NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 32

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

----------X

FELIX CUESTA,

Plaintiff,

- against -

AARON PEJCINOVIC, HALIM PEJCINOVIC, JOHN FERRIELLO, AND 900 PARK CORP.,

Defendant.

----------X

Index No. **20605/20E**

Hon. **FIDEL E. GOMEZ** Justice

The following papers numbered 1 to 4, Read on the (1) Order to Show cause noticed on 7/11/22, and duly submitted as no. 3 on the Motion Calendar of 7/25/22; and (2) the motion noticed on 7/22/22, and duly submitted as no. 4 on Motion calendar of 7/25/22.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1-2	
Answering Affidavit and Exhibits	3-4	
Replying Affidavit and Exhibits		
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law		

Defendants AARON PEJCINOVIC, HALIM PEJCINOVIC, and 900 PARK CORP.'s motion and plaintiff's motion are Decided in accordance with the Decision and Order annexed hereto.

Dated: 7/26/2022

_____

Hon. _____

FIDEL E. GOMEZ, AJSC

1.CHECK ONE ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION/CROSS-MOTION IS
X GRANTED (MOTION)
☐ DENIED (CROSS-MOTION)

3. CHECK IF APPROPRIATE.
☐ GRANTED IN PART
☐ OTHER
☐ SETTLE ORDER
☐ SUBMIT ORDER
☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT
☐ REFEREE APPOINTMENT
☐ NEXT APPEARANCE DATE: 8/22/22 at 10am

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

FELIX CUESTA,

Plaintiff(s),

- against -

AARON PEJCINOVIC, HALIM PEJCINOVIC, JOHN FERRIELLO, AND 900 PARK CORP.,

Defendant(s).
----------x

DECISION AND ORDER

Index No: 20605/20E

In this action for, *inter alia*, breach of contract, plaintiff moves seeking an order vacating this Court's dismissal pursuant to 22 NYCRR 202.27(b), which dismissed the complaint and all cross-claims against defendant JOHN FERRIELLO (Ferriello) when neither plaintiff nor defendants AARON PEJCINOVIC (AP), HALIM PEJCINOVIC (HP), nor 900 PARK CORP. (900) appeared for a Compliance Conference. Plaintiff avers that his failure to appear was excusable and that the claims in his complaint have merit. AP, HP, and 900 move seeking identical relief for the same reasons. The instant motion is unopposed.

For the reasons that follow hereinafter, plaintiff's motion and AP, HP, and 900's motion are granted, without opposition.

The instant action is for, breach of contract, breach of the covenant of good faith and fair dealing, specific performance, unjust enrichment, tortious interference with contract and business

relationships, fraud, and indemnification. The complaint alleges that on February 7, 2017, upon HP's representation that HP owned all of 900's shares, plaintiff and HP executed an agreement, whereby plaintiff purchased 10 percent of 900's shares for $15,000. 900's sole business was the operation of an Italian restaurant located at 900 Morris Park Avenue, Bronx, NY. On June 2, 2017, plaintiff and HP executed another agreement, whereby plaintiff purchased 900's remaining shares from HP for $235,000 - payable with a down payment of $85,000 and the remaining $150,000 to be paid in three installments. Per the foregoing agreements, plaintiff would own 900 and the restaurant owned by the same. Despite paying HP $100,000 in connection with the tho agreements, on June 12, 2017, Ferriello provided plaintiff with a note indicating that Ferriello was 900's owner and had sold it to AP. On October 13, 2017, Ferriello and AP took over 900 and locked plaintiff out from the restaurant. Based on the foregoing, plaintiff interposes seven causes of action, including one for breach of contract against HP, for breaching the agreement between plaintiff and HP. Plaintiff also interposes a cause of action for tortious interference with contract and business relationships against Ferriello and AP, asserting that in locking plaintiff out of 900, the foregoing defendants intentionally and maliciously interfered with plaintiff's anticipated economic benefits under the agreements between plaintiff and HP. Plaintiff seeks money damages

and specific performance with the agreements between he, HP, and 900.

AP, HP, and 900's answer contains a cross-claim against Ferriello for contribution and/or indemnification.

On March 21, 2022, this Court issued an order dismissing the complaint and all cross-claims against Ferriello because no one other than Ferriello appeared for a virtual Compliance Conference held on March 9, 2022 at 11am. Specifically, this Court stated that

> [d]efendant John Ferriello (Ferriello) appeared, but neither plaintiff nor the other defendants appeared. The Court gave Ferriello the option of either having the case adjourned or dismissed as against him. Ferriello chose to have the case dismissed. Accordingly, pursuant to 22 NYCRR 202.27(b), the Court hereby dismisses the complaint solely as against Ferriello.

PLAINTIFF'S MOTION

Plaintiff's motion seeking an order vacating this Court's dismissal of the complaint against Ferriello is granted. Significantly, plaintiff provides both a reasonable excuse for failing to appear at the Compliance Conference and an affidavit demonstrating that his claims against Ferriello have merit.

CPLR § 3404 and 22 NYCRR 202.27 both prescribe mechanisms for dismissal of cases when parties fail to appear for required

calendar calls. CPLR § 3404 states that

> [a] case in the supreme court or a county court marked off or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order.

22 NYCRR §202.27 states that

> [a]t any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows:
>
> (a) If the plaintiff appears but the defendant does not, the judge may grant judgment by default or order an inquest.
>
> (b) If the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or cross-claims.
>
> (c) If no party appears, the judge may make such order as appears just.

While the foregoing statutes are similar, the circumstances under which they apply are not. CPLR § 3404 only applies to cases which are on the trial calendar, meaning those cases for which plaintiff has filed a note of issue (*Jiles v New York City Transit Authority*, 290 AD2d 307, 307 [1st Dep. 2002]; *Johnson v Sam Minskoff & Sons, Inc.*, 287 AD2d 233, 235 [1st Dept 2001]; *Lopez v Imperial Delivery*

Service, Inc., 282 AD2d 190, 190 [2d Dept 2001]). Restoration of cases dismissed pursuant to CPLR § 3404 requires that plaintiff demonstrate (1) the merit of the action; (2) a reasonable excuse for the delay in seeking to restore the action; (3) lack of intent to abandon the case and; (4) lack of prejudice to the non-moving party (*Enax v New York Telephone Company*, 280 AD2d 294, 295 [1st Dept 2001]; *Lopez* at197). While CPLR § 3404 contemplates restoration within one year, a case which remains inactive for several years after dismissal may nevertheless be restored if the moving party can satisfy the test just described (*Lopez* at 197).

22 NYCRR 202.27 applies to those cases which have not yet been placed on the trial calendar, meaning those cases for which no note of issue has been filed (*Uddaraju v City of New York*, 1 AD3d 140, 141 [1st Dept 2003]); *Lopez* at 196). A failure to appear for a pre-note of issue calendar call or conference is deemed a default and restoration is, thus, governed by CPLR § 5015(a)(1) (*Johnson* at 236). Specifically, restoration requires the moving party to demonstrate (1) a reasonable excuse for the failure to appear at the calendar call where the case was dismissed; and (2) that the case is meritorious (*id.*; *Foley Inc. v Metropolis Superstructures, Inc.*, 130 AD3d 680, 680 [2d Dept 2015]; *Jones v New York City Housing Authority*, 13 AD3d 489, 489 [2d Dept 2004]). Consequently, the time within which to move for a restoration of the case, meaning vacatur of the dismissal for defaulting or not appearing is

usually one year after the service of the order or judgment entered upon the default (*Johnson* at 236; *Lopez* at 197). A failure to move to vacate the default within the year usually bars the restoration of the case regardless of the excuse or the merits (*id*. at 197; *Nahmani v Town of Ramapo*, 262 AD2d 291, 291 [2d Dept 1999]). However, vacatur after a year of the default is nevertheless warranted in the interests of justice (*Johnson* at 236; *State of New York v Kama*, 267 AD2d 225, 225 [1st Dept 1999] [Defendant's failure to answer resulting in default was excusable even when vacatur was sought five years after the default. The Court found that defendant's excuse for failure to appear and seek a vacatur was due to extensive illness requiring multiple hospitalizations. Court further reasoned that since the default was taken even though plaintiff knew that defendant might have needed a guardian appointed to avoid the default, the interests of justice mandated a vacatur of the default and a restoration of the case.]). In such cases, the excuse for the default must be more compelling than if made within the year prescribed by CPLR §5015(a)(1) (*Johnson* at 197 [illness constituted a reasonable excuse for a default and the delay in timely moving to restore and vacate the default]. Law office failure constitutes an excusable reason for a resulting default (*Uddaraju* at 141; *Mediavilla v Gurman*, 272 AD2d 146, 148 [1st Dept 2000]).

While the restoration of cases dismissed pursuant to CPLR §

3404 can be vacated and the case restored even if a party waits years after the dismissal to seek such relief, dismissals pursuant to 22 NYCRR 202.27 have to be, in most cases, vacated within a year (*Lopez* at 197). The rationale being that in dismissing post note of issue cases pursuant to CPLR § 3404, where discovery is usually complete, a restoration usually leads to an immediate trial and no further discovery or delay ensues (*id.*). Conversely, allowing pre-note of issue cases, dismissed pursuant to 22 NYCRR 202.27, to remain unrestored for more than a year is contrary to the court's role in expeditiously moving cases at the discovery stage, where discovery is not complete and, once restored, further discovery in those case must ensue (*id.*).

In support of the instant motion, plaintiff, by counsel, asserts that he failed to appear at the virtual conference because the email address to which the link for the conference was sent was not counsel's.

Plaintiff also submits an affidavit, wherein he reiterates the contents of his complaint, including his assertion that Ferriello locked him out of 900.

Based on the foregoing, the instant motion is granted. As noted above, 22 NYCRR 202.27 applies to those cases which have not yet been placed on the trial calendar, meaning those cases for which no note of issue has been filed (*Uddaraju* 141; *Lopez* at 196).

Moreover, a failure to appear for a pre-note of issue calendar call or conference is deemed a default and restoration is, thus, governed by CPLR § 5015(a)(1) (*Johnson* at 236). In the foregoing case, restoration requires the moving party to demonstrate (1) a reasonable excuse for the failure to appear at the calendar call where the case was dismissed; and (2) that the case is meritorious (*id.*; *Jones* at 489), or that the defenses have merit (*Foley, Inc.* at 680).

Here, the default in question arose from plaintiff's failure to appear at a conference prior to the filing of a note of issue, and pursuant to 22 NYCRR 202.27. Thus, vacatur of the default is governed by CPLR § 5015(a)(1). To that end, plaintiff provides both a reasonable excuse for failing to appear - that the link for the conference was sent to an email address that did not belong to his counsel - and with the submission of his affidavit, that the claims in the complaint have merit.

AP, HP, AND 900'S MOTION

AP, HP, and 900's motion seeking to vacate this Court's dismissal of their cross-claims against Ferriello is granted. Significantly, AP, HP, and 900 provide both a reasonable excuse for failing to appear at the Compliance Conference and an affidavit demonstrating that their cross-claims against Ferriello have merit.

In support of the instant motion, AP, HP, and 900, by counsel, assert the reason they failed to appear at the conference was because at the time of the conference, the fire alarm at counsel's office was activated, forcing an evacuation of the office and the inability to logon to the virtual conference.

AP, HP, and 900 also submit an affidavit by AP, wherein he asserts that neither he nor HP locked plaintiff out of 900 and that if anyone did, it was Ferriello.

Based on the foregoing, HP, AP, and 900 provide both a reasonable excuse for failing to appear - an inability to attend the conference due an an unforseen event - and with the submission of AP's affidavit, that the cross-claims against Ferriello in the answer have merit.

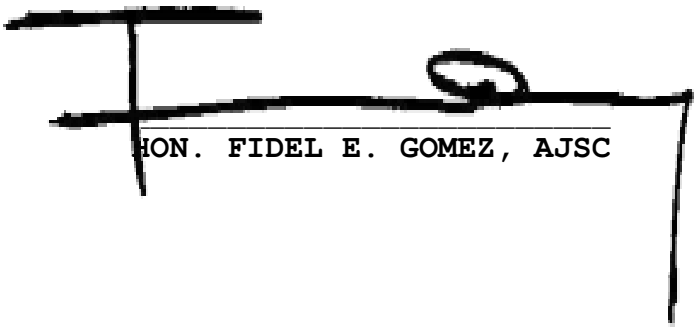
Accordingly, the instant motions are granted. It is hereby

ORDERED that the complaint and cross-claims against Ferriello be restored. It is further

ORDERED that all parties appear for a Compliance Conference on August 22, 2022 at 10am. It is further

ORDERED that plaintiff serve a copy of this Decision and Order with Notice of Entry upon all defendants within thirty (30) days hereof.

Dated : July 26, 2022
Bronx, New York



HON. FIDEL E. GOMEZ, AJSC