintiff as per the May 18, 2020 Order by the Honorable Wilma Guzman. Plaintiff further argues that he has been prejudiced, as Defendant Mena's delay has allowed him time to file a new motion and commence a new action, which Plaintiff will now have to oppose and defend. Lastly, Plaintiff argues that the claims of fraudulent conveyance raised in his new Amended Complaint were not in the original complaint.

The prior denial of Summary Judgment was in reference to the original complaint, and is therefore, not proof of a meritorious defense. For these reasons, Plaintiff urges the Court to grant default judgment against Defendant's Kovacevic and Mena and to deny both Defendant's cross-motions.

Defendant Kovacevic's cross-motion for an Order compelling Plaintiff to accept Defendant Kovacevic's late Answer is hereby granted. The interests of justice will best be served by compelling Plaintiff to accept service of the Defendant Kovacevic's late Answer *nunc pro tunc*. Defendant Kovacevic has offered a reasonable excuse for the delay in answering, to wit law office failure and the intervening COVID-19 pandemic and "Occupy City Hall" protests. Defendant Kovacevic has not made any showing that the delay in answering was willful and Plaintiff has made no showing that they would be prejudiced should this Court compel Plaintiff to accept Defendant Kovacevic's Answer pursuant to CPLR §§ 3012, 2004 and 2005. Furthermore, Defendant Mena's cross-motion for an Order granting leave to file and serve an Amended Verified Answer is hereby granted. "While a court has the discretion to accept law office failure as a reasonable excuse, such excuse must be supported by detailed allegations of fact explaining the law office failure." Ibrahim v Nablus Sweets Corp., 161 AD3d 961 (2nd Dept. 2018); see CPLR § 2005. The annexed affirmation of Mr. Zimnoch, from the office of the counsel for Defendant Mena, contains detailed allegations of facts regarding the law office failure, specifically relating to the lack of notification of the outstanding alleged default, the mis-calendaring of the deadline to answer the amended complaint and the difficulties present due to the intervening COVID-19 pandemic. Defendant Mena has not made any showing that the delay in answering was willful and Plaintiff has made no showing that they would be prejudiced should this Court grant Defendant Mena leave to file and serve an Answer. Due to the foregoing, Plaintiff's motion for an Order pursuant to CPLR §3215, granting default judgment against Defendants Mena and Kovacevic is heretofore denied. Furthermore, Defendant Kovacevic's and Defendant Mena's cross motions for an Order pursuant to CPLR §§ 3012, 2004 and 2005 are granted in their entirety.

Defendant Mena's Motion for a Temporary Receiver

In support of his motion for a temporary receiver, Defendant Mena argues that the business relationship between the parties in this action is irreparably damaged and cannot and will not allow them to engage in constructive communication concerning future tenants or a sale. After MBC vacated the Subject Premises, it has laid vacant, failing to produce income and has gathered debts.

Furthermore, Defendant Mena argues that, due to the lack of rental income stemming from the Subject Property, he cannot make the ordered payments. Defendant Mena argues that Plaintiff's refusal to entertain a sale has hindered the ability of the premises to produce income, and the premises continues to accumulate debt or which Defendant Mena is responsible, only worsening the wasteful situation. Defendant Mena argues that as the Subject Premises is not generating any income, it is at risk of being destroyed or dissipated, which is an adequate basis for the request of a temporary receiver. For these reasons, Defendant Mena urges the Court to enter an Order immediately appointing a temporary receiver to take over the management of the Subject Premises until the termination of the litigation and granting the receiver the following powers; (1) take a hold the Subject Premises, (2) relet the premises, (3) fix the rental value, (4) collect all rental income, (5) if necessary, institute any proceedings necessary against tenants who do not pay rents, (6) keep accurate books and records and (7) establish a separate account in the name of the receiver to hold all rental income collected.

In opposition, Plaintiff argues that Defendant Mena's motion for a temporary receiver should be denied on the grounds that (1) Defendant Mena lacks standing as he is in default in this action and a motion holding him in default is pending before the Court and that Defendant Mena is already enjoined, by an Order of this Court, by the Honorable Wilma Guzman on May 18, 2020, from selling or otherwise transacting with the Subject Premises.

This Court denies Defendant Mena's request for the appointment of a temporary receiver. This Court, having denied Plaintiff's motion for a default judgment against Defendant Mena herein, finds Plaintiff's claims that Defendant Mena does not have standing, moot. However, Defendant Mena is enjoined and restrained, by Order of the Honorable Wilma Guzman, signed and dated May 18, 2020 from "selling, reletting or otherwise transacting with the Subject Premises without Plaintiff's consent." The appointment of a temporary receiver would be a transaction involving the Subject Premises, and is among the actions which Defendant is restrained from doing by Order of this Court without consent of Plaintiff. Furthermore, "the appointment of a receiver is a drastic and intrusive remedy and may only be invoked in cases where the moving party has made a clear evidentiary showing of the necessity of conserving the property and protecting the interests of that party." Secured Capital Corp. v. Dansker, 263 A.D 2d 503 (2nd Dept. 1999). Defendant Mena has not submitted any evidentiary showing that the Subject Premises is in danger of being destroyed. Instead, Defendant Mena argues that that he cannot pay his outstanding costs because the property is

not generating any rental income. However, these costs were calculated for amounts due for taxes and water, as they have already been paid by Plaintiff. Lastly, the Court finds that, as both parties concede that there is no current tenant and the building is not collecting any rental income, the appointment of a temporary receiver would be unnecessary at this point in the litigation. For these reasons, Defendant Mena's motion requesting the appointment of a temporary receiver is denied.

Plaintiff's Cross-Motion for Costs, Sanctions and Civil Contempt

In response to Defendant Mena's motion, Plaintiff has cross-moved for an Order pursuant to CPLR § 2214, § 2215 and NYCRR § 130-1.1 awarding Plaintiff costs and sanctions against Defendant Mena and his attorney and for an Order pursuant to CPLR § 5104 holding Defendant Mena and his attorney in civil contempt of Court.

NYCRR § 130-1.1 states that "the court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court... costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. Conduct is considered frivolous if "it is undertaken primarily to delay or prolong the resolution of the litigation." NYCRR § 130-1.1.

Plaintiff has not met their burden to show that Defendant Mena acted with any intent to prolong or delay the resolution of this litigation. For these reasons, Defendant Mena's conduct is not frivolous, and Plaintiff's request for costs against both Defendant Mena and his counsel are hereby denied.

Furthermore, this Court grants Plaintiff's motion seeking to hold Defendant Mena in civil contempt. Pursuant to New York Judiciary Law § 253 (a)(3), "a party to the action or special proceeding, an attorney, counsellor, or other person, for the *non-payment of a sum of money*, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum except as otherwise specifically provided by the civil practice law and rules; or *for any other disobedience to a lawful mandate of the court.*" Furthermore, "In order to find that contempt has occurred in a given case, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate was in effect. It must appear with reasonable certainty, that the order has been disobeyed. Moreover, the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually be served upon the party. Prejudice to the right of a party to the litigation must be demonstrated (see Judiciary Law, § 753, subd. A)." McCormick v.

Axelrod, 59 N.Y.2d 574 (1983). It is clear that Defendant, Mena had knowledge of this Court's Order. Plaintiff has e-filed a copy of the Order dated May 18, 2020 signed by the Honorable Wilma Guzman, with Notice of Entry.

Furthermore, Defendant Mena never argues that he had been unaware of the outstanding Order. In fact, Defendant Mena directly quotes from the Order in his affirmation in opposition to Plaintiff's motion. Most importantly, "a finding of civil contempt requires the violation of a clear and unequivocal mandate set forth in an order or judgment of the court." Matter of Wright v McIntosh, 125 A.D. 3d 679 (2nd Dept. 2015). The May 18, 2020 Decision and Order of this Court signed by the Honorable Wilma Guzman clearly stated that Defendant Mena was enjoined and restrained from "selling, reletting or otherwise transacting with the Subject Premises without Plaintiff's consent." However, Defendant Mena filed a motion seeking to appoint a temporary receiver for the Subject Premises, conduct that is considered "transacting" with the Subject Premises, and clearly stated, in a letter to the Plaintiff, that he filed the motion for a temporary receiver with the "endgame...to have the property sold." The Appellate Division, Second Department held in the matter of Breskin v. Moronto, 172 A.D.3d 1298 (2nd Dept. 2019) that:

"A motion to punish a party for civil contempt is addressed to the sound discretion of the court, and the movant bears the burden of proving the contempt by clear and convincing evidence". "In order to adjudicate a party in civil contempt, a court must find: (1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the party against whom contempt is sought disobeyed the order, (3) that the party who disobeyed the order had knowledge of its terms, and (4) that the movant was prejudiced by the offending conduct. The party seeking a finding of civil contempt must prove these elements by clear and convincing evidence" and willfulness need not be established"

In Breskin, supra, the court determined that since a showing of willfulness is not required to establish civil contempt, no hearing was necessary with respect to the defendant's intent. The court concluded that the defendant's conduct in failing to vacate the premises was in civil contempt of the court orders and remitted the matter to the Supreme Court, Kings County, for a hearing and determination as to the appropriate punishment for contempt and the appropriate directive for allowing the defendant to purge herself of her contempt. The Appellate Court further found that the "Supreme Court improvidently exercised its discretion when it awarded the plaintiffs the sum of only \$ 5,000 in attorneys' fees. Accordingly, we also remit the matter to

the Supreme Court, Kings County, for a hearing and a new determination of the award of attorneys' fees to which the plaintiffs are entitled pursuant to the terms of the contract.” Breskin, supra.

Accordingly, defendant, Mena’s actions clearly violated the mandates set forth in the Order of this Court. The Order also plainly states that “Defendant Mena is responsible for the full amount of taxes owed for the period...in the amount of \$77,545.50.” Defendant Mena has not paid any of this amount, and thus, has violated yet another mandate set forth in the Order of this Court. Defendant Mena has also offered nothing but unsubstantiated claims to explain his failure to comply. Defendant Mena claims that he cannot pay his outstanding costs because the property is not generating any rental income. However, Defendant Mena was aware that the property was not generating rental income at the time when this Order was rendered and these costs were calculated for amounts due for taxes and water that have already been paid by Plaintiff. Therefore, Plaintiff has established that Defendant Mena has violated the Order of this Court dated May 18, 2020 and Defendant Mena has failed to substantiate his claims explaining this violation. Astrada v. Archer, 71 A.D.3d 803 (2nd Dept. 2010). For these reasons, the Court grants Plaintiff’s request to hold Defendant Mena in Civil Contempt of Court.

Appropriate sanctions and fines may be imposed with the determination of contempt. The statute “distinguishes between the amount of the fine assessable in two separate types of civil contempt cases, one where actual damage has resulted ... from the contemptuous acts and one where there may be prejudice to a complainant's right but ‘it is not shown that such an actual loss or injury has been caused.’” State of New York v. Unique Ideas, 44 NY2d 345 (1978) Where an injury or loss has occurred, the fine must be sufficient to indemnify the complaining party; however, where an injury or loss has not been shown, the fine may not exceed the complainant's costs plus \$250. Judiciary Law § 753; see Moffat v. Herman, 116 NY 131 (1889). In the instant matter, Plaintiff has demonstrated that loss has occurred, as the monies due to him by Defendant Mena pursuant to the Order were compensatory for taxes and utility bills already paid by Plaintiff. As Plaintiff has demonstrated actual loss, the sanction imposed will include fines sufficient to indemnify Plaintiff. Interest on the award fees, of reasonable costs and expenses, including attorneys' fees and the rate and date from which that interest shall be computed shall be in the court's discretion (See CPLR 5001[a]; governed by the facts, including any wrongful conduct by either party (see Danielowich v. PBL

Dev., 292 A.D.2d 414, 415, 739 N.Y.S.2d 408). This issue should be determined after the hearing.

Plaintiff has not met his burden in showing any wrongdoing on the part of Defendant Mena's attorney, which would rise to the level of contempt. For this reason, the Court denies Plaintiff's request to hold Defendant Mena's counsel in Civil Contempt of Court.

Accordingly, it is,

ORDERED and ADJUDGED that Plaintiff JOHN RANDAZZO's motion for an Order pursuant to CPLR §3215, granting default judgment in favor of Plaintiff is hereby denied. It is further,

ORDERED and ADJUDGED that Defendant FRANCESCA KOVACEVIC's motion for an Order pursuant to CPLR §§ 3012(d), 2004, and 2005 to compel Plaintiff to accept Defendant Kovacevic's Answer as timely is hereby granted. It is further,

ORDERED and ADJUDGED that Plaintiff JOHN RANDAZZO accept the Answer from Defendant FRANCESCA KOVACEVIC, *nunc pro tunc*. It is further,

ORDERED and ADJUDGED that Defendant MANUEL MENA's motion for an Order pursuant to CPLR §§ 3012(d), 2004, and 2005 for leave to file and serve an Amended Verified Answer is hereby granted. It is further,

ORDERED and ADJUDGED that Defendant MANUEL MENA file and serve an Answer to Plaintiff JOHN RANDAZZO's Amended Complaint within twenty (20) days of service of this Decision and Order with Notice of Entry. It is further,

ORDERED and ADJUDGED that Defendant MANUEL MENA's motion for an Order pursuant to CPLR § 6401(a) appointing a temporary receiver is hereby denied. It is further,

ORDERED and ADJUDGED that Plaintiff JOHN RANDAZZO's motion for an Order pursuant to CPLR § 2214 and §2215 and NYCRR § 130-1.1 awarding Plaintiff costs and sanctions against Defendant Mena's attorney are hereby denied. It is further,

ORDERED and ADJUDGED that Plaintiff JOHN RANDAZZO's motion for an Order pursuant CPLR § 5104 holding Defendant Mena's counsel in civil contempt of court is hereby denied. It is further,

ORDERED and ADJUDGED that Plaintiff JOHN RANDAZZO's motion for an Order pursuant CPLR § 5104 holding Defendant Mena in Civil Contempt of Court is hereby granted. It is further,

ORDERED and ADJUDGED that Defendant Mena is in Civil Contempt and a hearing shall be held on June 3, 2021 at 10:00 a.m. at Courtroom 624 of 851 Grand Concourse, Bronx, New York or Virtually via Microsoft Teams to determine the amount as to sanctions and/or fines including reasonable costs and expenses, attorneys' fees to be assessed by this Court, at its discretion. It is further

ORDERED and ADJUDGED that Plaintiff JOHN RANDAZZO shall serve a copy of this Order with Notice of Entry upon the Defendants within thirty (30) days from the date of entry of this Order.

The forgoing constitutes the Decision and Order of the Court.

Dated:

March 24, 2021



HON. WILMA GUZMAN, J.S.C.