2022-12-30

3339 E. 60th St. LLC v. Huston

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33-39 E. 60th St. LLC v Huston
2022 NY Slip Op 22396
Decided on December 30, 2022
Civil Court Of The City Of New York, New York County
Stoller, J.
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Decided on December 30, 2022
Civil Court of the City of New York, New York County

33-39 East 60th Street LLC
c/o SOL GOLDMAN INVESTMENTS LLC, Petitioner,

against

Michael Huston, Respondent.

Index No. 75473/2015

For Petitioner: Jerald D. Kreppel
For Respondent: Benson Defunis

Jack Stoller, J.

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Upon the foregoing papers, the Decision and Order on this motion are as follows:

33-39 East 60th Street LLC c/o Sol Goldman Investments LLC, the petitioner in this

proceeding ("Petitioner"), commenced this holdover proceeding against Michael Huston, the respondent in this proceeding ("Respondent"), seeking possession of 33 East 60th Street, Apt. 3F, New York, New York ("the subject premises") on the basis of nonprimary residence. Respondent is the prevailing party in this proceeding, both at trial and on appeal. By a decision and order dated April 7, 2022 ("the Order") the Court awarded Respondent a judgment for legal fees after inquest. Respondent now moves for the entry of a judgment in the name of Respondent's attorney and for fees for the present motion. Petitioner cross-moves to vacate the Order. The Court resolves both of these motions by this order.

As Petitioner's cross-motion has the potential to moot out Respondent's motion, the Court first considers the cross-motion. Petitioner's attorney avers in support of the cross-motion that another attorney in Petitioner's attorney's office defaulted on the date of the inquest because of a medical emergency. Petitioner does not support the motion with a sworn statement from the attorney who had personal knowledge of the medical emergency or any documentation otherwise [*2]of a medical emergency.

The Court cannot vacate a default determination without proof of a reasonable excuse for a failure to appear, *Citimortgage, Inc. v. Rahman*, 193 AD3d 810, 812 (2nd Dept. 2021), *U.S. Bank Tr. N.A. v. Rivera*, 187 AD3d 624, 625 (1st Dept. 2020), which the defaulting party must establish by "evidence in admissible form." *259 Milford, LLC v. FV-1, Inc.*, 2022 NY Slip Op. 06898, ¶ 2 (App. Div. 2nd Dept.). Therefore, an affirmation of an attorney not based on personal knowledge is insufficient to demonstrate a reasonable excuse for the default. *Mohamed v. Mohamed*, 176 AD3d 567, 567-68 (1st Dept. 2019). As the only support Petitioner offers for its excuse for the default is by the sworn statement of an attorney who has no personal knowledge of the reason for the excuse, Petitioner has not satisfied the prerequisite for the vacatur of the Order.

Respondent moves for an order directing the clerk to enter a judgment in the name of Respondent's attorney pursuant to CPLR §5019(c). CPLR §5019(c) provides that the clerk shall make an "appropriate entry" upon the filing of an instrument demonstrating that a person other than the party recovering a judgment has become entitled to enforce the judgment. Respondent supports his motion with an acknowledged assignment from Respondent assigning his cause of action to recover attorneys' fees to Respondent's attorney. Respondent's attorney avers in support of the motion that Respondent has not yet paid Respondent's attorney for his work on this case, which extends to a full trial and an appeal over the past seven years.

Petitioner opposes the motion on the basis that CPLR §5019(c) does not apply to a change of an owner of a "debt" through an assignment where no judgment exists. The Order itself states, " [j]udgment in favor of [R]espondent against [P]etitioner in the amount of $136,136.43". Despite this language, Petitioner is correct that the Order is not actually a judgment but, as an order, an "order for a judgment." Marsh v. Johnston, 123 A.D. 596, 597 (2nd Dept. 1908). *See* Towley v. King Arthur Rings, Inc., 40 NY2d 129, 132-33 (1976)(an opinion is distinct from a judgment). The particular posture of this proceeding, however — after an order for a judgment but before the entry of the judgment itself — raises a question about the value of Petitioner's argument. After all, it would be trivially easy for the Court to follow the Order and enter a judgment and then Respondent could just get the relief he now seeks by going through the exercise of a duplicative motion.

Moreover, the statute prohibits a pre-judgment assignment of a "debt," raising a question about the applicability of the statute to this matter. The Legislature added this language to CPLR §5019(c) by an act entitled the "consumer credit fairness act" ("the Act"), the synopsis of which stated that the statute was an act to amend the CPLR "in relation to consumer credit transactions." 2021 NY ALS 593, 2021 NY Laws 593, 2021 NY Ch. 593, 2021 NY SB 153. The Act references the practice of owners of consumer debts selling those debts to other parties who try to collect the debts from debtors. In this context, the amendment of CPLR §5019(c) to prohibit clerks from changing the owner of a debt does not necessarily prevent a claimant from assigning a claim, which Gen. Oblig. Law §13-101 permits. Najjar Grp., LLC v. W. 56th Hotel LLC, 106 AD3d 640, 641 (1st Dept. 2013), M.W. Zack Metal Co. v. Int'l Navigation Corp., 112 AD2d 865, 867 (1st Dept. 1985).

Judiciary Law §475 provides more context to a client's ability to assign a claim for attorneys' fees to the client's attorney. Judiciary Law §475 confers upon attorneys a lien upon their clients' causes of action from the commencement of the proceeding without notice or filing, *LMWT Realty Corp. v. Davis Agency*, 85 NY2d 462, 467 (1995), *Resnick v. Resnick*, 24 AD3d [*3]238, 239 (1st Dept. 2005), upon any judgment or settlement reached in favor of the client in the matter in which the attorney was the attorney of record, *Butler, Fitzgerald & Potter v. Gelmin*, 235 AD2d 218, 219 (1st Dept. 1997), *Bernard v. De Rham*, 161 AD3d 686, 686-87 (1st Dept. 2018), enabling the attorney to collect fees and disbursements. *Schneider, Kleinick, Weitz & Damashek v. Suckle*, 80 AD3d 479, 480 (1st Dept. 2011). A charging lien takes on particular saliency where, as here, the client did not pay the attorney, *See Holmes v. Evans*, 129 NY 140, 145 (1891), *Bennett v. Donovan*, 83 A.D. 95, 100 (2nd Dept. 1903), and where the client's claim is specifically for the client's attorney's fees. *Banque Indosuez v. Sopwith Holdings Corp.*, 98 NY2d 34, 38 (2002), *Mura v. Mura*, 128 AD3d 1344, 1345-46

(4th Dept.), *leave to appeal dismissed*, 26 NY3d 951 (2015).

Finally, the Legislature has expressed a policy favoring legal representation for litigants in Housing Court. N.Y.C. Admin. Code §26-1302(a)(2). On the margins, private attorneys would be less likely to accept clients who do not pay them upfront if the Court were to deprive the attorneys of a means to facilitate the collection of their fees.

Therefore, the Legislature's use of the word "debt" as opposed to the word "claim" in CPLR §5019(c), together with the free assignment of causes of action as provided by Gen. Oblig. Law §13-101, and the establishment of charging liens as provided by Judiciary Law §475 demonstrate that prohibitions of the pre-judgment assignments of debts do not apply to an attorney using a duly-acknowledged assignment of a claim for attorneys' fees.

Respondent also moves for a judgment for attorneys' fees for work on this motion. This motion, however, amounted to an application to the Court to amend a judgment to facilitate payment of attorney's fees to Respondent's counsel, not a motion made regarding a default of Petitioner. RPL §234 permits a tenant's award of attorneys' fees as a result of a landlord's breach or a tenant's successful defense of a proceeding. *Graham Ct. Owners Corp. v. Taylor*, 24 NY3d 742, 747 (2015). Respondent's motion does not show either.

Respondent, however, is entitled to attorneys' fees as a result of Respondent's successful defense of Petitioner's cross-motion to vacate Petitioner's default. The Court already found according to the Order that Respondent's attorney is entitled to an hourly rate of $350. The Court finds a reasonable amount of time for Respondent to oppose Petitioner's cross-motion, including reading the motion, writing the reply, and appearing for oral argument, would be three-and-a-half hours. The Court therefore adds $1,225 to the award the Court already rendered.

Accordingly, it is

ORDERED that the Court denies Petitioner's cross-motion to vacate Petitioner's default on Respondent's attorneys' fees hearing, and it is further

ORDERED that the Court amends the Order to include $1,225 for Respondent's attorney's work on the current motion practice, such that the total amount awarded is $137,361.43, and it is further

ORDERED that the Court directs the clerk to prepare a judgment against Petitioner in favor of Jerald Kreppel, who is Respondent's attorney, in the amount of $137,361.43.

This constitutes the decision and order of this Court.

Dated: New York, New York
December 30, 2022

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HON. JACK STOLLER
J.H.C.

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