

Gulyak v Grullon

2022 NY Slip Op 30560(U)

January 26, 2022

Supreme Court, Kings County

Docket Number: Index No. 525966/2019

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Term, **Part 83** 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 26th day of January 2022.

P R E S E N T : HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
LARRY GULYAK,

Index No.: 525966/2019

Plaintiff,

-against-

LUIS P. GRULLON,

Defendant.

-----X
The following e-filed papers considered herein:

E-Filed Papers Numbered

Notice of Motion/Affirmation/Exhibits	<u>56 - 63</u>
Answering Papers	<u>64 - 66</u>
Reply	<u>68</u>

In this matter, plaintiff, Larry Gulyak, moves (Mot. Seq. 4) pursuant to CPLR § 5015 (a) to vacate his default in complying with the conditional preclusion order of predecessor justice, Hon. Lawrence Knipel, dated October 16, 2020 (referred to interchangeably as “October 16, 2020 order” or “conditional preclusion order”). Plaintiff further requests vacatur of the court order dated May 18, 2021, which granted the defendant’s motion for summary judgment based upon plaintiff’s non-compliance with such based upon the conditional preclusion order.

Plaintiff commenced this matter by the filing of a summons and verified complaint on November 26, 2019 to recover damages based upon his contention that defendant, Luis P. Grullon (“defendant”), breached his obligations under a residential lease for the property known as 2805 Ocean Parkway, Unit 7A and PS, Brooklyn, New York. Plaintiff asserts that the lease was for a one year period, from April 1, 2018 through March 31, 2019, with a total rent obligation of \$36,000 per year, at \$3,000 per month. Plaintiff alleges that the lease also

contained provisions for the imposition of late charges for overdue rent as well as an increase in rent, to \$4,000 per month, if defendant remained in possession after expiration of the lease. Plaintiff further asserts that the lease provides for reimbursement of attorneys fees, if it became necessary for plaintiff to employ an attorney to enforce the lease agreement.

Plaintiff commenced a holdover proceeding against the defendant in the Housing Court, Civil Court of the City of New York, Kings County, in or about July 2019, prior to filing the instant action. The holdover proceeding resulted in a judgment of possession and warrant of eviction in plaintiff's favor and against the defendant. However, plaintiff asserts that the defendant was still occupying the subject premises when plaintiff commenced the instant matter in November 2019. Plaintiff further asserts that the defendant caused flooding and damage to the premises, adjoining apartments and common areas in February 2019 when plaintiff left the door to the balcony of the premises open and again, in and September 2019, when plaintiff blocked and obstructed the drain to the boiler room with his personal belongings. The defendant denied these allegations in his Answer and asserted counterclaims for breach of warranty of habitability, breach of contract, and constructive eviction.

The court issued a preliminary conference order on February 3, 2020 that set forth a schedule and directed the exchange of discovery. Plaintiff filed a motion to compel, to strike the defendant's answer, or preclude the defendant from offering evidence at trial, based upon his contention that the defendant failed to provide responses to plaintiff's interrogatories and combined discovery demands. The court granted the motion to the extent of directing the parties to appear for examinations before trial ("EBT"), such that the plaintiff's EBT is conducted on or before December 14, 2020 and the defendant's EBT is conducted on or before January 14, 2021. The court further directed that the note of issue be filed before March 12, 2021 and "[f]ailure to comply with this order will result in the non-complying party being precluded from offering evidence, without the need for further motion [practice] pursuant to CPLR 3126 (2).

Defendant moved for summary judgment on January 28, 2021 on the ground that plaintiff failed to appear for the EBT that was initially scheduled by counsel for December 7, 2020.

According to the defendant's attorney, on December 1, 2020, plaintiff's counsel requested an adjournment of plaintiff's EBT to a later date. Plaintiff's counsel claimed to have offered December 11 and 14, to which plaintiff's counsel did not provide a response. Defendant also claimed to have sent a follow up email to plaintiff's counsel, stating "'Erick, you never responded with the new dates for your client's deposition. The court ordered it to be held by 12/14/20. I am willing to adjourn it to another mutually convenient date, rather than make a discovery motion. Let me know when your client will be produced by this coming Monday, please.'" According to defendant's counsel, plaintiff responded on the same day by email, wherein he stated, "I will advise next week when he will be back to set up a date." Subsequently, on January 25, 2021, plaintiff's counsel indicated via email, "[m]y client is not comfortable appearing for an 'in person' EBT. If you want to do it over Zoom he is ready."

Plaintiff filed opposition to the defendant's motion for summary judgment with a cross motion to extend the note of issue and for partial summary judgment. Plaintiff's counsel also outlined the correspondence that had occurred in the intervening months between counsel, specifically as it related to the scheduling of plaintiff's EBT. Plaintiff's counsel contends that he advised that "[plaintiff] is available to be deposed 11/8 to 11/30" and apprised the defendant's attorney that plaintiff would be leaving the country for business on 11/30/2020. According to plaintiff's counsel, he stated, in pertinent part, that

"[plaintiff] is leaving on the 30th, can you do him in the evening? I doubt you will need more than 3 hours. I am just trying to get him done before he leaves. I am not trying to be disrespectful of you[r] time, please don't take it as such..."

Plaintiff's counsel affirms that there were several dates in December 2020 that did not materialize due to scheduling conflicts and that the plaintiff's counsel refused to schedule the deposition in January 2021, in favor of filing the motion for summary judgment.

Defendant's motion, initially returnable on March 18, 2021, was adjourned to April 29, 2021 and again to May 18, 2021, in order to give the parties additional time to resolve outstanding discovery. However, it was revealed that discovery was still outstanding at the

Microsoft Teams conference held on May 18th, and the court rendered a decision and order granting summary judgment in favor of defendant, dismissing plaintiff's claims without prejudice due to plaintiff's non-compliance with the conditional preclusion order.

Plaintiff now requests vacatur of his default in complying with the October 2020 order for the first time. Plaintiff further requests an order vacating the May 18, 2021 order. However, the October 16, 2020 and May 18, 2021 orders were not issued upon default. The plaintiff filed the motion to compel, strike or preclude and the defendant submitted written opposition to that application. The court granted the motion to the extent of setting dates by which the parties must provide discovery or be precluded from offering evidence at trial. Neither party sought relief from the October 16, 2020 decision and order by requesting leave to reargue or renew their respective position, nor did either party take an appeal from that decision.

The defendant filed the next motion, wherein he sought summary judgment based upon the plaintiff's failure to comply with the conditional preclusion order. The motion was contested by plaintiff in a cross motion with written opposition but plaintiff took no appeal from the resulting order. Rather, plaintiff filed the instant motion to obtain relief on CPLR § 5015 (a)(1) grounds. However, under the circumstances, the appropriate remedies consist of filing a timely appeal from the October 16, 2020 or May 18, 2021, or seeking leave to renew or reargue.


This comports with the Second Department's decision in *Pergamon Press v Tietze*, , 848 [2d Dept 1981], *lv. dismissed* 54 NY2d 605, where the plaintiff's motion to strike the defendant's answer for failure to respond to its discovery demands was contested by the defendant, who took no appeal from the court's decision but instead, moved for CPLR § 5015(a)(1) relief. The Second Department explained that relief pursuant to CPLR § 5015 (a)(1) is not available in cases where the defendant was able to take an appeal from an order that granted one of the party's relief pursuant to CPLR § 3126[3]. In affirming the motion court's decision, the Second Department reasoned that because the order striking the defendant's answer was obtained on a noticed and contested motion, permitting the defendant to obtain relief under CPLR § 5015 (a)(1) would allow for relitigation of the very issue previously contested and

decided; to wit, whether there was an excusable failure on the moving party's part to comply with the underlying disclosure order (*Id.* at 832). The precedent set by the Second Department in *Pergamon* is consistently applied in cases where a discovery default was followed by a contested motion to strike that resulted in an appealable order but instead of filing an appeal, or a motion for leave to renew or reargue, the losing party sought to obtain relief through a motion pursuant to CPLR § 5015 (a)(1). In those cases, as is this case, a motion to vacate pursuant to CPLR § 5015 (a) is procedurally improper (*Hinds v 33 Street Astoria*, 197 AD3d 697 [2d Dept 2021] citing *Cole-Hatchard v Eggers*, 132 AD3d 718, 719 [2d Dept 2015]; *Pinapati v Pagadala*, 244 AD2d 676 [3d 1997]; *Pergamon Press v Tietze*, 81 AD2d 831 [2d Dept 1981]).

Accordingly, plaintiff's motion (Motion Seq. 4) is denied.

This constitutes the decision and order of the court.

ENTER,



HON. INGRID JOSEPH, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice