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Lebanon Realty, LLC v. Gordon

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[*1]

Lebanon Realty, LLC v Gordon
2023 NY Slip Op 50179(U)
Decided on March 9, 2023
Civil Court Of The City Of New York, Bronx County
Zellan, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected in part through March 16, 2023; it will not be published in the printed Official Reports.

Decided on March 9, 2023

Civil Court of the City of New York, Bronx County

<p>Lebanon Realty, LLC, Plaintiff(s)</p> <p>against</p> <p>Garry Gordon; Kim Moye, Defendant(s).</p>

Index No. CV-001421-15/BX

For plaintiff: Kavulich and Associates (Gary Kavulich, of counsel), Port Chester, NY

For defendant Gordon: Garry Gordon, self-represented

For defendant Moye: No appearance

Jeffrey S. Zellan, J.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered

Order to show Cause/ Notice of Motion and

Affidavits /Affirmations annexed 1

Answering Affidavits/ Affirmations 2

Reply Affidavits/ Affirmations

Memoranda of Law

Other: Leases re 1849 Sedgwick accepted as Reply 3

In this action for alleged unpaid rent, respondent Garry Gordon ("respondent") moves to vacate a default judgment that was based on respondent's failure to appear for trial on July 17, 2015. Upon the foregoing cited papers and for the reasons discussed herein, the order to show cause is granted.

As a threshold matter, the Court addresses petitioner's argument that respondent's motion to vacate should not be considered as untimely based on CPLR 317. CPLR 317 applies when the defendant/respondent has been served the summons and complaint by a method other than personal delivery. As respondent in the instant action was served by personal delivery, CPLR 317 does not apply. *See*, David D. Siegel, *Prac. Commentaries*, McKinney's Cons. Laws of New York, Book 7B, CPLR C5015:6. Thus, the requirement under CPLR 317 to open up the judgment and defend on the merits within one year after obtaining "knowledge of entry of the judgment" also does not apply. Instead, CPLR 5015(a)(1) is controlling. Under CPLR 5015(a)(1), a defendant is permitted to open an excusable default within one year after "service of a copy of the judgment or order with written notice of its entry upon the moving party." There is nothing in the record that establishes that respondent was ever served a copy of the judgment and notice of judgment, and, notably, petitioner does not attest to any such service in its opposition papers. As such, the one-year limitations period has not yet started to run and the motion to vacate, therefore, is timely. [*See. U.S. Equities Corp. v. Cavadias, 75 Misc 3d 1223\(A\), *6*](#) (Civ. Ct., Bronx Co. 2022) (discussing CPLR 5015(a)(1) standard and finding that motion was timely because notice of entry had not been established in record).

Reviewing the merits of the motion, the Court finds both excusable neglect and a potentially meritorious defense. The Court found respondent in default and ordered an inquest [*2] clerk to enter judgment for a sum certain (*see*, CPLR 3215(a)) based on respondent's non-appearance at trial scheduled for July 17, 2015 (which was originally scheduled for April 24, 2015 and then adjourned). However, there is no record in the Court file of respondent having been given notice of the adjourn date. More importantly, the Court finds credible respondent's excuse that he believed in good faith that respondent had already "responded in 2015 with [his] evidence" that "this is not my [apartment]" and that he "was not notified again [about the case] until last week" [referring to November 2022]. Respondent's confusion and good faith belief that the matter had been resolved and did not require any further appearances is even more compelling given the submitted evidence that respondent never occupied the subject apartment in the form of continuous leases at a

different location at 1849 Sedgwick Avenue from 2009 through the present, including during the period in 2012 during which respondent allegedly occupied the subject apartment at 1185 Lebanon Street and became liable for rental arrears for this unit, as well as the conspicuous absence in any of petitioner's papers of any lease agreement between petitioner and respondent for any period of time for any apartment, or any document indicating respondent's connection to the subject apartment other than a computer generated rent ledger from petitioner's own computer system with no underlying supporting documents. Even the service of process initiating this action was served upon respondent at the 1849 Sedgwick Avenue location, not at 1185 Lebanon Street. Indeed, if it were not for the Court ordering an inquest clerk marking rather than an inquest, it is not clear from the record how petitioner could have made its prima facie case at inquest, which itself is a compelling factor in vacating the judgment. *See, Siegel, Prac. Commentaries, CPLR C5015:7; and Bowers Poetry Club, Inc. v. Lemoine, 2022 NY Slip Op 30965(U), *5 (Sup. Ct., New York Co. 2022) (collecting cases and noting that "[t]he statutory list provided in CPLR 5015 is not necessarily exhaustive and despite the absence of a catch-all paragraph, a court may vacate its own orders or judgments for sufficient reason and in the interests of substantial justice").*

In any event, while it is certainly feasible that petitioner could ultimately prove financial responsibility by respondent of the alleged rental arrears, there appears to be at the very least at this juncture, a potentially meritorious defense that warrants, in the interests of justice, a resolution of the dispute on the merits given "the strong public policy favoring the resolution of cases on the merits rather than on default." [*Boston Tremont Hous. Dev. Fund Corp. v. Torres, 67 Misc 3d 1203\(A\), *2 \(Civ. Ct., Bronx Co. 2020\)*](#) (citations omitted).

Accordingly, it is

ORDERED that respondent Gary Gordon's motion to vacate the judgment against him and restore the action to the calendar is granted; and it is further

ORDERED that the action is scheduled for a pre-trial conference in Part 11 on May 16, 2023; and it is further

ORDERED that the judgment against co-defendant and non-movant Kim Moye remains in effect.

This is the decision and order of the Court.

March 9, 2023

Hon. Jeffrey S. Zellan Civil Court Judge (NYC)

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