

Pettus v Board of Directors
2016 NY Slip Op 31349(U)
June 2, 2016
Supreme Court, Bronx County
Docket Number: 250720/2015
Judge: Jr., Kenneth L. Thompson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X

JAMES PETTUS,

Index No: 250720/2015

Plaintiff,

-against-

DECISION AND ORDER

BOARD OF DIRECTORS,

Present:

HON. KENNETH L. THOMPSON, JR.

Defendants. X

The following papers numbered 1 to 6 read on this motion to renew

No	On Calendar of April 4, 2016	PAPERS NUMBER
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	<u>1, 2, 4</u>
	Answering Affidavit and Exhibits-----	<u>3 5</u>
	Replying Affidavit and Exhibits-----	<u>6</u>
	Affidavit-----	_____
	Pleadings -- Exhibit-----	_____
	Memorandum of Law-----	_____
	Stipulation -- Referee's Report --Minutes-----	_____
	Filed papers-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Petitioners, James Pettus, (Pettus), and Charlene Thompson, (Thompson), move pursuant to CPLR 2221 to renew that portion of the decision and order of this Court dated December 16, 2015 that vacated an order of this Court dated September 11, 2015, that permitted petitioners to proceed as poor persons. Respondents move pursuant to CPLR 5015(a)(1), to vacate a default judgment and to dismiss the petition.

MOTION TO RENEW

Petitioners renew on grounds that Petitioners inadvertently submitted only Pettus' affidavit of his income and assets neglecting to submit the income and assets of co-petitioner, Thompson. Thompson avers that she is employed by the Human Resources Administration. She averred in one part of her affidavit that she earns \$41,000 a year and in another place \$45,000 a year. In the affidavit in Support of Application to Proceed as a Poor Person, Thompson's co-op is valued at \$165,000. Thompson avers to numerous expenses and debts, a disabled husband, Pettus, and a disabled son. However, Thompson resources exceed any

definition of a poor person.

Accordingly, Petitioners' application to renew is granted and upon renewal, the motion to permit petitioners to proceed as a poor person is denied. Pursuant to CPLR 1101(d) Petitioners will pay the statutory index number fee, and if the statutory index fee is not paid within 120 days of this order, the action will be dismissed.

MOTION TO VACATE AND DISMISS

Respondents' moves to vacate the order of Justice Alison Y. Tuitt dated August 3, 2015, which granted the petition on default. The motion to vacate the default is properly before this Court, because the Petition was granted on default and therefore, "such motion may be made, on notice, to any judge of the court." CPLR 2221(a)(2).

Defendants have established, [through a prior motion to dismiss], the existence of a meritorious defense and that there was no intent to abandon the defense, as demonstrated by the continued pretrial activities participated in by both parties. The delay was not inordinate (*see, Heffney v. Brookdale Hosp. Center*, supra., p 843) and plaintiffs have not established any prejudice. Under these circumstances, it was within Special Term's discretion to vacate the default (*see, CPLR 2005; Epstein v. Lenox Hill Hosp.*, supra.; *Paoli v. Sullcraft Mfg. Co.*, 104 AD2d 333, 334; *Heffney v. Brookdale Hosp. Center*, supra.).

Glen Travel Plaza, Inc. v. H.G. Anderson Equip. Corp., 122 A.D.2d 327, 328-29 [3rd Dept 1986).

Accordingly, that branch of respondents' motion to vacate the order decided on default of Justice Tuitt dated August 3, 2015, is hereby granted.

With respect to the motion to dismiss, the petition merely asserts a right to a garage key, even though the petitioners' do not rent any garage space. The Petition does not provide any basis in law or fact for the relief sought by petitioners. Furthermore, respondents submitted the affidavit of Peter Yee, (Yee), an account executive from the managing agent, respondent Charles

H. Greenthal, Agent/MGMT, in which Yee avers that it has been a decades long policy that only tenants who lease garage space are given garage keys. Yee further avers that the location of the garage near Yankee Stadium, several subway stations and the Bronx Courthouse raises safety concerns. Respondents submitted the minutes of the board minutes for the October 24, 2007 and December 11, 2007 meetings in which the security of the garage was discussed. Therefore, the respondents' long-standing policy of giving garage keys only to tenants who rent garage space is legitimately related to the safety and security concerns of respondents. *Seven Park Ave. Corp. v. Green*, 277 A.D.2d 123, 123-24, 715 N.Y.S.2d 697 [1st Dept 2000]).

“Although on a motion addressed to the sufficiency of a complaint, the facts pleaded are presumed to be true and accorded every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]), nevertheless, 'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration' ”. (*WFB Telecom. v NYNEX Corp.*, 188 A.D.2d 257, 259 [1st Dept 1992] quoting *Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, quoting *Roberts v Pollack*, 92 AD2d 440, 444).

Accordingly, the petition is dismissed pursuant to CPLR 3211(a)(7) for failure to state a cause of action.


CONCLUSION

Petitioners' application to renew is granted and upon renewal, the motion to permit petitioners to proceed as a poor person is denied. Pursuant to CPLR 1101(d) Petitioners will pay the statutory index number fee, and if the statutory index fee is not paid within 120 days of this order, the action will be dismissed. That branch of respondents' motion to vacate the order decided on default of Justice Tuitt dated August 3, 2015, is hereby granted. The petition is

dismissed pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

The foregoing shall constitute the decision and order of the Court.

Dated: JUN 02 2016



KENNETH L. THOMPSON JR. J.S.C.