

Jacobson v Gerriets

2008 NY Slip Op 30197(U)

January 22, 2008

Supreme Court, New York County

Docket Number: 0100814/2003

Judge: Herman Cahn

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

PRESENT: Cahn
Justice

PART 49m

Dr. Jerry I. Jacobson

INDEX NO. 100814/03

- v -

MOTION DATE _____

MOTION SEQ. NO. 005

Alfred E. Gerrits, II et al

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

FILED
JAN 25 2008
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

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

Dated: January 22, 2008

A. Cahn

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

-----X
DR. JERRY I. JACOBSON,

Plaintiff,

-against-

Index No. 100814/03

ALFRED F. GERRIETS, II, QUESTAR CORPORATE
ADVISORS, INC. AND PROMETHEUS
ACQUISITIONS, LLC,

Defendants.

-----X

Herman Cahn, J.:

FILED
JAN 25 2008
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Dr. Jerry I. Jacobson moves to vacate prior court orders dated July 28, 2006 and October 5, 2006, which vacated the dismissal of this action, restoring this action to the court's inquest calendar, and setting the matter down for an inquest on damages, CPLR 5015.

Defendants Alfred F. Gerriets, II, Questar Corporate Advisors, Inc., and Prometheus Acquisitions, LLC cross-move to reinstate their answer, which had been previously stricken in 2004.

In this action, plaintiff alleges that, on September 13, 2000, he retained defendants to act as his business consultants and agents in connection with the settlement of a legal action. He also alleges that, on October 10, 2000, his wife wired \$410,000 to Gerriets at Prometheus Acquisitions to be held in escrow to secure payment for services rendered and to secure payment of the settlement amount. Plaintiff further alleges that, despite his numerous demands in 2001, defendants have refused to forward the funds, to settle the legal action or to return the funds he paid as security, to him.

In January 2003, plaintiff commenced this action by the service and filing of a summons with notice seeking to recover the funds, together with interest, costs, and disbursements, on theories of fraud and breach of contract. Defendants did not respond to the summons. On June 7, 2004, approximately one and a half years after service of the summons with notice, plaintiff served and filed a verified complaint.

In June 2004, defendants served an answer in which they deny all wrongdoing and assert a single affirmative defense that the action is frivolous and demand that sanctions be imposed upon plaintiff, 22 NYCRR 130-1.2.

The court struck the answer in 2004 upon defendants' failure to appear for a preliminary conference on two separate dates. Defendants contend that they never received notification of the conference dates from plaintiff, contrary to plaintiff's former attorney's representations to this court that he sent defendants written notification.

Subsequently, plaintiff moved for a default judgment. By bench order issued December 10, 2004, the court granted the motion on default upon defendants' failure to appear on that date and referred the issue of damages to a special referee to hear and report.

On April 18, 2005, plaintiffs, their attorneys and defendants' attorneys appeared for inquest before the Honorable Jacqueline Silbermann. Justice Silbermann granted defendants' request to mark the matter off the inquest calendar in order to provide them with an opportunity to file a motion to vacate the default judgment. However, defendants did not file the motion.

In 2006, plaintiff moved to restore the matter to the inquest calendar. Defendants failed to file opposition papers. Counsel for each side represents that, during oral argument of the motion on July 24, 2006, they agreed to mark the motion off the motion calendar in order to

* 4]
afford plaintiff's counsel an opportunity to move to be relieved as counsel and defendants an opportunity to move to reinstate the answer. By order dated July 28, 2006, the court marked the motion off the calendar. Defendants did not move to reinstate the answer at that time.

Plaintiff's counsel moved to withdraw. By order dated October 5, 2006, the court deemed the motion abandoned. On that day, the Clerk of the Court marked the case "disposed."

Plaintiff now seeks an order vacating the July 28, 2006 order marking the motion "off calendar" and to restore the action to the inquest calendar. Plaintiff contends that any delay on his part was the result of inadvertent failure by his former attorneys, that he, at all times, intended to prosecute this action and that his claims have merit.

In opposition, defendants seek dismissal of the action on the grounds that plaintiff's failures, to timely move for a default judgment, to present a justifiable excuse for that failure and to state a viable cause of action, render this action abandoned prior to service of the complaint on June 7, 2004.

Plaintiff commenced this action by serving and filing a summons with notice on January 16, 2003 (see CPLR 304, 305 [b]). Defendants then had 20 days to serve a notice of appearance and written demand for a complaint or a motion which has the effect of extending the time to answer (see CPLR 320 [a], 3012 [b]). Where, as here, defendants fail to timely appear by any of these methods, the plaintiff has one year from the default to take proceedings for the entry of a default judgment (see PM-OK Associates v Britz, 256 AD2d 151, 152 [1st Dept 1998]; CPLR 3215 [a]).

Here, however, plaintiff failed to timely move for a default judgment. In such circumstance, "the court shall not enter judgment but shall dismiss the complaint as abandoned,

without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed" (CPLR 3215 [c]). To avoid dismissal of the action as abandoned, the plaintiff must demonstrate a reasonable excuse for the period of non-prosecution, his or her lack of intent to abandon the action and a meritorious cause of action (Truong v All Pro Air Delivery, Inc., 278 AD2d 45, 45 [1st Dept 2000]; see CPLR 3215 [c]). Plaintiff has met this burden.

At the outset, the court notes that, contrary to plaintiff's contention, a defendant does not waive its right to move for dismissal under CPLR 3215 (c) by appearing, even informally, on the merits (see Sports Legends, Inc. v Carberry, 38 AD3d 470, 470 [1st Dept 2007]; compare Myers v Slutsky, 139 AD2d 709, 710 [2d Dept 1988]).

Plaintiff has sufficiently alleged that the failure to timely move for a default judgment was apparently caused of the law office failure of the attorneys who previously represented him. (see Spyropoulos v Hirsh, 21 AD3d 818, 818 [1st Dept 2005]; CPLR 2005).

The procedural history of the action demonstrates that plaintiff did not intend to abandon it. Plaintiff served a complaint, appeared before the court for preliminary conferences, moved for a default judgment after defendants' answer was stricken for nonappearance and appeared for inquest. Indeed, it appears that the delays in the prosecution of the action were more the result of defendants' conduct in failing to make the motions that it represented to this court that it would make, than the result of plaintiff's conduct.

Last, plaintiff has demonstrated a meritorious cause of action for breach of contract. To establish a right to recover for breach of contract, a party must prove the existence of a contract, performance of the contract by the injured party, breach by the adverse party and damages (Furia

v. Furia, 116 AD2d 694, 695 [2d Dept 1986]). Here, plaintiff attests that he retained defendants to act as his agents in negotiating a settlement of a legal action and sent them \$410,000 to effect the settlement (see Dr. Jerry I. Jacobson Mar. 13, 2004 Aff., ¶¶ 2, 3). Plaintiff further attests that defendants repeatedly failed to follow his instructions regarding disposition of the funds by failing to effect the settlement or return the funds (see id., ¶ 16). Plaintiff also attests that Gerriets admitted the debt in writing (see id., ¶ 14).

For these reasons, that branch of defendants' cross motion to dismiss plaintiff's motion to vacate two prior court orders and to dismiss the action, is denied. For these reasons as well, that branch of plaintiff's motion to vacate the October 5, 2005 dismissal of the action as abandoned, is granted.

That branch of defendants' cross motion to reinstate the answer is granted. This court struck the answer for defendants' failure to appear at two preliminary conferences upon representations by plaintiff's prior counsel that he had advised defendants of the adjourned date. Defendants represent that they never received such written notification and allege that plaintiff's prior counsel failed to advise them of the adjourned dates. Plaintiff does not deny this allegation. Therefore, defendants' answer is reinstated.

In view of the reinstatement of defendants' answer, that branch of plaintiff's motion to vacate the July 28, 2006 order marking off the motion to restore the action to the inquest calendar is denied.

The court restores the action to its calendar for a preliminary conference at 9:30 at Part 49, on February 8, 2008. No adjournments will be granted.

Accordingly, it is

ORDERED that the motion is granted to the extent that the October 5, 2006, order dismissing this action is vacated and this action restored to the court's active calendar; and it is further


ORDERED that the cross motion is granted to the extent that defendants' answer served on June 8, 2004 is reinstated; and it is further

ORDERED that the parties are directed to appear in room 232 at 60 Centre Street, New York, NY, before Part 49 for preliminary conference on February 8, 2008 at 9:30 A.M.; and it is further

ORDERED that, in view of the procedural history of this case, no adjournments of the conference will be granted and, upon the failure of any party to timely appear for the conference, either the case will be dismissed or an inquest will be directed, as appropriate.

Dated: January 22, 2008

ENTER:



J.S.C.
FILED
JAN 25 2008
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