Spodek v Jane N. Barrett & Assoc., LLC

2009 NY Slip Op 30596(U)

March 16, 2009

Supreme Court, New York County

Docket Number: 401810/07

Judge: Louis B. York

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SCANNED ON 3/20/2009

[* 1]

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

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Ellen Spodek,

INDEX NO. 401810/07

MOTION DATE

- v -

MOTION SEQ. NO. 004

Jane N Barrett, et ano.

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
MAR 20 2009
NEW YORK COUNTY CLERK'S OFFICE

FILED
MAR 20 2009
NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 3/16/09

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

---x

ELLEN SPODEK,

Plaintiff,

-against-

JANE N. BARRET & ASSOC., LLC and
JANE N. BARRET,

Defendants

---x

Index No.: 401810/07

DECISION/ORDER

FILED
MAR 20 2009
NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK, J.:

In this action for breach of contract, the Plaintiff, Ellen Spodek asserts that the Defendant, Jane N. Barret, breached the terms of a December 2002 dissolution agreement ("the agreement"). The plaintiff and defendant are former law partners at Spodek & Barret, LLC. The agreement, provided for the division of funds in the firm's savings account and for the treatment of other accounts and related expenditures; for a refund to plaintiff of her share of the security deposit for their office space; the payment of firm debts, by both parties; the allocation of fees owed to the firm; and certain financial obligations of both parties, including plaintiff's obligation to pay storage costs, malpractice insurance, 401(k) contributions, and the like. The agreement also contains, at paragraph 30, a provision stating disputes arising under the agreement "shall be submitted to binding arbitration" if the parties themselves could not otherwise resolve them.

The defendant did not serve or file an answer, and failed to communicate, provide discovery, or select an arbitrator. Subsequently, on November 16, 2007, plaintiff entered

a default judgment against defendants. This Court in a decision dated 11/1/07, vacated the default judgment, dismissed the action, and ordered that arbitration is the exclusive remedy between the parties. This Court established strict parameters, stating that if the defendants failed to designate their choice of arbitrator within 60 days of service of a copy of the order with notice of entry, the plaintiff could vacate the dismissal, relying wholly on defendant's failure to designate an arbitrator. The parties were ordered to select three arbitrators; one by each party, and then a third, neutral arbitrator.

On April 29, 2008, the plaintiff moved to this Court by Order to Show Cause to reinstate the default, finding willful violations of this Court's orders. The plaintiff alleges that after Mr. Steven Bennett Blau was selected by defendant as arbitrator, Mr. Blau and defendant engaged in a willful pattern of delay and stall tactics in violation of the Court's order. Mr. Blau, according to the affirmation by defendant's counsel, Helen E. Blank, Esq, dated April 29, 2008, paragraph 10, proposed that a third neutral arbitrator not be sought, seeking instead to resolve the dispute with the two existing arbitrators. After consultation between Ms. Levien , the plaintiff's arbitrator, and the plaintiff's counsel, it was decided that it would be best to follow the prescribed procedure and seek the appointment of a third arbitrator. Plaintiff alleges and after communicating this to Mr. Blau in a letter dated February 26, 2008, she never heard from Mr. Blau again, despite numerous attempts. After contacting the defendant regarding Mr. Blau's failure to appoint a third arbitrator, the plaintiff received a letter dated April 10, 2008, staying that Ms. Barret had "every confidence that Mr. Blau will expeditiously address this matter" and that he had recently received some documentation and that Ms. Levein should contact him again. Plaintiff alleges that Ms. Levein called and left a message

which was never returned. Defendant was informed by a letter from Plaintiff dated April 15th, 2008 that Mr. Blau's failure to respond to any communications would be considered as a deliberate violation of this Court's order. The Defendant responded in a letter dated 4/25/08, staying that the allegation that her arbitrator was delaying an avoiding the resolution of the matter did not merit a response.

The matter was set for oral argument on July 9th, 2008. Defendant failed to appear at a July 9, 2008 oral argument concerning the plaintiff's Order to Show Cause. The defendant was found to be in default. The defendant has now defaulted in answering the original complaint, which this court excused, and in executing the directives of this court to seek a third arbitrator.

Defendant now moves this Court to reopen, re-argue, and renew the finding of default. Additionally, the defendant moves to dismiss the action by declaring that arbitration is the sole and exclusive remedy between the parties, and an order mandating that plaintiff cease and desist from alleged judicial impropriety.

Plaintiff opposed the motion, asserting that defendant has engaged in a pattern of willful non-appearances, delays, and habitual hindrances. Plaintiff also asserts that the motion to re-new and re-argue is untimely pursuant to CPLR 2221 as more than thirty (30) days have elapsed from the service of the original order.

Contentions

Defendant contends that the default finding should be excused. She asserts that reasonable excuse exists, as there was a clerical error on the court's behalf, there is a meritorious defense, and the court lack's jurisdiction in this matter.

Plaintiff contends that there is no reasonable excuse or meritorious defense, and that the defendant's motion is untimely.

Discussion

The defendant's motion is denied, as there exists no reasonable excuse for the default.

In order for a party to vacate a default in their nonappearance, they must demonstrate both a reasonable excuse for their failure and a meritorious defense to the underlying action. ***Brown. v. Suggs,*** N.Y.A.D., 1 Dept., (1 Dept 2007 March 15); ***Granibras Granitos Brasileiros, Ltda. v. Farber,*** 34 A.D.3d 230, 823 N.Y.S.2d 390 N.Y.A.D. (1 Dept November 02, 2006). The determination as to whether these prongs have been satisfied is left to the discretion of the trial court. ***Goldman v. Cotter,*** 10 A.D.3d 289, 291, 781 N.Y.S.2d 28,31 (1st Dept. 2004). When a default occurs not merely because of isolated, inadvertent mistakes, but from repeated neglect, there is no requirement that the court grant the requested relief. ***Chery v. Anthony***, 156 A.D.2d 414, 416. However, there is also a strong public policy of this State that matter be decided on their merits (112 A.D.2d 113, 116, 492 N.Y.S.2d 385).

In this case, the defendant claims that documents were duly served on plaintiff and submitted to the court, but that they were evidently misplaced by the court staff. For the purposes of vacating a finding of default, clerical error constitutes a reasonable excuse, but only when the default was a single, isolated, and inadvertent mistake and not due to willful default or persistent neglect. ***Gibson v. Motor Vehicle Accident Indemnification Corp.***, 45 A.D.2d 678, 356 N.Y.S.2d 77 (granting motion to vacate

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default because the inadvertent clerical error was a single, isolated mistake). Here, the defendant has indeed demonstrated a pattern of repeated and willful neglect. To date, the defendant has defaulted on the answering of the initial complaint, although excused by this Court, failed to select a third, neutral arbitrator, and failed to appear for the argument on the plaintiff's Order to Show Cause to reinstate the default. Mr. Blau, defendant's arbitrator, did not reply to multiple attempts to contact him and move the matter forward towards resolution. After plaintiff had brought this issue to the defendant's attention, the defendant made assurances that the Mr. Blau was proceeding on this matter, assurances that have proved to be false, as to date Mr. Blau has not responded to any communications from plaintiff's counsel or arbitrator. This failure to respond is part of a willful pattern of neglect by defendant. Given the history of this action, it is evident that this default is not an isolated, inadvertent mistake. Therefore, the reasonable excuse proffered by defendant, that the court committed a clerical error, will not be sufficient to vacate default in light of the history of multiple defaults by defendant. This Court concurs with plaintiff that to excuse the defendant yet again would be to sanction this behavior. Due to the lack of reasonable mistake, this Court's inquiry into the meritorious defense prong of the analysis is rendered moot.

This State however, has a strong public policy which dictates that matters be decided on their merits. ***J.R. Stevenson Corp., v. Dormitory Auth.***, 112 A.D.2d 113, 116, 492 N.Y.S.2d 385. This Court has adhered to that policy be excusing the previous default. Nevertheless, given the repeated violations by the defendant, vacating another default would reward these tactics.

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Therefore, the defendant's motion to renew, re-argue, and re-open the finding of default is denied.

Order

Accordingly, it is

ORDERED that the motion to renew, reargue and vacate the court's order of July 9, 2008 is denied; and it is further

ORDERED that the motion to dismiss is denied; an it is further

ORDERED that the remainder of the motion is denied as moot.

Dated: 3/16/09

Enter:

LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.

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MAR 20 2009

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