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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK
Present: HON. JOHN P. DUNNE, Justice
_____ TRIAL/IAS, PART 8

EURO-CENTRAL

Plaintiff

Index No. 8520/01
Motion Seq. No. 5&6
Motion Submission: 4/2/04
OTSC to vacate and cross-
motion to strike

-against-

DALSIMER, INC., MICHAEL PAUL, ESQ.,
(as Escrow Agent), and TIMOTHY DALSIMER

Defendant(s)

The following papers read on this motion:
Order to Show Cause and Cross-motion.....xx
Answering Affidavitsxxxx
Memo.....

Upon the foregoing papers, the Order to Show Cause by the Defendant
Dalimser, Inc. pursuant to CPLR 5015 for an order vacating a default judgment
entered November 13, 2002, and the

Cross motion by the plaintiff Euro-Central CPLR 3126 [2], [3] for an order,

inter alia, striking the answer of defendant Timothy Dalismer, are decided as follows:

By contract of sale dated January 2001, the defendant Dalismer, Inc [“Dal”]. agreed to sell an unimproved parcel of land located in North Woodmere, to non-party Yassi Shai.

Shai subsequently assigned his interest in the contract to plaintiff Euro-Central Corp., in which he is a principal.

A “time of the essence” closing date in April of 2001 was thereafter scheduled by the plaintiff’s counsel without objection by Dal.

Although the plaintiff appeared at the closing, Dal defaulted, allegedly because it had been unable to comply with a provision in the contract of sale requiring it to remove “all debris,” including trucks, from the premises (Contract of Sale, ¶ 2).

It appears that when the contract was executed, and allegedly for many years prior thereto, codefendant Timothy Dalsimer – a minority shareholder in Dal – was allegedly operating a landscaping business on the premises, where he stored his trucks, building materials and other equipment (T. Dalsimer Aff., ¶¶ 18-22).

According to Michael Nebenzhal, an officer of Dal, Dal permitted Timothy Dalsimer to remain on the premises only because Dal had “no immediate use” for the property.

Dal notes that immediately prior to the closing, it learned that Timothy

Dalsimer was claiming that he had acquired title to the premises by adverse possession.

In May of 2001, and after Dal's failure to appear at the closing, plaintiff Euro-Central commenced the within action for specific performance against Dal and its counsel Michael Paul, as escrow agent.

Moreover, Dal intentionally failed to appear in the plaintiff's subsequently commenced specific performance action in order to save counsel fees and since it "shared a common objective with the Plaintiff; to wit the sale of the Premises" (Nebenzhal Aff., ¶ 9). In response, the plaintiff entered a default judgment against Dal dated November 7, 2002.

In light of the Timothy Dalsimer's claim of title by adverse possession, the plaintiff served a supplemental summons and amended complaint, adding Dalsimer as a party to the action. The complaint, dated February of 2003, seeks declaratory relief to the effect that Dalsimer had no right or interest in the subject property.

Although Timothy Dalsimer initially defaulted in appearing, after further motion practice relating to the issue of personal jurisdiction, he served both an answer and later an amended answer – dated March, 2003 – interposing an affirmative defense, cross claim (against Dal) and counterclaim, alleging that he had acquired title to the property by adverse possession (Pltffs' Cross Mot., Exh., "D").

By order dated May 27, 2003, this Court denied a prior motion by the plaintiff for summary judgment, concluding, *inter alia*, that questions of fact existed with respect to the “[t]he element of hostile possession * * *” (Dec., at 2; Pltffs’ Cross Mot., Exh., “E”).

After a preliminary conference before the Court on September 24, 2003, the Court issued a Conference Order requiring, *inter alia*, Timothy Dalsimer to appear for a deposition on or before November 26, 2003, and to serve responses to the plaintiff’s discovery demands by November 7, 2003 (Pltff’s Exh., “F”).

It is undisputed that Dalsimer failed to comply with the Court’s order, *i.e.*, he did not appear for a deposition and did not provide discovery in response to the plaintiff’s demands.

At a conference before the Court in early December of 2003, Dalsimer requested an additional time to provide discovery based upon an alleged flood, fire and burglaries at his premises and claimed health problems (T. Dalsimer Aff., [dated Dec 8, 2003], ¶¶ 14-22).

By Preliminary Conference order dated December 10, 2003, Timothy Dalsimer was again directed to appear for a deposition and to respond to discovery demands by specified dates (Pltff’s Mot., Exh., “H”). Significantly, the Court’s December 10 order is marked with the notation “FINAL” – Subject to motion to strike.”

Notwithstanding the above, Mr. Dalsimer again failed to timely comply with the Court's discovery directives.

At a certification conference conducted after Dalsimer's second default in late February of 2003, the Court declined Dalsimer's request for additional time to produce documents and appear for a deposition, after which the case was certified as ready for trial.

Upon the instant notice – served some 14 months after entry of the November 7, 2002 judgment – Dal now moves for an order pursuant to CPLR 5015[a] [1], vacating its default.

The plaintiff Euro-Central cross moves for an order striking Timothy Dalsimer's answer based upon his failure to comply with the Court's September 24 and December 10, 2003 orders.

Dal's motion for an order vacating its default is denied. The plaintiff's motion for an order pursuant to CPLR 3126, striking the answer of codefendant of Timothy Dalsimer, is granted.

With respect to the motion to vacate, CPLR 5015[a][1] provides that a court may relieve a party from a judgment or order on the ground of excusable default if such a motion is made within one year after service of the judgment or order with written notice of entry” (**Kachar v. Berlin**, 296 AD2d 479 *see*, **La Barrera v.**

Handler, 290 AD2d 476; **Hazen v. Bottiglieri**, 286 AD2d 708). Here, it is undisputed that Dal waited more than a year before it moved to vacate its default (**Kachar v. Berlin, supra**).

Moreover, it is settled that a “party seeking to be relieved of its default must establish *both* a reasonable excuse and a meritorious defense” (**Wyckoff Heights Medical Center v. Merchants Ins. Co. of New Hampshire**, 2 AD3d 841 [emphasis added]; **Butterworth v. Sperber**, ___ AD3d ___ [2nd Dept. 2004]; **New York Telephone Co. v. Don Siegel Const. Co., Inc.**, 1 AD3d 329; **Dominguez v. Carioscia**, 1 AD3d 396).

Relief under CPLR 5015 is generally unavailable to party which intentionally defaults (**Wyckoff Heights Medical Center v. Merchants Ins. Co. of New Hampshire, supra**; **Westchester County Medical Center v. Allstate Ins. Co.**, 283 AD2d 488; **Eretz Funding, Ltd. v. Shalosh Associates**, 266 AD2d 184; **Wilf v. Halpern**, 234 AD2d 154 [“An intentional default is ipso facto inexcusable, and should not be vacated”] *see also*, **Pergolis Schwartz, Inc. v. Biberaj**, 280 AD2d 323, 324). “The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the Supreme Court” (**Westchester Medical Center v. Clarendon Ins. Co.**, 304 AD2d 753).

Here, Dal’s papers do not demonstrate the existence of either a reasonable

excuse and a meritorious defense. Rather, the record establishes that Dal intentionally elected to default (**Eretz Funding, Ltd. v. Shalosh Associates, supra**).

Dal's assertion that it chose not to appear because its interests were supposedly aligned with the plaintiff's (Nebenzhal Aff., ¶ 10), is not an excuse warranting vacatur of its default. Moreover, Dal was "aware that the plaintiff[] obtained a default judgment against * * * [it] and took no steps to vacate the default" until a period of 14 months had elapsed (**Eretz Funding, Ltd. v. Shalosh Associates, supra**, at 185 *see, Dominguez v. Carioscia, supra; Kachar v. Berlin, supra*). Under the circumstances, "[s]uch intentional, sustained inaction, whatever its tactical justification" is not excusable (**Pergolis Schwartz, Inc. v. Biberaj, supra see also, New York Telephone Co. v. Don Siegel Const. Co., Inc., supra; Wyckoff Heights Medical Center v. Merchants Ins. Co. of New Hampshire, supra**).

Nor has Dal offered a meritorious defense to the plaintiff's specific performance claim (**Dominguez v. Carioscia, supra; Truscello v. Olympia Const., Inc., 294 AD2d 350**).

The Court notes that Dal's papers make mention of its desire to defend against the Timothy Dalsimer's cross claim, which was interposed subsequent to the entry of the subject default judgment (*e.g.*, Cooper Aff., [dated March 15, 2004], ¶¶ 2-4). However, as defined by its own order to show cause, the narrow relief sought by Dal

is vacatur of the November, 2002 default judgment – not relief related to the present status of Timothy Dalsimer’s adverse possession cross claim and/or Dal’s right to defend against it at this juncture of the proceeding.

Accordingly, Dal’s motion for vacatur of the November, 2002 default judgment is denied.

The plaintiff’s cross motion for an order striking Timothy Dalsimer’s amended answer in its entirety is granted.

“Although striking a pleading pursuant to CPLR 3126 is a drastic remedy, it is warranted where a party’s conduct is shown to be willful, contumacious, or in bad faith” (*see, Beneficial Mortg. Corp. v. Lawrence*, 772 NYS2d 713 [2nd Dept. 2004]).

Further, “[i]t is well settled that the determination of whether or not to strike a pleading lies within the sound discretion of the Supreme Court” (*Pashayan v. Corson*, 306 AD2d 259 *see, Ito v. Dryvit Systems, Inc.* 773 NYS2d 599 [2nd Dept. 2004]).

Here, the Court issued two prior orders – the latter of which was marked “FINAL” – “subject to motion to strike” – in response to which Timothy Dalsimer failed to timely produce documents or submit to a court-ordered deposition.

Although Dalsimer has offered excuses based upon asserted health issues and an alleged inability to produce the requested documents in timely fashion, the Court

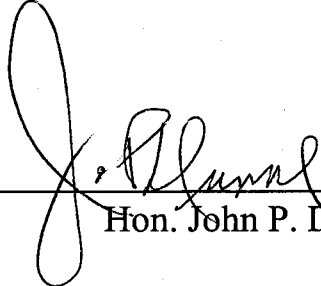
concludes that these claims do not constitute justifiable reasons for his noncompliance with the Court's directives.

Rather, the sanctionable nature of his conduct can be "inferred from his repeated failure to respond to the plaintiff's discovery requests, even after being directed do so by court order, as well as the inadequate explanations offered to excuse * * * [his] failure[] to comply" (**Beneficial Mortg. Corp. v. Lawrence International, supra**, at 713-714; **Conch Associates, Inc. v. PMCC Mortg. Corp.**, 303 AD2d 538; **Consulting Services, Ltd. v. Kiss**, 773 NYS2d 599 [2nd Dept. 2004]; **Pryzant v. City of New York**, 300 AD2d 383). In light of the foregoing, the plaintiff's cross motion is granted to the extent that Timothy Dalsimer's answer shall be stricken.

The foregoing constitutes the decision and order of the Court.

It is, so Ordered.

Dated: May 5, 2004



Hon. John P. Dunne

ENTERED

MAY 11 2004

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