

Gooding v Corp. Headquar FJC Servs.

2009 NY Slip Op 31609(U)

July 17, 2009

Supreme Court, New York County

Docket Number: 115853/06

Judge: Edward H. Lehner

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

PRESENT: EDWARD H. LEHNER

PART _____

Index Number : 115853/2006

GOODING, LEROY

vs.

CORP. HEADQUAR FJC SECURITY

SEQUENCE NUMBER : 003

VACATE DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

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 _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance

with accompanying memorandum decision

FILED

JUL 21 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: JUL 17 2009

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 19

-----x
LEROY GOODING,

Plaintiff,

Index No. 115853/06

-against-

CORP. HEADQUAR FJC SERVICES,

Defendant.

-----x
EDWARD H. LEHNER, J.:

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JUL 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff moves, pursuant to CPLR 5015, for an order
vacating the dismissal of his complaint granted on default on or
about November 21, 2007; restoring to the motion calendar
defendant's motion to dismiss the complaint, preclusion and/or
other relief, which was the basis for the dismissal on default;
and upon restoration to the motion calendar, denial of
defendant's said motion, as plaintiff has fully complied with all
of defendant's requests.

This action alleging, inter alia, assault and battery, civil
rights violations, intentional infliction of emotional distress,
and seeking punitive damages, was commenced in October 2006.
This action arose out of an alleged incident which occurred on
premises known as Charles H. Gay Shelter Car Center for Men,
Wards Island, New York (the Premises). The complaint alleges
that, on February 11, 2006, at approximately 8:30 p.m., while

plaintiff was lawfully on the shelter Premises getting ready to sign up for a bed, he was assaulted, battered, handcuffed, dragged, and thrown into a van by defendant's employees. He claims he was thereafter beaten, and thrown out of the shelter.

On or about January 3, 2007, defendant answered the complaint, generally denying the allegations and asserting six affirmative defenses. At the same time, defendant served a Demand for Bill of Particulars, together with various demands for discovery. On September 21, 2007, defendant moved for an order seeking the following relief: (1) pursuant to CPLR 3126 (3), dismissing plaintiff's complaint due to plaintiff's failure to prosecute the action; or in the alternative, (2) pursuant to CPLR 3126 (2), precluding plaintiff from offering any evidence supporting or opposing designated claims or defenses based upon a failure to provide discovery; or in the alternative, (3) pursuant to CPLR 3126 and 3042 (c), compelling plaintiff's counsel to provide a Verified Bill of Particulars and responses to defendant's discovery demands. The motion was returnable on October 29, 2007.

On October 26, 2007, plaintiff's counsel contacted counsel for defendant, requesting an adjournment of the motion. Defendant consented to an adjournment and the parties stipulated to adjourning the motion three weeks, to November 19, 2007. Pursuant to the stipulation, plaintiff's opposition was to be

served on the defendant "and received in hand by the defendant" by November 12, 2007.

Defendant claims that plaintiff failed to submit opposition papers to defendant's motion. By order dated November 21, 2007, this court granted defendant's motion to dismiss the complaint on default. On December 12, 2007, defendant's counsel served plaintiff's counsel with a Notice of Entry of the November 21, 2007 Order. On December 11, 2008, plaintiff moved to vacate the said order.

In support of his motion, plaintiff's counsel affirms that plaintiff appropriately responded to defendant's demands by serving upon the defendant plaintiff's verified Bill of Particulars, dated February 22, 2007, medical authorizations and medical records, as well as other requested demands, together with plaintiff's cover letter, dated February 22, 2007.

He attaches a copy of an affidavit of mailing which is signed by Veronika Moshnyakova with a notarization by plaintiff's counsel. The affidavit of service states that the following documents were mailed to defendant's counsel on February 22, 2007: Verified Bill of Particulars, Response to Discovery and Inspection, Cross-Notice to Take Deposition, Plaintiff's Demand for Discovery and Inspection, Demand for Defendant's Verified Bill of Particulars, and Plaintiff's Notice of Availability for Physical Combined Demands. Plaintiff also attaches to his motion

[* 5]
a copy of the Verified Bill of Particulars and the disclosure responses that were allegedly mailed.

Defendant's counsel affirms that his office never received any of the requested documents prior to making the motion to dismiss the complaint. Defendant requests a traverse hearing to determine whether service was validly effected upon defendant's counsel. He further argues that plaintiff's motion to vacate this court's prior order of dismissal should be denied because plaintiff has failed to demonstrate a reasonable excuse for his default and a meritorious cause of action.

CPLR 5015 (a) (1) permits the court to vacate a default judgment where there has been an "excusable default." A party seeking to vacate a default judgment on the ground of excusable default bears the burden of demonstrating both a justifiable excuse for the default and a meritorious defense (*see Zino v Joab Taxi, Inc.*, 20 AD3d 521 [2d Dept 2005]). The determination of what constitutes a reasonable excuse is left to the sound discretion of the court (*see Ray Realty Fulton, Inc. v Lee*, 7 AD3d 772 [2d Dept 2004]). Finally, there is a strong public policy in this state which favors the resolution of cases on the merits (*Picinic v Seatrain Lines, Inc.*, 117 AD2d 504 [1st Dept 1986]).

While conceding that plaintiff's opposition papers to defendant's motion to dismiss the complaint were not served in

conformity with the stipulation of adjournment, plaintiff's counsel affirms that an attorney affiliated with his office, Bradford L. Hooper (Hooper), prepared opposing papers which contained the Bill of Particulars, and the various documents which had been previously sent to the defendant's counsel. He claims that the opposing papers, together with the attached materials, were served on the defendant on or about November 16, 2007.

~~██████████~~ Counsel further claims that Hooper attempted to submit his opposing papers on the return date of the motion, however, he missed the calendar call, and the clerk in the motion support office refused to accept plaintiff's opposing papers, and marked the motion "submitted without opposition."

It is undisputed that defendant's motion to dismiss the complaint was premised upon plaintiff's alleged failure to respond to defendant's discovery demands. If plaintiff timely and appropriately responded to defendant's discovery demands, there would be no basis for the granting of defendant's motion to dismiss the complaint. In these circumstances, there should be a traverse hearing on the issue of whether plaintiff timely and properly responded to defendant's discovery demands.

Accordingly, it is

ORDERED that the issue of whether plaintiff timely and properly responded to defendant's discovery demands is referred to

a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

Dated: JUL 17 2009

FILED
JUL 21 2009
ENTER
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NEW YORK
J.S.C.

¹Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.