

Gutevich v Voller
2022 NY Slip Op 32762(U)
August 11, 2022
Supreme Court, Kings County
Docket Number: Index No. 520252/2020
Judge: Richard J. Montelione
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At an IAS Term, Part DJMP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the ____th day of _____, 2022.

AUG 1 1 2022

P R E S E N T: HON. RICHARD J. MONTELLIONE

Justice.

-X

ZLATA GUTEVICH f/k/a ZLATA SOSIN,

DECISION and ORDER

Plaintiff,

-against-

Index No.: 520252/2020

MICHAEL VOLLER,

Defendant.

-X

Mot. Seq. 1-2

The following e-filed papers read herein:

NYSEF Nos.:

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed

6-7

Opposing Affidavits (Affirmations)

20

Affidavits/ Affirmations in Reply

21, 23

Other Papers: _____

Upon the foregoing papers, the plaintiff moves for a default judgment pursuant to CPLR 3215 and for an order pursuant to CPLR 3212(a) for the relief demanded in the Complaint, upon the grounds that the defendant, Michael Voller, has defaulted in appearing and answering in this action, and further ordering (a) that the plaintiff is seized and possessed as a joint tenant with right of survivorship of an undivided one-half interest of the premises; (b) that the defendant is seized and possessed as a joint tenant with right of survivorship of an undivided one-half interest of the premises; (c) that the said premises are so situate that a sale thereof is necessary, and that the said premises be sold by and under the direction of the Court and conveyance given to the purchasers; and (d) that the proceeds of such sale be divided between said parties according to their respective rights and interests as aforesaid after payment of the costs of this action and of

the said sale; and (e) that the defendant account to the plaintiff for any and all rents or other monies received or collected from said premises, and that the defendant pay to the plaintiff any sum of money as may be found due to said plaintiff according to plaintiff's respective rights and interests as aforesaid.

Defendant cross moves for an order deeming defendant's Answer dated April 10, 2021 as timely or alternatively permission to deliver and file the answer late; and/or confirming and enforcing the Stipulation of Settlement by and between the parties dated December 29, 2020 as against the Plaintiff.

This is a partition action between parties previously married. Defendant avers that as a result of a mutual mistake, the premises, a cooperative apartment, was never transferred to him upon execution of their divorce agreement and decree. Plaintiff commenced this action for partition of the property, filing the summons and complaint on October 20, 2020. On December 29, 2020, the parties entered into a stipulation of settlement resolving the present lawsuit (NYSCEF doc. #12). The stipulation provided that plaintiff was to prepare the documents required to transfer of the property to the defendant, and within 30 days of the execution of the stipulation, defendant was to pay the plaintiff Twenty Thousand Dollars (\$20,000.00) to be held by her attorney pending stipulation of discontinuance and release. The stipulation further provided that that all transfer taxes and fees of the transfer and carrying charges of the apartment would be the sole responsibility of the defendant.

Plaintiff contends that the defendant failed to pay her the amount due pursuant to the stipulation, and as such the stipulation became a nullity. Plaintiff further contends that defendant, having failed to comply with the stipulation, and having failed to file an answer to the complaint is in default, and that she is entitled to a default judgment granting the relief sought in the complaint, including an appointment of a receiver to sell the apartment and divide the proceeds.

In his cross-motion in opposition, defendant's counsel avers that he attempted to send the \$20,000.00 due under the terms of the stipulation via wire transfer to plaintiff's counsel on January 28, 2021, thirty days from the execution of the stipulation. Plaintiff's counsel did not send the wire transfer information as requested to facilitate payment, but instead e-mailed defendant's counsel referring to a conversation between counsel regarding a proposed addendum to the agreement (NYSCEF doc. #20, exhibit B). Plaintiff was concerned that defendant was significantly in arrears on his mortgage payments for the subject apartment and sought to modify the agreement to better protect herself from liability and because her credit rating was affected. Defendant seeks to enforce the agreement as written and executed as the parties.

On March 2, 2021, plaintiff's counsel e-mailed defendant's counsel advising him that inasmuch as the \$20,000.00 payment was not made, they would move ahead seeking

summary judgment and the appointment of a referee (NYSCEF doc. #20, exhibit C). Plaintiff avers that defendant is in breach of the stipulation as he could have tendered the payment in some way other than a wire transfer. Plaintiff further contends that defendant should have filed an answer when he breached the stipulation and is thereby in default.

“A defendant seeking to vacate a default in answering a complaint pursuant to CPLR 5015(a) must show both a reasonable excuse for the default and the existence of a potentially meritorious defense” (Natanel v Plaza Ins. Co., 200 AD3d 890, 891; see CPLR 5015[a][1]; Elderco, Inc. v Kneski & Sons, Inc., 183 AD3d 703, 703). “Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits” (Natanel v Plaza Ins. Co., 200 AD3d at 891 [internal quotation marks omitted]).

Here, given the totality of all relevant factors, including the lack of any evidence of willfulness by the defendant, the short delay in filing the answer once the plaintiff notified defendant that the settlement was not being honored, the lack of prejudice to the plaintiff from the delay, and the strong public policy in favor of resolving cases on the merits, the defendant established a reasonable excuse for his default (see *id.*; Stango v Byrnes, 200 AD3d 821, 823; Garcia v City of New York, 189 AD3d 788, 789; P&H Painting, Inc. v Flintlock Constr. Servs., LLC, 179 AD3d 1086, 1087). In addition, the defendant established a potentially meritorious defense to the action by proffering evidence that the plaintiff was in breach of the stipulation by her refusing to accept the payment as offered and her attempt to modify the agreement rather than honor its terms (see *Khanal v Sheldon*, 74 AD3d 894, 896). *6 Crannell Street, LLC, et al., v Urban Green Equities, LLC*, ___ AD3d ___, 2022 WL 2823164 (Mem), 2022 N.Y. Slip Op. 04613 (2d Dept., July 20, 2022).

Accordingly, it is

ORDERED that plaintiff’s motion for a default judgement, summary judgment and appointment of a receiver is denied in its entirety, and it is further

ORDERED that defendant’s cross-motion is granted to the extent that the answer filed by defendant on April 13, 2021 is deemed served, and it is further

ORDERED parties are to appear at the courthouse located at 360 Adams Street, Brooklyn, NY 11201, Courtroom 419, or as otherwise indicated on the door of the courtroom, in Part 99 on October 12, 2022 at 2:30pm, and it is further

ORDERED that at the aforesaid time and place plaintiff shall personally appear and shall bring with her a Bargain and Sale deed transferring her interest in the real property,

which is the subject of the stipulation (NYSCEF Doc. #20), to the defendant, along with all related and necessary paperwork necessary to effect the transfer of her interest to the defendant; and it is further

ORDERED that the plaintiff's counsel is directed to bring a stipulation of discontinuance; and it is further

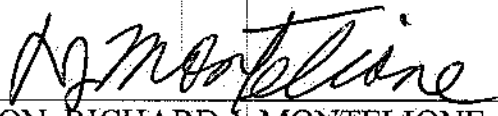
ORDERED that at the aforesaid time and place defendant shall personally appear and shall bring with him a certified check in the amount of \$20,000.00 made payable to plaintiff; and it further

ORDERED that in the event plaintiff or defendant fails to appear or to bring with them the items directed in this order, the party who fails to appear or to bring with them the items directed in this order shall show cause why they should not be sanctioned under 22 NYCRR 130-1.1 et. seq.

Any relief not explicitly granted herein is denied.

The foregoing constitutes the decision and order of the court.

ENTER


HON. RICHARD J. MONTELIONE
J.S.C.