

**Jovino v Smith**

2024 NY Slip Op 31035(U)

March 20, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 621870/2019

Judge: David T. Reilly

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
I.A.S. PART 30 SUFFOLK COUNTY**

**PRESENT:  
HON. DAVID T. REILLY, JSC**

**INDEX NO.: 621870/2019**

\_\_\_\_\_  
**DALE ROBERT JOVINO, AMERICAN LAND  
ACQUISITION CORP., AMERICAN GAS AND  
OIL ACQUISITION CORP., and SMITH  
LANDINGS, INC.,**

**Law Office of Jeffrey Davis  
Attorneys for Plaintiffs  
600 Mamaroneck Avenue, 4<sup>th</sup> Floor  
Harrison, NY 10528**

**Plaintiff(s),**

**Kim & Epstein Law Group, P.C.  
Attorneys for Defendants  
1305 Middle Country Road, Suite 6  
Selden, NY 11784**

**-against-**

**EUGENE G. SMITH and GENE'S FOUR  
SEASONS LANDSCAPE AND NURSERY INC.,**

**Defendant(s).**

\_\_\_\_\_  
X

MOTION DATE: 09/22/23  
SUBMITTED: 01/03/24  
MOTION SEQ. NO.: 003,004  
MOTION DEC.: 003 MD  
004 MD

Upon the reading and filing of the following papers in this matter: NYSCEF Doc. Nos. 36-50 (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that plaintiffs' motion (003) for an Order vacating the dismissal of this action pursuant to CPLR 5015 and defendants' cross-motion (004) for an Order awarding sanctions against plaintiffs are hereby consolidated for purposes of this determination; and it is further

**ORDERED** that plaintiffs' motion pursuant to CPLR 5015(a) for an Order vacating the default and subsequent dismissal of this action, done in accordance with 22 NYCRR §202.27, is denied; and it is further

**ORDERED** that defendants' cross-motion for an Order sanctioning plaintiffs pursuant to 22 NYCRR §130.1-1 is denied.

Plaintiff commenced this action with the filing of a summons with notice on November 4, 2019 seeking money damages for causes of action sounding in breach of contract. In their complaint, filed on January 13, 2020, plaintiffs allege that on or about August 10, 2012 defendant Eugene G. Smith entered into a contract with defendant American Land Acquisition Corp. for the purchase of a 50% ownership of a property described as 1000 Tenth Street, Ronkonkoma, New York. Plaintiffs further allege that plaintiff Dale Robert Jovino and defendant Eugene G. Smith attended a Suffolk County tax foreclosure sale on October 23, 2012 and plaintiff purchased three properties. Plaintiff Jovino states that he assigned the three properties to defendant Smith in exchange for a 50% ownership interest and 50% profit when the properties were sold. Plaintiff claims that he did not receive any of the profits after two of the properties were sold in 2016 and 2017.

This matter was scheduled for a preliminary conference on January 18, 2023. The parties were advised that they could file a proposed preliminary conference order in lieu of an appearance. No proposed order was filed and plaintiffs' counsel failed to appear at the conference. The matter was adjourned to February 7, 2023. On that date plaintiffs' counsel again failed to appear. The matter was adjourned to June 6, 2023. On the June 6, 2023 date plaintiffs' counsel again failed to appear and the matter was adjourned to August 29, 2023. Plaintiffs' counsel failed to appear on that date and this Court dismissed plaintiffs' complaint pursuant to 22 NYCRR §202.27 and denied the two pending motions, sequenced as motion 001 and 002, as moot. That oral determination was memorialized in a written Order dated September 6, 2023.

Plaintiffs now move for an Order vacating the default and dismissal pursuant to CPLR 5015(a). In support of the motion plaintiffs' counsel avers that the first conference on January 18, 2023 was adjourned on consent of the parties as there was some confusion among the attorneys as to whether the conference was by telephone or "in person." Counsel states that he missed the February 7, 2023 conference due to a "calendar issue." Counsel further claims that he had absolutely no notice of the June 6 and August 29, 2023 conferences. Counsel states that he never received a phone call or email from defense counsel notifying him of the conference dates.

A party seeking to vacate a default in appearing or answering a complaint in an action on the ground of excusable default must demonstrate a reasonable excuse for the default and a potentially meritorious case or defense to the action (*Codoner v. Bobby's Bus Co., Inc.*, 85 AD3d 843 [2d Dept 2011], *citing* CPLR 5015 [a] [1]; *Citimortgage, Inc. v. Brown*, 83 AD3d 644 [2011]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the court (*see Aurora Loan Servs. LLC v Ahmed, supra*; *Bank of N.Y. Mellon v Colucci*, 138 AD3d 1047, 30 NYS3d 667 [2d Dept 2016]).

Here, the Court finds that the excuses offered by plaintiffs' counsel to be unreasonable. While there may have been some confusion regarding the type and manner of the initial conference on January 18, 2023, and a lack of proper calendar practice leading to counsels' absence at the February 7, 2023 conference, there has been no real excuse offered to explain counsels' absence at the June 6 and August 29, 2023 conferences. The Court will not credit plaintiffs' counsel's argument that he received no notice of the last two conferences. As a matter of practice this Court's

calendar of cases is available on the eCourts tracking system and requires only that the user know the index number of the case and the county in which the case is pending. At the very least plaintiffs’ counsel could have made a reasonably diligent search after his failure to properly calendar the February 7, 2023 conference to determine the adjourn date. In addition, it is not the role or responsibility, as plaintiffs’ counsel implies, of defense counsel to personally advise his adversary of the calendar dates of plaintiffs’ case. Accordingly, the Court finds that plaintiffs have failed to set forth a reasonable excuse for the default (*see Feldstein v. New York State Dept. of Correctional Servs.*, 55 AD3d 663, 867 NYS2d 464 [2d Dept 2008]). In light of this determination the Court need not address plaintiffs’ claims of meritorious causes of action (*see generally Fernandez v Santos*, 161 AD3d 473, 76 NYS3d 147 [1<sup>st</sup> Dept 2018]).

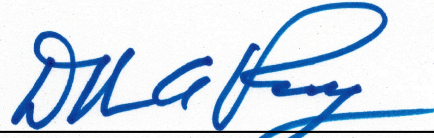
With respect to defendants’ cross-motion, “[T]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct” (22 NYCRR 130-1.1[a]). Conduct is frivolous under 22 NYCRR 130-1.1 if it is “completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law” or it is “undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another” (*Id.*, §130-1.1[c][1], [2]; *see Matter of Olivieri*, 208 AD3d 171, NYS3d 372 [2d Dept 2022]), citing *Mascia v Maresco*, 39 AD3d 504, 505, 833 N.Y.S.2d 207 [2d Dept 2007]).

Here, the Court finds that plaintiffs have not commenced the instant action to harass or maliciously injure defendants. Nor can the Court say that plaintiffs’ second cause of action asserted in the original complaint and proposed amended complaint is completely without merit in law such that the imposition of sanctions would be appropriate. Accordingly, defendants’ cross-motion is denied.

This constitutes the decision and Order of the Court.

Dated: March 20, 2024  
Riverhead, New York



  
\_\_\_\_\_  
DAVID T. REILLY  
JUSTICE OF THE SUPREME COURT

X  FINAL DISPOSITION      \_\_\_ NON-FINAL DISPOSITION