

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

2009 NY Slip Op 31740(U)

July 29, 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 and Company

- v -

D2D Val Express

INDEX NO. 107284/07

MOTION DATE _____

MOTION SEQ. NO. 04

MOTION CAL. NO. _____

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

IN ACCORDANCE WITH ACCOMPANYING PERSONAL SERVICE

FILED
JUL 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/29/09

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.

Index No.107784/07
Mtn Seq.004

FILED
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WALTER B. TOLUB, J.:

This is a motion by the Defendant to: (1) restore the action to the calender; (2) extend the ten day period contained in this Court's order dated March 27, 2009; (3) allow the Defendant to file a written notice of bond; and (4) to direct Plaintiff's attorney to remit to the Bonding Company approximately \$33,000 which was recovered by the Sheriff pursuant to the Judgment which was conditionally vacated in this Court's prior order.

Facts

As stated in this Court's January 14, 2009 and March 27, 2009 orders, 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 (Judgment) was entered against the Defendant.

On January 14, 2009 this Court granted Defendant's motion to vacate the default judgment on the condition of Defendant's posting of a \$162,312 bond.

Defendant then brought a motion seeking a modification of the January 14, 2009 order eliminating or reducing the bond requirement. The motion was argued on February 27, 2009. Defendant claimed that it was unable to secure \$162,312 because it has insufficient collateral, was unable to receive an adequate line of credit and because Defendant's case should be heard on the merits.

Before a decision was issued on the motion, but after it was argued, Plaintiff began execution on the Judgment and the sheriff seized approximately \$33,000 from Defendant's bank account.

By Order dated March 27, 2009, this Court modified its January 14, 2009 order and reduced the bond requirement to \$50,000. Defendant had ten days within which to post the bond. The March order was served on Defendant on April 1, 2009.

Defendant failed to file the \$50,000 bond within the ten days provided in the order.

Defendant now argues that since the March 27, 2009 order conditionally vacated the default and changed the undertaking requirement, that the \$33,000 collected by the sheriff should be remitted to the Defendant so that it may post the \$50,000 bond. Defendant argues that without the remittance of the money, it will be financially unable to post the bond.

Plaintiff argues that since there was no request for a stay of execution on the Judgment in either of Defendant's motions, that Plaintiff was free to execute on its Judgment.

By this motion Defendant seeks an order restoring the action to the calender, extending the ten day period to post the bond and directing Plaintiff's attorney to remit to the Bonding Company approximately \$33,000.

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]).

This Court has already determined that Defendant had an excusable default and a meritorious defense, namely the expiration of the statute of limitations provided for in the agreement. In its January 14, 2009 decision this Court vacated Defendant's default given the strong public policy for adjudicating matters on the merits. By the March 27, 2009 order, this court lowered the bond requirement so that this matter could be heard on the merits. Plaintiff here has attempted to subvert the intention of this court to have the matter heard on the merits by collecting on the Judgment prior to a decision being rendered in the bond dispute.

The Court may relieve a party of a default "upon such terms as may be just", because of the strong public policy to hear cases on the merits and since Defendant should not be deprived of his day in Court (CPLR §5015). As such, as a condition to vacating the Default, Defendant is directed to post a \$15,000 bond within ten days from the date of service of a copy of this order with notice of entry. Additionally, Plaintiff is directed to deposit \$33,000 in an interest bearing escrow account pending the final determination of this matter.

Accordingly, it is

ORDERED that the Defendant's motion is granted to the extent that the default judgment entered against shall be vacated on the condition that the Defendant post a \$15,000 bond; and it is further

ORDERED that within 10 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 within 10 days from the date of service of this order with notice of entry, Plaintiff is directed to deposit \$33,000 in an interest bearing escrow account pending the final determination of this matter.

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 September 11, 2009 at 11:00 AM in room 335 at 60 Centre Street.

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

Dated: 7/27/09

FILED
JUL 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

WALTER E. TOLUB, J.S.C.