State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 16, 2024 CV-23-0922

In the Matter of VW CREDIT, INC.,
Respondent,
v
MEMORANDUM AND ORDER
MICHAEL'S AUTOMOTIVE TECH,
Appellant,
et al.,
Respondent.

Calendar Date: March 29, 2024

Before: Garry, P.J., Clark, Pritzker, Ceresia and Mackey, JJ.

Faraci Lange, LLP, Rochester (*Stephen G. Schwarz* of counsel), for appellant.

Law Offices of Rudolph J. Meola, Albany (*Rudolph J. Meola* of counsel), for VW Credit, Inc., respondent.

Pritzker, J.

Appeal from an order of the Supreme Court (David A. Weinstein, J.), entered February 22, 2023 in Albany County, which, in a combined proceeding pursuant to Lien Law § 201-a, action for declaratory judgment and plenary action, among other things, denied a motion by respondent Michael's Automotive Tech to vacate a prior judgment.

Respondent Michael's Automotive Tech (hereinafter respondent), the operator of an automobile repair garage in the City of Rochester, Monroe County, conducted repairs on a vehicle that had been damaged in a collision. The owner of the vehicle refused to pay for the repairs and abandoned the vehicle, causing respondent to obtain a

garagekeeper's lien in Virginia, where the vehicle was titled and registered. Petitioner, who already possessed a lien on the vehicle, commenced this proceeding in Supreme Court in Albany County, seeking, among other things, a court order declaring respondent's garagekeeper's lien invalid and physical possession of the vehicle. Specifically, petitioner argued that respondent failed to establish the elements for a proper garagekeeper's lien and that, in any event, petitioner's interest in the vehicle was perfected before respondent had possession. In February 2022, after respondent failed to oppose petitioner's order to show cause, the court entered a default judgment granting petitioner's application. In doing so, the court declared respondent's "claims against [petitioner] . . . cancelled" and ordered respondent to turn over physical possession of the vehicle to petitioner.

In May 2022, respondent commenced a separate action in Supreme Court in Monroe County, seeking damages from petitioner for unjust enrichment related to respondent's repair and maintenance of the vehicle. In response, petitioner moved in this proceeding to consolidate it with the Monroe County action. Respondent opposed and cross-moved for sanctions, arguing, among other things, that petitioner's argument was frivolous because this proceeding had been resolved. Ultimately, Supreme Court denied petitioner's motion to consolidate the proceedings and granted respondent's cross-motion for sanctions.

Thereafter, respondent moved to vacate Supreme Court's February 2022 default judgment. The court sua sponte construed respondent's motion as not only one to vacate the prior judgment but also to clarify it, and granted that portion "to the extent that the provision of the [February 2022] [j]udgment stating that '[r]espondent['s] . . . claims against [p]etitioner . . . for garaging, repairing and storing the subject . . . vehicle are cancelled' concerns any assertion of a *lien* as to those items." The court otherwise denied respondent's motion to vacate based on, among other things, respondent's failure to discuss the merits of its unjust enrichment claim and its failure to move to vacate rather than moving for sanctions in response to petitioner's consolidation motion, which essentially waived its rights by acceding to the validity of the judgment.[1] Respondent appeals.

"[A] party seeking to vacate a default judgment must show a reasonable excuse for the default and the existence of a meritorious defense to the action" (*Matter of Santander*

[1] Respondent's unjust enrichment action in Monroe County was subsequently dismissed on res judicata grounds.

Consumer USA, Inc. v Kobi Auto Collision & Paint Ctr., Inc., 166 AD3d 1365, 1365 [3d Dept 2018]; *see* CPLR 5015 [a] [1]). "Whether there is a reasonable excuse for default . . . turns on a number of factors, including whether there has been willful neglect and prejudice to the opposing party, and the strong public policy in favor of resolving cases on the merits" (*Matter of Santander Consumer USA, Inc. v Kobi Auto Collision & Paint Ctr., Inc.*, 166 AD3d at 1365-1366 [internal quotation marks and citations omitted]; *see McCue v Trifera, LLC*, 173 AD3d 1416, 1418 [3d Dept 2019]). "Whether to vacate a prior order or judgment is addressed to the court's sound discretion, subject to reversal only where there has been a clear abuse of that discretion" (*Reverse Mtge. Solutions, Inc. v Lawrence*, 200 AD3d 1146, 1148 [3d Dept 2021] [internal quotation marks and citations omitted]; *see Matter of CCAP Auto Lease Ltd. v Savannah Car Care, Inc.*, 211 AD3d 1210, 1212-1213 [3d Dept 2022]). "[T]hat discretion[, however,] should not be exercised where . . . the moving party has demonstrated a lack of good faith, or been dilatory in asserting its rights" (*Greenwich Sav. Bank v JAJ Carpet Mart*, 126 AD2d 451, 452 [1st Dept 1987]; *see Calderock Joint Ventures, L.P. v Mitiku*, 45 AD3d 452, 453 [1st Dept 2007]).

First and foremost, respondent utterly failed to proffer a reasonable excuse for its failure to respond to petitioner's original proposed order to show cause. Although respondent's owner asserted that he "was never served personally" with petitioner's papers, petitioner's application was supported by an affidavit of service which established that respondent's agent was served (*see* Business Corporation Law § 306 [b] [1] [i]).[2] Moreover, although the parties undertook negotiations to settle the dispute, respondent failed to answer or otherwise oppose petitioner's requested relief. Additionally, respondent did not move to vacate the February 2022 judgment until several months after it was entered, when it commenced the unjust enrichment action in Monroe County. Accordingly, Supreme Court's order denying respondent's motion to vacate the February 2022 judgment was not an abuse of discretion because not only was respondent's apparent excuse for its failure to oppose petitioner's application – that its owner was not personally served – unreasonable (*see Matter of CCAP Auto Lease Ltd. v Savannah Car Care, Inc.*, 211 AD3d at 1213), but also because the motion to vacate was unreasonably delayed, reflecting a litigation strategy aptly identified by Supreme Court (*see generally McCue v Trifera, LLC*, 173 AD3d at 1418-1419; *Greenwich Sav. Bank v JAJ Carpet Mart*, 126 AD2d at 452-453; *cf. Matter of Santander Consumer USA, Inc. v Kobi Auto*

[2] We also note that, in respondent's attorney's affidavit opposing petitioner's motion to consolidate, respondent's attorney averred that he "agreed to waive proper service."

Collision & Paint Ctr., Inc., 166 AD3d at 1366). To the extent not specifically addressed herein, we have examined respondent's remaining contentions and find them unavailing.

Garry, P.J., Clark, Ceresia and Mackey, JJ., concur.

ORDERED that the order is affirmed, with costs.

ENTER:

Robert D. Mayberger
Clerk of the Court