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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 112258/2004

MURAWSKI, WILLIAM

VS

MANHATTAN COMMUNITY ACCESS

Sequence Number : 004

VACATE

INDEX NO. _____

MOTION DATE 3/27/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
JUN 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by plaintiff William Murawski for an order vacating the default judgment dismissing his Complaint for failure to prosecute and placing this matter back on the trial calendar is granted, and this matter is restored to the active calendar; and it is further

ORDERED that the parties shall appear in Part 40 for trial on July 13, 2009, no further adjournments; and it is further

ORDERED that upon receipt of a copy of this order, the Trial Support office shall place this matter on the trial calendar for Part 40, July 13, 2009, 9:30 a.m.;

ORDERED that plaintiff's counsel's failure to appear and proceed to trial on July 13, 2009 shall result in dismissal of this action, with prejudice. Plaintiff's counsel is provided sufficient time consult and modify his calendar and/or obtain substitute counsel if he is unavailable on July 13, 2009 for the trial of this matter; and it is further

ORDERED that plaintiff serve a copy of this Order by facsimile upon defendant within three (3) days of the date of this order.

This constitutes the decision and order of the Court.

Dated: 6/22/09

HON. CAROL EDMEAD J.S.C.

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

Check one: FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

WILLIAM MURAWSKI,

Index No. 112258-2004

Plaintiff,

-against-

MANHATTAN COMMUNITY ACCESS CORPORATION D/B/A MANHATTAN NEIGHBORHOOD NETWORK,

Defendants.

---------- X

HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this trip and fall personal injury action, plaintiff William Murawski ("plaintiff") moves for an order vacating the default judgment dismissing his Complaint for failure to prosecute and placing this matter back on the trial calendar.

Factual Background

Plaintiff claims that on August 28, 2003, he tripped and fell on an defective protruding lip found on the door saddle while entering the premises located at 537 West 59th Street, New York, New York (the "premises") owned by defendant Manhattan Community Access Corporation d/b/a Manhattan Neighborhood Network ("defendant").

This action was scheduled for jury selection in Part 40 before Judicial Hearing Officer ("JHO") Ira Gammerman on September 25, 2007, but was adjourned to December 4, 2007 for discovery to be held concerning additional injuries to and surgery of plaintiff's right knee. On December 4, 2007, jury selection was further adjourned to a final trial date of March 3, 2008.

According to plaintiff, on February 29, 2008, a few days before the trial selection date,

Evelyn Hammer ("Ms. Hammer"), a paralegal of trial counsel, Jay Stuart Dankberg ("Mr. Dankberg") advised the Court that Mr. Dankberg was engaged in a trial before Judge Brenda Spears, which he was not permitted to adjourn and was required to complete over the next few days. Plaintiff contends that he was unable to participate in the trial at that time due to medical/health reasons. Plaintiff claims that the Court advised Ms. Hammer to submit an Affirmation of Engagement on March 3, 2008 in order to obtain an adjournment. Further, plaintiff claims that defense counsel consented to an adjournment.

On March 3, 2008, Ms. Hammer went to Part 40 and submitted an Affirmation of Engagement concerning a trial entitled *T.A. Realty v Jean and Stanley Ray*, in Civil Court, New York County. The Affirmation of Engagement requested an adjournment to the last week in March, indicated that defense counsel "would consent to a brief adjournment." The case was adjourned to the following day, March 4, 2008 and the Court advised Ms. Hammer that the case was marked "final" and that Mr. Dankberg must appear to avoid the case being dismissed.

Mr. Dankberg failed to appear on March 4, 2008. However, Ms. Hammer appeared again, this time with counsel admitted only in Florida. According to plaintiff, Ms. Hammer submitted another Affirmation of Engagement stating that (1) Mr. Dankberg was actually engaged in a matter entitled *Kayzee Realty v Hanagan* in "Part 52" in Civil Court, Bronx County (2) plaintiff underwent a second surgery, was in pain and unable to attend court, and (3) defense counsel "would consent to a brief adjournment." Although Mr. Dankberg was also actually engaged on March 4, 2008 in another matter entitled *560 W 140th St. v Diallo*, Mr. Dankberg retained counsel to handle such matter. However, JHO Gammerman rejected the Affirmation of Engagement, and dismissed the case with prejudice.

Defendant's Motion

Defendant contends that JHO Gammerman's dismissal was an improvident exercise of discretion. Defendant argues that the First Department has held that a court's failure to grant an adjournment to permit defense counsel to recover from surgery was an improvident exercise of discretion in the absence of any indication by defendant that it would have been prejudiced by a slight delay in the start of trial. JHO Gammerman's dismissal was unwarranted because (1) opposing counsel consented to the adjournment, (2) Mr. Dankberg was actually engaged, (3) plaintiff was ill and medically unable to participate in trial, (4) there was an incomplete exchange of doctors' reports and defendant's doctor report after plaintiff's second surgery, and (5) there was no prejudice to defendant if a short adjournment was granted.

Opposition

Defendant argues that plaintiff has failed to establish a reasonable excuse for the default. Although Mr. Dankberg submitted an Affirmation of Engagement noting that he was on trial starting March 4, 2008 on *T.A. Realty*, Mr. Dankberg's office was advised that Supreme Court takes precedence over any Housing Court matters and was granted an adjournment until the following day in order to be present in Court and/or have an attorney duly licensed in New York to appear on his behalf. On the following day, instead of sending an attorney admitted to practice in New York, Mr. Dankberg again sent his paralegal and an attorney admitted in Florida. Also, although the second Affirmation of Engagement advises that Mr. Dankberg was engaged in a Housing Court action in Bronx County, entitled *Kavzee Realty v Hanagan*, defendant's counsel personally reviewed the records of the Bronx County Civil Court and found no Index Number and/or case matching the case of *Kayzee Realty v Hanagan*. Furthermore, a review of the records

of the New York County Civil Court revealed that there were no records and/or Index Number matching a case entitled *560 W. 140th St v. Diallo* referenced in the plaintiff's counsel's motion at paragraph 6 wherein he indicates that he was engaged in a Housing Court trial on that matter.

Defendant argues that while engagement of counsel is a ground for an adjournment (Part 125.1) (a) of the Court Rules), each engagement has to be proved by affidavit or affirmation filed with the Court (Part 125.1) (e)(1). Where an attorney has conflicting engagements in the same court or different courts, the affected courts shall determine in which matters adjournments shall be granted and in which matters the parties shall proceed. In making such decisions, they shall, to the extent lawful and practicable, give priority to actions and proceedings in civil actions with priority to those involving jury trials. Mr. Dankberg was scheduled to select a jury in this action on March 3, 2008, which was adjourned to March 4, 2008 by the Supreme Court in order for him to appear and proceed. However, Mr. Dankberg submitted another Affirmation of Engagement indicating that he was engaged in a different Housing Court trial than the day prior. Since the Supreme Court takes precedence over the Housing Court matters, the Court was within its discretion to deny the plaintiff's application for an adjournment based upon an engagement.

Moreover, according to 22 NYCRR § 125.1 (g), where a date for trial of an action is fixed at least two months in advance, the attorneys previously designated as trial counsel must appear for trial on that date. If any of such attorney is actually engaged on trial elsewhere, he or she must produce substitute trial counsel. If neither trial counsel nor substitute trial counsel is ready to try the case on the scheduled date, the court may impose sanctions. In this case, the parties were notified in December 2007 that there was a firm trial date of March 3, 2008. Nevertheless, plaintiff's counsel failed to appear and failed to have substitute counsel appear on his behalf.

Thus, the Court properly dismissed the case.

Moreover, although the CPLR provides that the defaulting party may move to vacate a default within one year of being served with the entry of Judgment, plaintiff's counsel waited over ten months from when this case was dismissed on March 4, 2008 to file the instant motion, resulting in prejudice to defendant. The defense of this matter will result in increased costs and expense to the defendant, and should the default be vacated, defendants would be required to prepare the case for trial again and contact witnesses who may now be gone. Additionally, due to the passage of time, there is no way to determine the present physical condition of the plaintiff.

Furthermore, plaintiff's claim that he suffered from an unidentified "chemical reaction" when he went for an independent medical examination months prior and that he was ill, do not constitute a reasonable excuse for failing to proceed with the trial. It was not until the second day that the case was scheduled for trial that the plaintiff proffered this excuse to the Court and there was no medical affidavit attesting to the fact that the plaintiff was ill. Moreover, the mere fact that the plaintiff felt nausea should not be considered an illness sufficient to justify the postponement of a firm trial date particularly since the case was scheduled for jury selection, which did not require that the plaintiff, himself, be present.

Reply

On March 2, 2008 when the Court advised that an "Affirmation of Engagement" would be sufficient to obtain an Adjournment "on consent," at no time was she advised that the adjournment would be for one day only. Mr. Dankberg submits a copy of the file jacket of the *T.A. Realty* case from the files of Civil Court, New York County, showing that such case was scheduled for March 3, 2008 and a Notice of Appearance. Plaintiff argues that although JHO

Gammerman adjourned the trial for one day, a one day adjournment on a personal injury case (where doctors and other witnesses need to be notified) and under circumstances where the client is physically not well, without prior notice thereof of an adjournment being given for "only one day," is not reasonable. Mr. Dankberg also submits a copy of the Civil Court file jacket showing that he was engaged in a trial on March 4th, and a Notice of Appearance for the matter. When the paralegal and attorney (not admitted in New York) attempted to submit a second "Affirmation of Engagement" for this matter and advise of the consent adjournment, JHO Gammerman refused to accept the Affirmation of Actual Engagement for filing; refused to adjourn the matter; refused to "hear" words spoken explaining that plaintiff was physically ill and could not appear in court of a trial at that time; refused to mark the case "off calendar"; refused to even take a brief recess for anyone to call Mr. Dankberg's cell phone to find out if he could appear later in the morning; and directed a default judgment against plaintiff thereby dismissing plaintiff's personal injury lawsuit.

Plaintiff argues that no "default" took place - as Mr. Dankberg was "actually engaged" and the adverse party consented to a "reasonable" adjournment. Nor was there a "default" for which this action should be dismissed for "failure to prosecute" (or any other reason). However, assuming that there was a "default," plaintiff argues that such default was excusable, as Mr. Dankberg was previously engaged in a continuing trial and hearing on the two successive days that this case was made returnable. The days being made "consecutive," Mr. Dankberg did not have any time, after being notified of the one (1) day adjournment, to even "seek" to adjourn the next day's scheduled Bronx County hearing or the New York County case. Conspicuously absent in the defendant's papers is any denial that she had agreed to adjourn this case.

Plaintiff contends that defendant would not have been prejudiced in any way by a brief adjournment of three weeks (as requested) or recess (on March 3) as defendant agreed to an adjournment. Moreover, defendant was not ready for trial itself; shortly before March 2, defendant requested another medical exam of plaintiff and it had not received/exchanged the results of said medical exam.

Plaintiff also contends that under caselaw, once a judicial proceeding has commenced, the judge to whom a case is assigned has exclusive jurisdiction over its conduct and may not delegate or surrender judicial authority over such issues as adjournments. JHO Gammerman should have sent the request to adjourn the trial to the Justice initially assigned to the case. JHO Gammerman does not have an obligation to "move the calendar" no matter who might be prejudiced. Here, Mr. Dankberg was actually engaged in a continuing trial and a court-ordered hearing and opposing counsel consented to a reasonable adjournment and Mr. Dankberg acted in reliance thereon.

Furthermore, plaintiff argues, defendant's reference to Section 125.1(c) of the Uniform Rules for the Engagement of Counsel is inaccurate; where an attorney has conflicting engagements, as between those engagements the affected courts shall give priority to those involving jury trial. At no time was a jury ever selected in this matter and the case in which Mr. Dankberg was actually engaged was a "continuing trial," which it is respectfully believed has a "priority" over a "personal injury" case still in the "calendar" part.

As for plaintiff's illness, on March 3, 2008, plaintiff advised that he was experiencing pains in his knee and feeling nauseosus and that this pain was a result of his visit to the office of defendant's doctor, Dr. Totero, for a recent physical examination due to chemicals being

used in Dr. Totero's office. Plaintiff claims that he is and was under the care of a environmental doctor (Dr. Sprouse, M.D.); these symptoms are from chemical exposure, and Dr. Selby (his knee surgeon) advised him to wait for any additional physical therapy until the pain in his knee cleared up. Further, plaintiff's illness is temporary and he will be able to participate in his trial if given a brief period to recover.

Plaintiff also submits a letter dated February 26, 2008, only days before the March 2nd trial date from defendant's counsel seeking to re-examine plaintiff due to his second knee injury. Plaintiff appeared at UMC Medical Consultants, P.C./Charles M. Totero M.D. on February 26, 2008 and at no time since then has a copy of the report ever been provided to plaintiff. Aside from being contrary to the Rules of the Supreme Court, defendant's failure to exchange the medical report is prejudicial to plaintiff.

Also, defendant fails to state what its "increased costs" might be related to preparing the case for trial again and contacting witnesses. Aside from the inherent speculation in that sentence that witnesses "may" now be gone, plaintiff never received a witness list from defendant. Even if defendant did not agree to adjourn the matter back in December 2007, after plaintiff's second surgery, and the matter then went forward to trial, plaintiff would not have been seen by a defendant's doctor for at least six months prior thereto; thus, defendant would then have no way of knowing the physical condition at that time of the trial.

Plaintiff also maintains that of the five cases cited by defendants, two are not from the First Department and all are clearly distinguishable.

Further the default judgment directed by JHO Gammerman may be vacated pursuant to CPLR Section 2005. The Court should not, as a matter of law, be precluded from exercising its

discretion in the interests of justice to excuse delay or default resulting from any potential finding of law office failure. In the unlikely event one were to consider that what occurred here was "law office failure" due to counsel having been actually engaged in another court-ordered trial and a hearing at the same time, the Court should vacate the default in the interest of justice given that defendant consented, both sides were not ready for trial, there was no prejudice to defendant, only a brief adjournment was requested, there was no willfulness on the part of plaintiff, and plaintiff has a meritorious severe personal injury claim.

The First Department has noted the strong public policy for resolving disputes on their merits. If plaintiff's default is not vacated, and given the fact that he has a meritorious claim, then a great miscarriage of justice would occur if plaintiff is not given his day in court.

Analysis

CPLR 5015 (a)(1) permits a party to move to open a default judgment, based on excusable default and a meritorious defense, within one year of service of a copy of the judgment with written notice of its entry upon it, or, if the moving party has entered the judgment within a year of entry of the judgment. Generally, a party moving to vacate a default judgment must establish: (1) a reasonable excuse for the delay or default; and (2) that the party's claim or defense has merit (*Assignment v Medasorb Technologies, LLC*, 50 AD3d 342 [lst Dept 2008]).

Defendant does not contest that plaintiff's claim has merit. The issue before the Court is the reasonableness of plaintiff's failure to proceed to trial on the dates scheduled.

It is uncontested that the actual engagement of counsel is a ground for an adjournment (Part 125.1) (a), which shall be proved by affidavit or affirmation filed with the Court (Part

125.1) (e)(1), and with priority given to matters involving a jury trial.[1]

In *SKR Design Group, Inc. v Louise Avidon* (32 AD3d 697, 822 NYS2d 3 [2006]), the Court stated that:

> . . . the court's failure to grant adjournment to permit defense counsel to recover from surgery was improvident exercise of discretion in absence of any indication by plaintiff that it would have been prejudiced by delay in commencement of trial.... In the absence of any indication by plaintiff, even at this late juncture, that it would have been prejudiced by a delay in the commencement of trial, we discern no reason for the failure to grant a sufficient adjournment to permit defendant's counsel to recover from surgery. As an initial consideration, once a judicial proceeding has commenced, the judge to whom a case is assigned has exclusive jurisdiction over its conduct and may not delegate or surrender judicial authority over such issues as adjournments .... Therefore, it was incumbent upon Supreme Court to make a *de novo* determination of the merits of defendant's adjournment request.

Notwithstanding that plaintiff's inadequately supported excuse that he was physically unable to attend trial, it is uncontested that defendant consented to a brief adjournment, and that Mr. Dankberg submitted two Affirmations of Engagement to the Court indicating that he was actually engaged in two different cases. Further, there is no indication in the record that defendant's defense of this action would have been prejudiced by the granting of a brief adjournment as requested, especially in light of the fact that defense counsel consented to a brief adjournment at that time. Nor has defendant made a sufficient showing of any prejudice in the defense of this action by the granting of plaintiff's request for relief herein. And, the instant motion was made within one-year of the default, within the statutory period.

The cases to which defendant cites do not warrant a different result *(cf. Diamond v*

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[1] Section 125.1 (c) of the Uniform Rules for the Engagement of Counsel (22 NYCRR § 125.1 [c] [6]) provides, in pertinent part:

> . . . Where an attorney's conflicting engagements include two or more engagements within any one of these categories of actions and proceedings, as between those engagements the affected courts shall give priority to those involving jury trial.

Diamond Diamonte, 57 AD3d 826, 869 NYS2d 609 [2d Dept 2007] [plaintiff failed to appear ready to proceed for two successive court dates during the trial-in-chief, when she was scheduled to undergo cross examination; on the second occasion, which was marked "final" by the court, she was outside of the courthouse in her car and refused to enter the building. Although the court directed her husband, the plaintiff Joseph Diamond, to bring her into the courtroom, and afforded them adequate time to appear in the courtroom, both of the plaintiffs then failed to appear before the Supreme Court ready to proceed, which conduct evidenced an intent to abandon the action]; *Fuchs v Midali America Corp.*, 260 AD2d 318, 689 NYS2d 80 [1st Dept 1999] [defendants failed to show a reasonable excuse for their failure to appear on two scheduled trial dates; they failed to explain why some indication of their scheduling needs could not have been conveyed to the court];*Teachers Insurance v Code Beta Group, Inc.*, 204 AD2d 193, 612 NYS2d 124 [1st Dept 1994] [where defendants' attorney was aware of complications from eye surgery more than a month before trial was set to begin on February 24, 1992, but failed to arrange for substitute counsel as the court had directed two months before, attorney's failure to seek substitution of other counsel was not excusable given these circumstances]).

Here, Mr. Dankberg communicated to the Court, with consent from the defendant on both scheduled dates, that he was actually engaged in two other cases. The *Kayzee* matter in Part 52 was adjourned less than two weeks prior to March 4th for a traverse hearing. And, defendant's claim, without documentary support, that the records he reviewed failed to show that Mr. Dankberg was actually engaged, fail to overcome the submissions by plaintiff indicating that Mr. Dankberg was scheduled to appear in *T.A. Realty* in New York County, and *Kayzee* in Bronx County on the dates this matter was scheduled for jury selection. Further, the instant matter was

scheduled for jury selection; a jury trial had not yet been commenced.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff William Murawski for an order vacating the default judgment dismissing his Complaint for failure to prosecute and placing this matter back on the trial calendar is granted, and this matter is restored to the active calendar; and it is further

ORDERED that the parties shall appear in Part 40 for trial on July 13, 2009, no further adjournments; and it is further

ORDERED that upon receipt of a copy of this order, the Trial Support office shall place this matter on the trial calendar for Part 40, July 13, 2009, 9:30 a.m.;

ORDERED that plaintiff's counsel's failure to appear and proceed to trial on July 13, 2009 shall result in dismissal of this action, with prejudice. Plaintiff's counsel is provided sufficient time consult and modify his calendar and/or obtain substitute counsel if he is unavailable on July 13, 2009 for the trial of this matter; and it is further

ORDERED that plaintiff serve a copy of this Order by facsimile upon defendant within three (3) days of the date of this order.

This constitutes the decision and order of the Court.

Dated: June 22, 2009

Hon. Carol Robinson Edmead, J.S.C.