

Prashad v New York City Dept. of Hous. Preserv. & Dev.
2024 NY Slip Op 35335(U)
March 22, 2024
Supreme Court, Queens County
Docket Number: Index No. 716325/2020
Judge: Kevin J. Kerrigan
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FILED

3/26/2024

COUNTY CLERK
QUEENS COUNTY

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
JusticePart 10-----X
Dianna Prashad,Index
Number: 716325/20

Plaintiff,

- against -

New York City Department of Housing
Preservation and Development and
Gail McMillan,Motion
Date: 3/18/24

Motion Seq. No.: 3

Defendants.
-----X

The following papers numbered E70-E83 read on this motion by Defendant, Gail McMillan, for an order to restore, to vacate the order issued on March 12, 2021, to vacate the judgment entered on December 5, 2023, to enlarge the time to answer and to cease collections.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits..... E70-81
Affirmation in Opposition..... E82
Reply..... E83

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Defendant, Gail McMillan, for an order to restore, to vacate the order issued on March 12, 2021, to vacate the judgment entered on December 5, 2023, to enlarge the time to answer and to cease collections is granted.

Plaintiff is the title owner of the premises 327 Beach 43rd Street in Queens County, also known as Ocean View Villas, having purchased the property on April 4, 2007 pursuant to HPD's Partnership New Homes Program a/k/a Ocean View Villas New Homes Project, a/k/a Edgemere B: Phase II, a program offered by HPD to people of low to moderate income seeking to purchase their first home in the Edgemere section of Far Rockaway. Applicants to the program who are found to meet HPD's income criteria are offered

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units to purchase at a reduced sale price and a 25-year interest-free mortgage loan, pursuant to an enforcement note and enforcement mortgage. Moreover, the purchasers are not required to make any payments on the principal, but rather, the principal self-amortizes at the rate of 1/25th of the initial principal sum each year, so that at the end of the 25th year, the homeowners would have no debt. This offer, however, comes with conditions. The deeds, including the deed to Plaintiff, include a covenant that the grantee and the grantee's successors and assigns shall occupy their units as their primary residence for at least 25 years from the date of the deed conveyance or for as long as the mortgage remains outstanding, whichever is later, and that the covenant runs with the land and is enforceable by the City, State and Federal government. The mortgage provides that if the grantees sell their unit prior to 25 years, or if they violate the covenant in their deed, they will be obligated to repay the grant. Also, depending upon whether they sell their unit within the first year or after three years, a percentage of the profit from the sale will be due upon the sale. If the property is sold within the first year, 100% of the profit from the sale will have to be paid, but only up to the combined recapture obligation. If the property is sold after three years, 50% of the profit up to the combined recapture amount will be owed.

Plaintiff alleged, inter alia, a breach of contract claim against the City for HPD's failure to enforce the covenant against Defendant Gail McMillan, who rented her premises in violation of her covenant. Plaintiff alleges that the rental created a nuisance and diminished her property value. She sought a declaratory judgment, declaring that she is no longer bound to pay the combined capture obligation or, alternatively, that HPD immediately enforce the covenant against McMillan. Plaintiff also claimed \$200,000 as damages representing the remaining balance of the combined recapture obligation plus improvements to the property. In the complaint, Plaintiff alleged that McMillan, her neighbor, moved out of her unit and leased it to undesirable tenants who created a substantial nuisance by way of noise, loitering, vandalism, and other illicit activities. She contends that the forgoing diminished Plaintiff's quality of life and the value of her home. She alleged home improvements and repairs in excess of \$200,000.

This Court granted the City's motion to dismiss the complaint against it pursuant to CPLR §3211(a)(7), finding that the Plaintiff was bound by the terms of the deed and mortgage. The Plaintiff appealed. The Appellate Division, Second Department affirmed this Court's order by order issued September 21, 2023,

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insofar as it granted the City's motion to dismiss. The Second Department merely modified the order, finding that since dismissal pursuant to CPLR §3211(a)(7) was appropriate, this Court should have treated the motion as a declaratory judgment, and thus, entered judgment declaring that the Plaintiff remained bound by the terms of the deed and mortgage.

Prior to the Second Department's decision, McMillan failed to answer the Plaintiff's complaint in this matter. This Court granted a motion for default judgment against McMillan, which was submitted without opposition, by order issued March 12, 2021. Subsequently, judgment was entered by the County Clerk on December 5, 2023, for a total sum of \$326,586.16. McMillan now moves to vacate the judgment, extend her time to answer, and cease collections.

Pursuant to CPLR §5015(a)(1), the Court has the discretion to vacate judgment upon several grounds, including excusable default and reversal, modification, or vacatur of a prior judgment or order upon which it is based (see CPLR §5015[a][1];[a][5]). A motion to vacate a default judgment on the grounds of excusable default must be made within one year after service of a copy of the order (see Goldenberg, 123 A.D.3d at 761; see also Capurso v. Capurso, 134 A.D.3d 974 [2d Dept. 2015]). Here, the judgment with notice of entry was served upon McMillan on December 5, 2023. The instant motion was filed on February 20, 2024, and is therefore timely. McMillan has set forth a reasonable excuse for her default and a meritorious defense (see CPLR 5015 [a][1]; Goldenberg v. Goldenberg, 123 A.D.3d 761 [2d Dept. 2014]; Bank of New York v. Segui, 42 A.D.3d 555 [2d Dept. 2007]).

McMillan argues that her default was based upon her confusion with the court system, as she was a pro-se litigant. She filed her notice of appearance on the New York State Courts Electronic Filing System (NYSCEF) on December 4, 2020. She was unaware that she was required to do anything further. She also avers that she lives out of state, could not afford to retain an attorney, and the COVID-19 pandemic was ongoing. Upon learning that a judgment was entered against her, McMillan immediately retained her current Counsel.

Counsel for McMillan further argues that the claims against her are without merit pursuant to the Second Department's order issued September 21, 2023. The averment is that the claims against McMillan are essentially solely predicated upon the City breaching its contract with the Plaintiff by permitting McMillan to rent her premises. In granting the City's motion, this Court found that

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Plaintiff had no standing to assert a grievance against McMillan based on the rental of her property nor was she entitled to reimbursement for the improvement of her property. As noted supra, the Second Department affirmed that portion of the order. Notwithstanding, the Court assessed Plaintiff's entitlement to damages at the default inquest held on November 6, 2023. The Court ultimately awarded Plaintiff renovation expenses and punitive damages for the intentional infliction of emotional distress in the sum of \$275,000, representative of \$100,000 in compensatory damages, \$150,000 in punitive damages, and \$25,000 in attorneys fees with interest running from September 1, 2020. Movant avers that based on the Second Department's decision, no judgment should have been entered against her, as she was permitted to rent her home, and Plaintiff had no standing to challenge said rental.

When exercising its discretion to vacate a judgment, the Court is required to consider the extent of the delay, any prejudice to the opposing party, a lack of willfulness, and the strong public policy in favor of resolving cases on their merits (see Orwell Bldg. Corp. V. Bessaha, 5 A.D.3d 573 [2d Dept. 2004]). Here, the Court finds that the excuse proffered by the once pro-se Movant is sufficient given the very specific circumstances and history of this case, and her clear willingness to proceed in this matter from its inception, evidenced by her notice of appearance. Indeed, McMillan's affidavit, which provides, inter alia, that her confusion regarding the posture of the case and the court system in general, financial restraints, and the COVID-19 pandemic prevented her from timely appearing in the manner qualifies as a sufficient excuse (see Matter of Salon Ignazia, Inc., 24 A.D.3d 821 [2d Dept. 2006]; see also Ruiz v. Laophermsook, 211 A.D.3d 496 [1st Dept. 2022]). Moreover, the delay has not been substantial, as judgment was only entered a matter of months ago. The Court also recognizes that there is a strong public policy of resolving cases on their merits, and this case certainly falls into that category, as the Movant has demonstrated a potentially meritorious case. Indeed, the forgoing is belied by McMillan's annexed affidavit, this Court's prior order and the Second Department's subsequent affirmation of it.

Accordingly, the motion is granted. It is hereby

ORDERED that this Court's order issued March 12, 2021 and entered March 17, 2021 is hereby vacated and any collections commenced are hereby ceased; and it is further

ORDERED that the judgment entered December 5, 2023 after inquest is hereby vacated; and it is further

ORDERED that Defendant Gail McMillan shall serve her responsive pleading no later than twenty (20) days after service of a copy of this order with notice of entry.

Dated: March 22, 2024



KEVIN J. KERRIGAN, J.S.C.

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