Lewis v Bartow
2024 NY Slip Op 35352(U)
June 11, 2024
Supreme Court, Westchester County
Docket Number: Index No. 66205/2015
Judge: Joan B. Lefkowitz
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SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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JAKE LEWIS,

Plaintiff,

-against-

HAL BARTOW & THE CIT GROUP/CONSUMER FINANCE, INC.,

Defendants.
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DECISION & ORDER

Index No: 66205/2015

Motion Sequence Nos. 10 and 11

The following electronically filed papers (NYSCEF Doc Nos. 183-186; 188-200) were read on: (1) the motion by the plaintiff for an order, pursuant to CPLR §§ 5015 (a)(2), (a)(3), (a)(4), (a)(5) and 22 NYCRR § 130-1.1, vacating so much of the Court's Order dated June 29, 2016, which denied a motion by the plaintiff which sought leave to enter a default judgment against the defendant, The CIT Group/Consumer Finance, Inc., and which further sought to strike an affirmation in opposition to the motion filed by non-party Caliber Home Loans, Inc. and granting such other and further relief as may be just and proper (sequence no. 10); and (2) the cross-motion by the plaintiff for an order, deeming the plaintiff a vexatious litigant, enjoining plaintiff from filing any further motions in this action without first obtaining leave of Court and granting such other and further relief as may be just and proper (sequence no. 11).

Motion Sequence No. 10
Notice of Motion-Affidavit in Support-Exhibits (A-L)-Affidavit of Service

Motion Sequence No. 11
Notice of Cross-Motion-Memorandum of Law in Support and in Opposition to Motion-Affirmation in Support and in Opposition to Motion-Exhibits (A-F)-Affidavit of Service
Affidavit in Opposition & in Reply to Motion-Affidavit of Service

Upon reading the foregoing papers, the motions are determined as follows:

By way of background, plaintiff, proceeding *pro se*, commenced this action seeking, *inter alia*, pursuant to Real Property Law § 329, to cancel of record two assignments of mortgage that were recorded against the real property located at 630 South 4th Avenue, Mount Vernon, New York, alleging that the individual who executed the two assignments lacked the authority to do so. The defendant, Caliber Home Loans, Inc., f/k/a Vericrest

Financial Inc., as successor to the named defendant, The CIT Group/Consumer Finance, Inc. (collectively hereinafter referred to as, "Caliber"), interposed an answer to the complaint wherein, *inter alia*, it denied the material allegations and raised various affirmative defenses.

Between the time this action was commenced in 2015 and now, various motions have been filed. Among others, Caliber twice moved for summary judgment,[1] plaintiff twice moved for default judgment against Caliber,[2] plaintiff moved for sanctions,[3] defendant moved for sanctions,[4] and plaintiff thrice moved to compel discovery.[5] All motions have been denied.[6]

As relevant to the disposition of the instant motions, by decision and order dated June 29, 2016 (hereinafter referred to as, "June 2016 Order"), the Court (Bellantoni, J.), *inter alia*, granted defendant summary judgment dismissing the complaint, denied plaintiff's motion for default judgment against Caliber and further denied plaintiff's motion to strike Caliber's opposition to plaintiff's motion for default judgment. In July 2019, the Appellate Division, Second Department, modified the June 2016 Order to the limited extent of reversing the grant of summary judgment to Caliber and otherwise affirmed that portion of the June 2016 Order which denied the motion by plaintiff for leave to enter a default judgment against Caliber pursuant to CPLR 3215 (*see Lewis v Bartow*, 174 AD3d 590 [2d Dept 2019]). Following remand, plaintiff subsequently moved (motion sequence no. 9), a second time, for leave to enter a default judgment against Caliber based upon Caliber's failure to file an answer in this action. By decision and order dated October 20, 2023, this Court denied that motion.

Plaintiff now moves (sequence no. 10) for, among other things, an order, pursuant to various subdivisions of CPLR 5015 (a), vacating so much of the June 2016 Order, which denied plaintiff's initial motion (sequence no. 2) for default judgment against Caliber, upon the ground that Caliber and its counsel engaged in fraud in prior motion practice and during the discovery process in this action and upon the ground of newly discovered evidence (public records). Defendant Caliber opposes the motion and cross-moves (sequence no. 11) for an order, enjoining plaintiff from filing any further motions in this action without first obtaining leave of Court upon the ground that plaintiff is a vexatious litigant. Plaintiff opposes the cross-motion. The motions are consolidated for joint disposition and are decided as follows.

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[1] Motion sequence nos. 1 and 5
[2] Motion sequence nos. 2 and 9
[3] Motion sequence no. 8
[4] Motion sequence no. 4
[5] Motion sequence nos. 6, 7 and 8
[6] Caliber's two motions for summary judgment were initially granted by the Supreme Court in separate orders dated June 29, 2016 (Bellantoni, J.) and April 27, 2020 (Smith, J.). However, so much of these orders granting Caliber summary judgment were reversed on appeal by the Second Department (*see Lewis v Bartow*, 200 AD3d 971 [2d Dept 2021]; and *Lewis v Bartow*, 174 AD3d 590 [2d Dept 2019]).

Motion by Plaintiff to Vacate the June 2016 Order
Sequence No. 10

As outlined above, plaintiff moves under various subdivisions of CPLR 5015 (a) including, (a)(2), (a)(3), (a)(4) and (a)(5), to vacate so much of the June 2016 Order which denied his prior motions (sequence nos. 2 and 3) which sought leave to enter a default judgment against Caliber and which further sought to strike Caliber's opposition to plaintiff's motion for leave to enter a default judgment against Caliber upon the grounds that Caliber Home Loans, Inc., as a non-party, had no standing to oppose the motion.

Initially, contrary to Caliber's contention, the requirement that a motion pursuant to CPLR 5015 be brought by order to show cause instead of by notice of motion has been rejected by the Second Department (*see Angulo v Yogi Trans Corp.*, 218 AD3d 721, 722 [2d Dept 2023]; *Strunk v Revenge Cab Corp.*, 98 AD3d 1029, 1029-1030 [2d Dept 2012]). As such, the motion is properly before the Court. However, for the reasons explained below, the motion is denied on several grounds.

First, while there is no specific time limit within which a party may move to vacate an order pursuant to CPLR 5015 (a)(2), (a)(3) and/or (a)(5), the motion must nevertheless be made within a reasonable time (*see Nash v Port Auth. of N.Y. & N.J.*, 22 NY3d 220, 225 [2013]; *Long Is. Capital Mgt. Corp. v Silver Sands Motel, Inc.*, 167 AD3d 857, 859 [2d Dept 2018]; *Dimery v Ulster Sav. Bank*, 82 AD3d 1034, 1034 [2d Dept 2011]; *Kleet Lbr. Co., Inc. v Saw Horse Remodelers, Inc.*, 13 AD3d 414, 415 [2d Dept 2004]). The determination as to whether such a motion has been made within a reasonable time is entrusted to the court's sound discretion (*see Nash*, 22 NY3d at 225).

Here, plaintiff failed to move for relief pursuant to CPLR 5015 (a)(2), (a)(3) and (a)(5) within a reasonable time, as he delayed moving for such relief for nearly eight years after the issuance of the June 2016 Order and nearly five years after the issuance of the July 2019 order by the Second Department, during which period of time plaintiff engaged in other motion practice in this action despite the availability of public records purportedly supporting his assertion that Caliber Home Loans, Inc. is not the successor to the named defendant, The CIT Group/Consumer Finance, Inc. (*see Long Is. Capital Mgt. Corp.*, 167 AD3d at 859; *LaSalle Bank N.A. v Oberstein*, 146 AD3d 945, 945 [2d Dept 2017]). Accordingly, the motion is denied as untimely.

Second, and notwithstanding the foregoing, the motion is denied based on application of the law of the case doctrine. "A court has the inherent power to grant a motion to vacate its own judgment or order for sufficient reason, in furtherance of justice. An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court…and operates to foreclose re-examination of the question absent a showing of subsequent evidence or change in law" (*Wells Fargo Bank N.A. v Area Plumbing Supply, Inc.*, 207 AD3d 596, 597 [2d Dept 2022] [internal quotation marks, citations and brackets omitted]).

Here, plaintiff failed to demonstrate entitlement to vacatur of so much of the June 2016 Order that denied his motions for leave to enter a default judgment against Caliber and to strike Caliber's affirmation in opposition to plaintiff's motion (*see* CPLR 5015 [a][5]; *Wells Fargo Bank N.A.*, 207 AD3d at 597-598). In prior motion practice, this Court previously considered plaintiff's contention that he was entitled to a default judgment against Caliber based on Caliber's failure to answer the complaint. The Court (Bellantoni, J.), in the June 2016 Order, *inter alia*, rejected that contention and denied that motion. The denial of that motion was affirmed by the Second Department (*see Lewis*, 174 AD3d at 591). Notwithstanding the affirmance thereof, plaintiff moved, again, before this Court (motion sequence no. 9) for leave to enter a default judgment against Caliber. By decision and order dated October 20, 2023, this Court denied that motion, holding that the law of the case doctrine precluded reconsideration of that issue and also finding that plaintiff presented nothing new so as to preclude application of the doctrine. Here, again, law of the case doctrine precludes reconsideration of the issue of Caliber's standing to interpose an answer in this action and, relatedly, whether plaintiff is entitled to enter a default judgment against Caliber based upon its failure to answer the complaint/intervene in the action (*see Hampton Val. Farms, Inc. v Flower & Medalie*, 40 AD3d 699, 701 [2d Dept 2007]).

Regardless, plaintiff has not made a sufficient showing herein to warrant reexamination of the previously decided issue of Caliber's standing to interpose an answer to the complaint and the related issue of plaintiff's entitlement to a default judgment against Caliber (*see Bank of N.Y. Mellon v Selig*, 213 AD3d 894, 896 [2d Dept 2023]; *Wells Fargo Bank, N.A. v Archibald*, 211 AD3d 1081, 1083 [2d Dept 2022]; *Pascual v Rustic Woods Homeowners Assn., Inc.*, 173 AD3d 756, 757 [2d Dept 2019]; *US Bank, N.A. v Morrison*, 160 AD3d 679, 680 [2d Dept 2018]). While this Court may entertain a motion to vacate a prior order on the ground of newly discovered evidence even after an appellate court has affirmed the original order (*see Levitt v County of Suffolk*, 166 AD2d 421, 422 [2d Dept 1990]), plaintiff fails to proffer any "new evidence" sufficient to support vacatur of the June 2016 Order (*see* CPLR 5015 [a][2]; *HSBC Bank USA, N.A. v Walker*, 201 AD3d 795, 797 [2d Dept 2022]; *IMC Mtge. Co. v Vetere*, 142 AD3d 954, 955 [2d Dept 2016] ["evidence which is a matter of public record is generally not deemed new evidence which could not have been discovered with due diligence before trial"] [internal quotation marks and brackets omitted]) or otherwise sustain his "heavy burden of showing due diligence in presenting the new evidence to the Supreme Court in order to imbue the appellate decision with a degree of certainty" (*Levitt*, 166 AD2d at 423). Plaintiff similarly failed to demonstrate his entitlement to relief under CPLR 5015 (a)(3) since he failed to establish that Caliber engaged in fraud, misrepresentation or other misconduct warranting vacatur of the June 2016 Order (*see Matter of Apostolidis*, 219 AD3d 1331, 1333 [2d Dept 2023]; *HSBC Bank USA, N.A.*, 201 AD3d at 797). Accordingly, the motion seeking vacatur of the June 2016 Order pursuant to CPLR 5015 (a) is denied (*see US Bank, N.A.*, 160 AD3d at 680). To the extent not specifically addressed herein, the Court finds plaintiff's remaining arguments unavailing.

<u>Cross-Motion by Defendant Caliber for Sanctions</u>
Sequence No. 11

As outlined above, Caliber cross-moves for an order enjoining plaintiff from filing any further motions in this action absent leave of Court upon the grounds that plaintiff is a vexatious litigant.

In support of the motion, Caliber argues, among other things, that through motion sequence no. 10, plaintiff continues to seek to relitigate the issue of Caliber's standing to answer the complaint in this action, and relatedly, whether plaintiff is entitled to a default judgment against Caliber, an issue that has been previously resolved against plaintiff on three separate occasions: twice by this Court and once by the Second Department. Caliber asserts that plaintiff presents nothing new in motion sequence no. 10 that would alter the three prior judicial determinations on this issue and, instead, plaintiff simply seeks to rehash the same arguments that have previously been determined to be without merit. Based thereon, Caliber submits that plaintiff's pattern and practice of filing repetitive motions seeking the same relief constitutes abusive litigation tactics and, as such, warrants the issuance of an order enjoining plaintiff from filing any further motions without leave of Court.

In opposition, plaintiff contends, among other things, that the Court lacks jurisdiction to entertain Caliber's cross-motion since Caliber is not a proper defendant to this action. As such, plaintiff submits that the cross-motion should be denied in its entirety.

"While public policy generally mandates free access to the courts, a party may forfeit that right if she or he abuses the judicial process by engaging in meritless litigation motivated by spite or ill will" (*Financial Freedom Acquisition, LLC v Braunsberg*, 201 AD3d 788, 792 [2d Dept 2022] [internal quotation marks omitted]).

Here, the record reflects that plaintiff has abused the judicial process through vexatious litigation by filing multiple unsuccessful motions on the issue of Caliber's standing to interpose an answer to the complaint in this action and, relatedly, whether plaintiff is entitled to enter a default judgment against Caliber (*see Financial Freedom Acquisition, LLC*, 201 AD3d at 792; *Panagoulopoulos v Carlos Ortiz Jr. MD, P.C.*, 194 AD3d 728, 729-730 [2d Dept 2021]; *confer Murray v National Broadcasting Co., Inc.*, 217 AD2d 651, 653 [2d Dept 1995] ["[c]ourts have found frivolous conduct within the meaning of 22 NYCRR 130-1.1(c) where a party litigated the same issue over an extended period of time."]). As outlined above, the issue of Caliber's standing to interpose an answer to the complaint and the related issue of plaintiff's entitlement to a default judgment against Caliber was litigated in prior motion practice, resolved in Caliber's favor and, importantly, affirmed on appeal. Notwithstanding same, plaintiff unsuccessfully moved, a second time, before this Court for leave to enter a default judgment against Caliber which this Court denied in an order dated October 20, 2023. Notwithstanding this latest denial, plaintiff has now moved to vacate the June 2016 Order. While plaintiff is moving under a different

CPLR provision this time (*i.e.*, CPLR 5015), the arguments presented in motion sequence no. 10 are essentially the same as those arguments previously advanced in prior motion practice and plaintiff has presented nothing new herein. Accordingly, the Court finds that a narrow order enjoining plaintiff from engaging in further motion practice is warranted. Based thereon, the motion is granted to the extent that, absent prior leave of Court, plaintiff is enjoined from filing any further discovery-related motions in this action as well as any further motions related to the issue of Caliber's standing in this action and correspondingly, any further motions related to Caliber's alleged default in this action and/or whether plaintiff is entitled to a default judgment against Caliber (*see Xiaokang Xu v Xiaoling Shirley He*, 147 AD3d 1223, 1226 [3d Dept 2017] ["[t]he requirement imposed by Supreme Court, that defendant first seek approval of the court before commencing any further actions or proceedings involving plaintiff and others, is sufficiently narrow and balanced so as to protect any legitimate claims that defendant may have, while, at the same instance, protecting plaintiff from further vexatious actions or proceedings by defendant."]).

All other arguments raised on the motions and evidence submitted in connection therewith have been considered by the Court, notwithstanding the specific absence of reference thereto. In view of the foregoing, it is hereby:

ORDERED that the motion by the plaintiff is denied; and it is further

ORDERED that the cross-motion by Caliber is granted to the extent that, absent prior leave of Court, plaintiff is enjoined from filing any further discovery-related motions in this action as well as any further motions related to the issue of Caliber's standing in this action and correspondingly, any further motions related to Caliber's alleged default in this action and/or whether plaintiff is entitled to a default judgment against Caliber;[7] and it is further

ORDERED that Caliber shall serve a copy of this decision and order upon the plaintiff within five (5) days from the date hereof.

The parties are reminded of the previously scheduled compliance conference for June 25, 2024, at 2:00 p.m. in Courtroom 1600 of the Supreme Court, Westchester County, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York 10601, at which time the Court expects that a Trial Readiness Order shall issue.

E N T E R,

Dated: White Plains, New York
June 11, 2024

Joan B. Lefkowitz

HON. JOAN B. LEFKOWITZ, J.S.C.

[7] As outlined above, "Caliber" collectively refers to Caliber Home Loans, Inc., f/k/a Vericrest Financial Inc., as successor to the named defendant, The CIT Group/Consumer Finance, Inc.

[* 6]