

Caso v Manmall, LLC
2008 NY Slip Op 32315(U)
August 12, 2008
Supreme Court, New York County
Docket Number: 0100560/2005
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK / NEW YORK COUNTY

PRESENT: WALTER B. TOLUB
Justice

PART 15

LISA MARIE CASO

INDEX NO.

100560/05

MOTION DATE

MOTION SEQ. NO.

6

MOTION CAL. NO.

MANMALL, LLC ET AL.

The following papers, numbered 1 to _____ were read on 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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

FILED

AUG 20 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/12/08

WALTER B. TOLUB

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 15

-----x
LISA MARIE CASO

Plaintiff,

Index No. 100560/05
Mtn Seq. 006

-against-

MANMALL, LLC., MANHATTAN MALL, LLC.,
MANHATTAN MALL RESIDUAL HOLDINGS LLC.,
1275/1291 BROADWAY LLC., 1275/1291 MANAGER
LLC., 1275 CORP., CUSHMAN & WAKEFEID, INC.,
and CUSHMAN & WAKEFIELD OF NEW YORK, INC.,
And ONESOURCE FACILITY SERVICES, INC.,

Defendants.

FILED
AUG 20 2008
COUNTY CLERK'S OFFICE
NEW YORK

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WALTER B. TOLUB, J.:

This is a motion by plaintiff, pursuant to CPLR §
5015(a)(1), to vacate a default judgment entered on May 25, 2007,
and to restore the matter to the calendar *nunc pro tunc*.

FACTS

Plaintiff Lisa Marie Caso commenced the underlying
negligence action against Defendants to recover damages for
injuries sustained when she slipped and fell on a wet escalator
on April 11, 2003. Initially, the action was before the Hon.
Edward H. Lehner. Defendants Cushman & Wakefield, Inc. and
Cushman & Wakefield of New York, Inc. then added the Metropolitan
Transit Authority as a third-party defendant. The action was
transferred to the Transit Part on August 18, 2006, before the
Hon. Robert D. Lippmann. The Hon. Donna M. Mills succeeded Judge

Lippmann in the Transit Part. On February 13, 2007, Judge Mills issued an order granting the Transit Authority summary judgment dismissing the complaint. Once the MTA was no longer a party, the action was transferred to this Part on March 1, 2007.

All parties appeared before this court for a compliance conference on April 20, 2007. Defendants claim that at that conference, this court directed the parties to appear on May 25, 2007. On May 25, 2007, all Defendants were present for a status conference, however Plaintiff failed to appear, and this court dismissed the action pursuant to 22 NYCRR 202.27.

By this motion, Plaintiff seeks to vacate the May 25, 2007 dismissal of the action, arguing that, as required by CPLR § 5015(a), there was a reasonable excuse for failing to attend the conference and the action is meritorious.

Defendants argue that Plaintiff did not have a reasonable excuse for missing the May 25, 2007 conference, and instead exhibits a pattern of willful neglect in prosecuting this action. Furthermore, Defendants argue that the action is without merit because by granting the Metropolitan Transit Authority's motion for summary judgment, Judge Mills found that none of the Defendants could be found liable for the accident in question.

DISCUSSION

"If the defendant appears but the plaintiff does not, the judge may dismiss the action." 20 NYCRR 202.27. After ordering

dismissal of the action, the court directed Defendants to submit an order to Part 15 to be signed. While this court later decided against signing the submitted order, this does not render the dismissal ineffective. (Campos v. New York City Health & Hosps. Corp., 307 AD2d 785, 785 [1 Dept. 2003]; see also American Continental Properties, Inc. v. Lynn, 32 AD3d 700 [1 Dept. 2006]).

Pursuant to CPLR § 5015(a)(1), the party against whom the default was ordered may seek relief through vacation of the order within one year of the default judgment. (CPLR § 5015(a)[1]). Defendants' argument that the instant motion was not submitted in a timely fashion is unavailing. The deadline for Plaintiff to submit this motion was on May 25, 2008, a Sunday. GCL § 25-a states that in such instances, the next business day acts as the deadline. Because the following Monday was Memorial Day, May 27, 2008 became the deadline for submission of the motion to vacate the default judgment. (GCL § 25-a). It follows that Plaintiff's motion was timely.

To succeed on a motion to vacate, the movant must show reasonable excuse for the default and a meritorious claim. (Campos 307 AD2d at 785). While Plaintiff did not exercise great diligence it did attend all conferences prior to May 25, 2007. Additionally, the May 25, 2007 status conference was not mentioned in the April 20, 2007 compliance conference order. New

York courts strongly prefer to adjudicate claims on their merits. (Rugieri v. Bannister, 22 AD3d 299, 302 [1 Dept 2005], citing Harwood v. Chaliha, 291 AD2d 234 [1 Dept 2002]). Plaintiff has thus shown reasonable excuse for missing the status conference on May 25, 2007.

The movant in a motion to vacate must also demonstrate a meritorious claim. Showing whether an action is meritorious demands a lesser burden than that to demonstrate entitlement to summary judgment. (Levy v. New York City Housing Authority, 287 AD2d 281 [1 Dept 2001]). The Bill of Particulars is sufficient to establish the merits of a claim in deciding a motion to vacate. (Reices v. Catholic Medical Center of Brooklyn and Queens, Inc., 306 AD2d 394 [2 Dept 2003]). Here, the Bill of Particulars sufficiently claims that Plaintiff suffered serious injuries after falling down the escalator in question because of Defendants' negligence in owning, operating and maintaining the escalator and surrounding premises.

Defendants argue that the decision rendered by Judge Mills constitutes the law of the case, and her decision granting summary judgment for the MTA because the MTA did not own the escalator in question thereby negates Plaintiff's claim of merit. The law of the case doctrine, like claim and issue preclusion, is "designed to limit relitigation of issues." (People v. Evans, 94 NY2d 499, 502 [2000]). This doctrine deals with the possible

preclusive effects of decisions rendered in "the course of a single litigation *before* final judgment." (Id. at 502). Furthermore, the doctrine applies only to issues that were decided on their merits in a previous decision. (Baldasano v. Bank of New York, 199 AD2d 184 [1 Dept 1993]).

For Defendants' argument to succeed, the decision rendered by Judge Mills must have determined the merits of an issue or claim in the instant action. Judge Mills' order granted summary judgment for the Metropolitan Transit Authority because the evidence submitted showed that a different entity, the New York City Transit Authority, owned the escalator in question:

In support of its motion for summary judgment, the MTA has provided proof in admissible form that the escalator in question is the property of the NYCTA. As such, in the instant action it is clear that the MTA is not liable for any possible negligence of the NYCTA.

(Pl. Ex. E). Defendants' claim that this relieves them of any liability to Plaintiff, because they could not have been responsible for the maintenance of the escalator. However, "[a]n issue must be actually litigated for the law of the case doctrine . . . to apply." (People ex rel. Spitzer v. Grasso, ___ NYS2d ___ [1 Dept 2008], *citations omitted*).

At issue in the motion before Judge Mills was the MTA's liability to defendants Cushman & Wakefield, Inc. and Cushman & Wakefield of New York, Inc. The liability of Defendants' to

Plaintiff was not at issue, and not actually litigated. Therefore, this court sees no relationship between Judge Mills' finding that the MTA did not own the escalator on which Plaintiff was injured and the Defendants in the instant action. As such, Defendants cannot claim that Judge Mills' decision affects the remainder of Plaintiff's claims against them.

It follows that Plaintiff's motion to vacate is granted and the matter is restored. Furthermore, all discovery in this matter is directed to be completed by December 31, 2008.

Accordingly it is

ORDERED that Plaintiff's motion to vacate the May 25, 2007 Default Order is granted.

Counsel are directed to appear for a status conference on August 29, 2008, at 11:00 a.m. in Part 15, Room 335, 60 Centre Street, New York, New York.

This constitutes the decision and order of this court.

Dated:

8/14/08

FILED
AUG 20 2008
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HON. WALTER B. TOLUB, J.S.C.