

Rogel & Co., Inc. v D2D Val Expres, Ltd.

2009 NY Slip Op 30104(U)

January 14, 2009

Supreme Court, New York County

Docket Number: 107784/07

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

Rogel & Co., Inc.

INDEX NO. 107784/07

- v -
D2D VAI EXPRESS, LTD.

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

FILED

JAN 21 2009

COUNTY CLERK'S OFFICE
NEW YORK

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 1/14/09

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
ROGEL & CO., INC.,

Plaintiff,

-against-

D2D VAL EXPRESS, LTD.,
Defendant.

-----x

Index No.107784/07
Mtn Seq 002

FILED
JAN 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

WALTER B. TOLUB, J.:

This is a motion by the Defendant to vacate this court's September 24, 2008 Order which granted Plaintiff a default judgment for Defendant's failure to appear at the September 19, 2008 compliance conference.

Facts

Plaintiff is a designer, manufacturer and importer of diamonds and other precious stones. Defendant is a common carrier in the business of transporting valuable cargo in both the United States and abroad.

Plaintiff commenced the underlying action on June 8, 2007, to recover \$162,312 claiming that the Defendant failed to properly deliver a diamond shipment to Italy.

On July 28, 2008, Defendant's counsel moved to withdraw as counsel. August 4, 2008, this court granted Defendant's counsel's application and set a conference date in the action for September 19, 2008. Defendant failed to appear at the September 19, 2008 conference date and, as such, on September 24, 2008, this court

issued an order pursuant to 22 NYCRR 202.27 striking Defendant's Answer. On November 13, 2008, judgment was entered against the Defendant. By this motion Defendant's new counsel seeks to vacate this court's September 24, 2008 order.

Discussion

CPLR §5015(a) provides, inter alia, that the court which rendered the judgment or order may relieve a party from such order upon such terms as may be just upon the ground of excusable default. Courts have routinely recognized that there is a strong preference for adjudicating matters on the merits rather than relying on procedural issues. (Campos v. New York City Health and Hospitals Corp., 307 AD2d 785 [1st Dept 2003]). Where the party's default resulted from a mistake and an inadvertent assumption, courts have granted motions to vacate. (Connolly v. Tuan, 12 Misc.3d 1172(A) [Sup. Ct. NY Co. June 23, 2006]).

Here, Defendant argues that his non-compliance was excusable because Mr. Aniano, an officer of Defendant, was informed by his Home Office that once prior defense counsel was relieved, the insurance company's attorney would take on the defense of this matter. As such, Mr. Aniano claims that he took no further action believing that the matter would be handled by the insurance carrier's attorney. Once Mr. Aniano received notice of the default judgment he informed Defendant's Home Office and was directed to hire new counsel. Additionally, Defendant argues

that it has a meritorious defense, namely the expiration of the statute of limitations provided for in the agreement entered into between the parties.

Defendant's claim of misinformation does not readily explain or justify the fact that Defendant could have been more thorough and diligent in managing its affairs, however there being an excusable default coupled with a meritorious defense, this court is inclined to vacate the default judgment so that the matter may be decided on the merits.

Since Defendant's delay has caused Plaintiff to waste time and money, and in order to prevent any prejudice to the Plaintiff, the default judgment entered against the Defendant is vacated on the condition that the Defendant post a \$162,312 bond and pay Plaintiff \$750 for time and expenses incurred as a result of Defendant's failure to appear at the September 19, 2008 conference.

Accordingly, it is

ORDERED that the Defendant's motion seeking to vacate the default judgment entered against it is granted on the condition that the Defendant post a \$162,312 bond; and it is further

ORDERED that within 20 days from the date of service of a copy of this order with notice of entry, the Defendant will file

with the Clerk of this Court and upon the attorneys for the Plaintiff a written notice of the bond; and it is further


ORDERED that Defendant is pay Plaintiff \$750 for the costs incurred as a result of Defendant's default; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Counsel for the parties are to appear for a compliance conference in this matter on February 27, 2009 at 11:00 AM in room 335 at 60 Centre Street..

This memorandum opinion constitutes the decision and order of the Court.

Dated: 1/14/09


HON. WALTER B. TOLUB, J.S.C.

FILED
JAN 21 2009
COUNTY CLERK'S OFFICE
NEW YORK