

Advanced Fertility Servs., P.C. v Yorkville Towers Assoc.
2007 NY Slip Op 30378(U)
March 23, 2007
Supreme Court, New York County
Docket Number: 0107564
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. MARILYN SHAFER, JSC

PRESENT: SHAFFER |
Justice

PART 62

ADVANCED FERTILITY SERVICES
- v -
MURKINUS TOWNS ASSOCIATES

INDEX NO. 107564/03
MOTION DATE _____
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is

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

FILED
MAR 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/23/07

[Signature]
HON. MARILYN SHAFER, JSC

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

PRESENT: HON. MARILYN SHAFER
Justice

PART 62

ADVANCED FERTILITY SERVICES, P.C.,

Plaintiff,

-against-

**YORKVILLE TOWERS ASSOCIATES, and
RY MANAGEMENT CO. INC.,**

Defendants.

INDEX NO. 107564/03

FILED

MAR 28 2007

NEW YORK COUNTY CLERK'S OFFICE
MOTION SEQ. NO. 02

The following papers were read on this motion to vacate:

PAPERS NUMBERED

Order to Show Cause	1
Memo in Support of Order to Show Cause	2
Affirmation in Opposition	3
Reply Affirmation	4

Plaintiff Advanced Fertility Services, P.C. moves by order to show cause pursuant to CPLR §5015 (a) 1 to vacate the dismissal of its action on default for plaintiff's failure to oppose a motion to dismiss by defendants Yorkville Towers Associates and Ry Management Co. Inc. Plaintiff affirms that it has a reasonable excuse for the default and a meritorious defense in the underlying action. In opposition, defendants state that the instant motion to vacate is improper since it is predicated on CPLR§ 3126, for which the only remedy is appeal, and, in addition, a probable subrogation action for similar relief has been brought by plaintiff in Kings County (Affirmation in Opposition, II). Plaintiff fertility clinic brought the underlying complaint for breach of contract resulting from water damage to the medical offices it leased from defendants. This court granted a motion to strike the pleading on default, with costs, by decision dated July

27, 2005, and following a stipulation of adjournment the within motion to vacate was fully submitted on December 13, 2006.

As a matter of policy, courts prefer that actions be tried on the merits wherever possible, and for that purpose a liberal policy is adopted with respect to the opening of default judgments in the furtherance of justice, so that parties may have their day in court (*Cappel v RKO Stanley Warner Theaters Inc.*, 61 AD 2d 936, [1st Dept 1978]). CPLR §5015 (a) (1) provides, in part, that the court may relieve a party of a judgment or order, on motion, on grounds of excusable default if the motion is made within one year, or, under CPLR §5015 (b), on stipulation of consent to vacatur by the parties personally or their attorneys. A motion to open a default is addressed to the sound discretion of the court and is usually granted, provided the moving papers include an affidavit of merit and a sufficient excuse for the default (*Cappel v RKO Stanley Warner Theaters Inc.*, *supra*). To vacate a default, the movant must demonstrate both a meritorious defense and a reasonable excuse for the default (*Achampong v Weigelt*, 240 AD 2d 247, 248 [1st Dept 1997]).

CPLR §3126 governs penalties for refusal to comply with orders to disclose. It provides, in pertinent part, that if any party refuses to obey an order for disclosure, the court may make such orders with regard to the failure or refusal including CPLR §3126 (3), which provides that “an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.” In a properly contested motion predicated upon CPLR §3126, an appeal of the resulting order or judgment is the proper and sole remedy of the defaulting party (*Parker v State Farm Mutual Automobile Ins. Co.*, 26 AD 3d 719, 720 [3d Dept 2006]). However, the court has held that where the default that plaintiff sought to vacate was her default in opposing defendant’s motion to preclude in the first instance, the trial did not err in entertaining the motion to vacate (*id.*).

Here, the default which plaintiff seeks to vacate is the default in opposing defendants' motion to strike in the first instance. Since this motion was not contested by plaintiff, appeal is not the appropriate remedy.

Defendants do not dispute that plaintiff's claim has merit, nor that the delay is excusable. Plaintiff Dr. Melnick, founder and director of the fertility clinic, swears that the medical offices were flooded, causing extensive toxic mold damage allegedly attributed to badly installed ductwork from the building's water tower (Order to Show Cause, Melnick Affirmation).

Attorney for plaintiff affirms, and it is not disputed, that exigent circumstances prevented him from filing timely opposition to the motion, to wit, a medical emergency involving his 88 year-old father (Order to Show Cause, Newman Affirmation). Defendants do not deny that they refused to consent to an adjournment of the underlying motion to strike, evidently requested by plaintiff at the last minute, resulting in plaintiff's delayed arrival at the courthouse, opposition and discovery responses in hand, after the motion had been submitted. So that the parties may have their day in court, the court finds that these circumstances constitute sufficient excuse for plaintiff's default, and the motion is accordingly restored to the trial calendar.

The court has considered defendant's argument that a subrogee insurer for plaintiff has apparently brought a complaint in Kings County in 2005 after commencement of the within action. This branch of the opposition is denied without prejudice to renew. Accordingly, it is

ORDERED that the motion is granted to the extent that the default is vacated; and it is further

ORDERED that the motion is denied only with respect to the imposition of costs, which are to be paid personally by counsel pursuant to the prior order of this court.

This reflects the decision and order of this court.

Dated: 3/23/07



J.S.C.
HON. MARILYN SHAFER, JSC

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

FILED
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