

Phoenix Sutton Str. Inc. v Rakhman

2024 NY Slip Op 33417(U)

September 24, 2024

Supreme Court, Kings County

Docket Number: Index No. 506342/2022

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At IAS Part 99 of the Supreme Court of the State of New York, Kings County, on the ___ day of September 2024

SEP 24 2024

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C. SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS: PART 99

DECISION AND ORDER

-----X
PHOENIX SUTTON STR. INC.,

Index No.: 506342/2022

Plaintiff,

-against-

Mot. Seq.: 001 & 002

BOBBY RAKHMAN, aka BORIS RAKHMAN
249 BRIGHTON CORP., BNH III LLC, ARSEN
ATBASHYAN, and JOHN DOE #1 through JOHN
DOE # 10, defendants being fictitious, it being
Intended to name all other parties who may
Have some interest in or lien upon the premises
Sought to be foreclosed,

Defendants.
-----X

The following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	<u>Numbered</u>
Non-Party BB249 LLC's motion to dismiss pursuant to CPLR 3215(c), to discharge the notice of pendency pursuant to CPLR 6514, to cancel and discharge the mechanic's lien of \$39,490.16 against the real property located at 247 Brighton Beach Avenue, Brooklyn, NY, Block 8671, Lot 936 because the lien expired, to discharge the lien of \$39,490.16 against the real property located at 249-251 Brighton Beach Avenue, Brooklyn, New York, Block 8671, Lot 934, upon the ground that the lien expired; etc.; attorney affirmation of Yevgeny Tsyngauz, Esq., affirmed on October 17, 2023; affidavit of Pyotr Yadgarov, duly sworn to on October 17, 2023; Exhibits 1-10, and Memorandum of Law In Support.....	8-21
Plaintiff's Cross-Motion to enter the default judgment in favor of the plaintiff and against the defendant 249 Brighton Corp. and against the non-party, BB249 LLC, attorney affirmation of Michael Siwec, Esq., affirmed on November 3, 2023; attorney affirmation of Romuald P. Magda, affirmed on November 3, 2023; Memorandum of Law in Opposition to Motion and in Support of Cross-Motion; Exhibits 1-6.....	24-34
Non-Party BB249 LLC's Attorney Affirmation in Reply of Yevgeny Tsyngauz, affirmed on December 26, 2023; Exhibits 1-9, and Memorandum of Law in Reply.....	35-45
Plaintiff's Cross-Motion Reply Affirmation of Romuald P. Magda, affirmed on February 12, 2024, Exhibits 1 & 2, and Memorandum of Law in Reply.....	48-51

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MONTELIONE, RICHARD J., J.S.C.

Phoenix Sutton Str. Inc. (plaintiff) commenced this action on March 3, 2022, with the filing of the Summons and Verified Complaint alleging breach of contract for failure to pay for materials and services. Plaintiff filed a notice of pendency and sought to foreclose two mechanics' liens filed against properties located at 247 Brighton Beach Avenue, Brooklyn, NY, Block 8671, Lot 936 and 249-251 Brighton Beach Avenue, Brooklyn, New York, Block 8671, Lot 934, each lien in the amount of \$39,490.16. Service was made upon defendant 249 Brighton Corp. (249 Brighton) and BNH III LLC (BNH) through the Secretary of State pursuant to Section 306 of the BCL. on March 23, 2022. Service was not made on the remaining defendants.

Defendants 249 Brighton and BNH failed to appear or answer. On October 17, 2023, non-party BB249 LLC ("non-party BB249" or "BB249"), the successor-in-interest to 249 Brighton, as purchaser of both of the above properties, by deed dated March 13, 2023 and recorded on March 16, 2023, moved to dismiss plaintiff's action against 249 Brighton as plaintiff failed to take proceedings to enter a default judgment against the 249 Brighton within one year of its default. On November 6, 2023, the plaintiff opposed BB249's motion and cross-moved for leave to enter a default judgment against defendant 249 Brighton Corp. and BNH III LLC. For the reasons set forth below, the Court grants BB249's motion and denies plaintiff's cross-motion.

Plaintiff, in its Verified Complaint (NYSCEF # 1), alleged, amongst other facts, that plaintiff is a construction contractor and entered into two contracts, (the first on March 3, 2017 and modified on March 17, 2017, and the second on March 22, 2017), with defendant 249 Brighton, a New York State corporation, "for the construction, renovation and operation" and thereafter for the "installation and removal of an emergency heavy duty sidewalk bridging and related work" for defendant's real properties located at 247 Brighton Beach Avenue and 249-251 Brighton Beach Avenue in Brooklyn. On December 16, 2021, and allegedly "within eight (8) months of the date of furnishing the last item of its services," and with a \$78,980.32 balance due pursuant to the contracts, plaintiff filed a notice of Mechanic's Lien with the Kings County Clerk against both of 249 Brighton's properties.

On March 3, 2022, plaintiff commenced the instant action and filed a Notice of Pendency against both of 249 Brighton's properties. According to the Affidavit of

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Service filed by the plaintiff, (NYSCEF # 6), defendants 249 Brighton and BNH III LLC were served on March 23, 2022, when Nancy Dougherty, the authorized agent for service in the office of the Secretary of the State, was personally served at said office. The time for 249 Brighton to appear or answer pursuant to CPLR 320(a) was within thirty (30) days of that service. Defendant 249 Brighton defaulted. Plaintiff was required to move for default judgment no later than on or about April 23, 2023.

On October 17, 2023, approximately six months later, non-party BB249 moved for an order, *inter alia*, dismissing the instant action as abandoned pursuant to CPLR § 3215[c]. In non-party's BB249's attorney Affirmation in Support of its motion to dismiss, states that its client bought "Properties" from 249 Brighton on March 13, 2023. In support, counsel attaches as Exhibit 10, a copy of the NYC Department of Finance of the City Register Recording and Endorsement Cover Page indicating property addresses of 249 Brighton Beach Avenue, 247 Brighton Beach Avenue, and 3064 Brighton 1 Terrace, Brooklyn New York. BB249 argues that as a result of the 247 Brighton's transfer of interest to BB249, CPLR § 1018 provides BB249 standing to bring the instant motion to dismiss without a formal substitution. The sole member of BB249 LLC by affidavit swears to the foregoing facts. Plaintiff opposes the relief sought by BB249 but does not challenge BB249's standing to bring the motion. (*See Woori Am. Bank v. Global Universal Grp. Ltd.*, 134 A.D.3d 699 [2nd Dept 2015], ["in the event that a note and mortgage are validly assigned to a third party subsequent to the commencement of a foreclosure action, as was the case here, the assignee can continue an action in the name of the original mortgagee, even in the absence of a formal substitution"]. (citations omitted)]

Plaintiff's counsel, in opposition to the motion to dismiss, argues law office failure and affirms as follows: counsel failed to move for a default judgment within a year of the default; he is a solo practitioner; and he "failed to make sure that the deadlines as entered on [his] office computer had actually been entered into the system." In addition to the excuse for his delay, he sets out activity after defendant 249 Brighton's default and well within the one-year period as follows: he received a communication from the office of Yevgeny Tsyngaus, Esq., counsel for the non-party BB249 LLC, in June of 2023 "telling me that they represent the new owner of the Properties, and they would be willing to settle the matter"; and "[s]ubsequently in September 2023 [plaintiff's counsel] called the No[n]-Party attorney and was told that they are no[t] interest[ed] in settlement."

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Finally, non-party BB249 argues that bare neglect does not constitute sufficient cause and that plaintiff failed to demonstrate the existence of a potentially meritorious cause of action.

CPLR 3215 reflects the following:

(c) Default not entered within one year. If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

Commentary to CPLR 3215:

C3215:16 “Sufficient Cause” for Not Timely Taking Proceedings

A defendant will not be able to excuse its failure to timely “take proceedings” within one year from the defendant's default, if the excuse for doing so is mere efforts to settle and resolve the parties' dispute and make demands for overdue payments (*American Express National Bank v Skyline Luxury, Inc.*, 79 Misc.3d 1203[A], 188 N.Y.S.3d 918, 2023 WL 3731292 [Sup. Ct. N.Y. Co. May 30, 2023]; *American Express National Bank v Hybrid, Inc.*, 76 Misc.3d 637, 173 N.Y.S.3d 868 [Sup. Ct. N.Y. Co. 2022] [settlement overtures insufficient]).

Commentary to CPLR 3215:

What qualifies as sufficient cause will vary from case to case. The inquiry is by definition *sui generis*. The statute does not excuse the plaintiff's failure to timely take proceedings for any cause, but only when the cause is found by the court to

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be “sufficient.” The sufficiency of the cause does not lend itself to objective or quantifiable criteria, but instead requires a subjective evaluation of the facts and excuses argued by the plaintiff and the opposing arguments, if any, of the defendant. The court therefore has discretion to determine whether the plaintiff’s burden of establishing a sufficient cause for failing to take proceedings is established (*JP Morgan Chase Bank, N.A. v Greenberg*, 177 A.D.3d 860, 112 N.Y.S.3d 234 [2d Dep’t. 2019]; *Bank of Am., N.A. v Shami*, 173 A.D.3d 954, 104 N.Y.S.3d 719 [2d Dep’t. 2019]; *Mills v Niagra Mohawk Power Corp.*, 216 A.D.2d 828, 628 N.Y.S.2d 857 [3d Dep’t. 1995]).

It is within the sound discretion of the court to determine whether there has been sufficient cause presented to excuse a delay in seeking a default judgment within one year after a party’s default as required by CPLR 3215(c). *See, Pipinias v. J. Sackaris & Sons, Inc.*, 116 A.D. 3d 749 (2 Dept 2014). In exercising its discretion and determining whether the delay should be excused, the court will, on a *sui generis* basis, determine whether sufficient cause, and a meritorious cause of action have been presented. *See, Bank of New York Mellon v. Izmiriligil*, 144 A.D.3D 1067 (2 Dept. 2016).

The court finds that the verified complaint, verified by plaintiff, and plaintiff’s affidavit in support, provide sufficient evidence of a meritorious action. However, arguments regarding judicial economy so as to avoid commencing another action as a reason to allow entry of the default judgment after one year is rejected as not a factor that may be considered. Plaintiff’s argument concerning law office failure, “(t)he reason for my failure was that I failed to make sure that the deadlines as entered on my office computer had actually been entered into the system” is confusing and not sufficient cause for allowing late filing of a default judgment. Plaintiff’s assertion of a “willingness to settle” is likewise insufficient as there are no details as to how or why this would impact on the timely entry of a judgment within one year of default. Further, the argument of lack of prejudice to the defendant is not a factor that may be considered by the court. *Supra*.

Based on the foregoing, it is

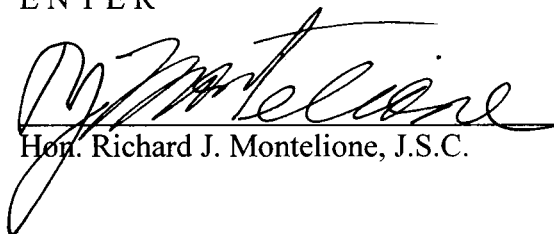
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ORDERED, that the motion to dismiss brought by non-party BB249, LLC is GRANTED (MS#1) and the Kings County Clerk is directed to cancel and discharge any Notice of Pendency filed in this action and cancel and discharge the mechanics' liens placed by plaintiff Phoenix Sutton Str. Inc. of \$39,490.16 against the real property located at 247 Brighton Beach Avenue, Brooklyn, NY, Block 8671, Lot 936 and to also discharge the lien of \$39,490.16 against the real property located at 249-251 Brighton Beach Avenue, Brooklyn, New York, Block 8671, Lot 934; and it is further

ORDERED, that the plaintiff's cross motion to file a default judgment is DENIED as academic (MS#2).

This constitutes the decision and order of the Court.

ENTER


Hon. Richard J. Montelione, J.S.C.

2024 SEP 26 A 10:43
KINGS COUNTY CLERK
FILED