

Whitehaven P.I. Fund LLC v Nokley

2008 NY Slip Op 32445(U)

September 3, 2008

Supreme Court, New York County

Docket Number: 0112379/2006

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART _____

Index Number : 112379/2006
WHITEHAVEN P.I.FUND LLC.
vs
NOKLEY, ROBERT
Sequence Number : 004
VACATE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...
Answering Affidavits -- Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**motion (a) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

SEP 08 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/3/08

JUDITH J. GISCHE, J.S.C.
J.J. Gische
JUDITH J. GISCHE, J.S.C./s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----x
WHITEHAVEN P.I. FUND, LLC,

Plaintiff,

Decision/Order

Index No.: 112379/06
Seq. No.: 004

-against-

Present:
Hon. Judith J. Gische
J.S.C.

ROBERT NOKLEY and PRE-SETTLEMENT
HEALTHCARE FUNDING, LLC,

Defendants.
-----x

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

Papers

	Numbered
Def n/m [vacate] w/ LL affirm, exhs	1
Pltf affirm in opp (MF), exhs	2
LL affirm	3
7/24/08 Transcript	4

FILED
SEP 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers the decision and order of the court is as follows:

This action is for tortious interference with contract. Plaintiff entered into multiple pre-settlement funding contracts with David Kingsbury ("DK") based upon an auto accident and personal injury action in which DK was involved. Plaintiff alleges that defendants thereafter interfered with its DK contracts by providing DK with additional funding, at DK's request. Defendants are a limited liability company and an individual.

Defendants jointly move to vacate the court's decision and order dated April 10, 2008 (the "prior decision") in its entirety, or in the alternative, granting defendants leave to renew and reargue plaintiff's motion to strike defendants' answer.

In the prior decision, the court granted plaintiff's motion to strike defendants' answer because "defendant failed to appear or oppose th[e] motion in writing (11:30 a.m.) Defendant has failed to comply with court orders of discovery dated 6/7/07, 10/25/07 and 2/21/08. While some documents have been provided, they are incomplete and contract copies are not executed." The court then directed plaintiff to file note of issue and proceed to an inquest on damages.

Defendants now argue that this court should exercise its discretion, in light of the strong public policy in this State that favors determination of claims on the merits, and grant the relief it seeks. With respect to the motion to strike, Leslie Lopez, Esq., attorney for defendants maintains that she was told by plaintiff's counsel that opposition papers were not necessary, and that the parties "would deal with any outstanding issues at the [April 10, 2008] Conference. Attorney Lopez claims that her failure to appear at the April 10, 2008 conference was "due to a diary error on [her] part, while attempting to get this case in order, this matter was inadvertently not diared and it did not appear on [her law] office's Court calendar.

Defendants also argue that the prior order should be vacated because there default in appearing was not willful, defendants did in fact adequately respond to plaintiff's outstanding discovery requests, that law office failure is a reasonable excuse for defendants' default in appearing and plaintiff will not be prejudiced by a resolution of this matter on the merits. Defendants essentially make arguments based on the standard to vacate a default judgment enunciated in Dilorenzo, Inc. v. A.C. Dutton Lumber Co., Inc., 67 NY2d 138 (1986). Defendants also provide copies of their response to the preliminary and compliance conference orders and response to notice

for discovery and inspection, each dated March 11, 2008.

Plaintiff argues that defendants' motion should be denied because they do not have a reasonable excuse to vacate the prior decision. Plaintiff also claims that the history of this case demonstrates that defendants' counsel "has engaged in a course of conduct that evidences an unexplained inability to comply with, or respond to, the directions of this Court." Plaintiff points to four motions "which were abandoned with explanation and without the courtesy of a phone call to plaintiff's counsel" and defendants' failure to appear at a status conference scheduled on February 21, 2008, in addition to the April 10, 2008. Plaintiff also contends that defendants' counsel should have provided to the court a copy of the diary entry evidencing the law office failure.

In reply, defendants maintain that they did not miss the February 21, 2008 conference, but that the *per diem* attorney who appeared on defendants' behalf that morning was merely late.

Discussion

There is a strong public policy in this state that matters be disposed of on their merits in the absence of real prejudice to defendant. Lirit v. S.H. Laufer World, Inc., 84 A.D.2d 704 (1st Dept 1981). Therefore, actions should be decided on their merits whenever possible and the harsh penalty of striking pleadings should only be imposed where the failure to comply was willful, contumacious or due to bad faith (Bassett v. Bando Sangsa Co., 103 AD2d 728 [1st Dept 1984]; Carter v. Baldwin Transp. Corp., 215 AD2d 256 [1st Dept 1995]). With respect to the default at issue here, defendants have met their burden in establishing that their failure to appear at the April 10, 2008 conference was not willful, contumacious or due to bad faith.

Defendants have also demonstrated a meritorious position with respect to plaintiff's motion to strike. Defendants maintain that they have provided all outstanding discovery requested by plaintiff, and are "ready, willing, and able to schedule and conduct depositions. Thus, defendants have demonstrated a reasonable excuse for their default in appearing at the April 10, 2008 conference which led to the courts' prior decision and a meritorious position with respect to plaintiff's motion to strike. Eugene Di Lorenzo, Inc. v. Dutton Lbr. Co., 67 N.Y.2d 138 (1986).

The court rejects plaintiff's contention that defendants' law office failure is not a reasonable excuse. Law office failure may constitute grounds for a finding of excusable default (Goldman v. Cotter, 10 AD3d 289, 291 [1st Dept 2004]) and it is within the discretion of the court to determine the sufficiency of the proffered excuse for the default [Navarro v. A. Trenkman Estate, Inc., 279 AD2d 257, 258 [1st Dept 2001]]. Moreover, the court rejects defendants' contention that the history of this case sufficiently demonstrates a pattern of neglect in this case. Striking defendants' answer is a harsh penalty. Undesired motion practice, a lack of courtesy between adversaries, and two missed court appearances do not justify such draconian relief, in light of defendants' proffered excuse (see i.e. Rivera v. 101 West 12th St. Garage Corp., 111 AD2d 622 [1st Dept 1985]).

Accordingly, plaintiff's motion to vacate the prior decision is granted.

Conclusion

In accordance herewith, it is hereby:

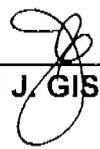
ORDERED that defendants' motion to vacate the court's decision and order dated April 10, 2008 is hereby granted; and it is further

ORDERED that the court hereby schedules a status conference in this case for September 25, 2008 at Part 10.

Any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
September 3, 2008

So Ordered: 

HON. JUDITH J. GISCHE, J.S.C.

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NEW YORK