

Reznik v Silverstein, Gitlin Dental Off., P.C.
2009 NY Slip Op 32756(U)
November 18, 2009
Supreme Court, New York County
Docket Number: 602460/08
Judge: Richard B. Lowe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Lowse, Hon. Richard B. Lowe, Jr.
Justice

PART 56m

Leonid Reznik et al

INDEX NO. 602460/09

MOTION DATE 11/18/09

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

- v -

Silverstein et al

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
 NOV 24 2009
 NEW YORK COUNTY CLERK'S OFFICE
 HON. RICHARD B. LOWE, JR.

Dated: 11/18/09

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

-----X
Leonikd Reznik, individually and as a shareholder of
Silverstein, Gitlin Dental Office, P.C., d/b/a Vatrenko,
Gitlin & Reznik Dental Offices, P.C. suing on behalf
of himself and all other shareholders of Silverstein, Gitlin
Dental Offices, P.C. similarly situated and in the right of
Silverstein, Gitlin Dental Office, P.C. d/b/a Vatrenko,
Gitlin & Reznik Dental Offices, P.C.

Index No 602460/08

Plaintiffs,

-against-

Silverstein, Gitlin Dental Office, P.C., d/b/a Vatrenko
Gitlin & Reznik Offices, P.C. and Michael Gitlin and
Irinia Vatrenko,

Defendants.

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NOV 24 2009
NEW YORK
COUNTY CLERK'S OFFICE

-----X
Hon. Richard B. Lowe, III:

Plaintiff moves for an order (1) pursuant to CPLR 5015(a) setting aside the Order entered by this court on September 19, 2009 (the "Order"); (2) striking the defendants answer and counterclaims for untimely service; (3) striking the plaintiffs counterclaims pursuant to CPLR 3011; and (4) restoring this action to the calendar.

Background

On June 16, 2009, the defendants filed and served a motion for a default judgment alleging that the plaintiffs did not timely reply to their counterclaims. The return date for the motion was July 8, 2009. The plaintiff did not respond, nor did he request an adjournment of the motion. However, sua sponte the clerk's office granted the plaintiff an adjournment until July 23, 2009 to oppose the motion. Again, the plaintiff did not respond and on July 23, 2009, the motion for a default judgment was submitted to this court without opposition. On September 10, 2009, this court entered an order granting the motion without opposition and directed that the order be settled.

The Notice of Settlement order prepared by the defendants was served upon the plaintiff on October 8, 2009, with a settlement date of October 28, 2009. The plaintiff did not respond to the Notice of Settlement, but rather filed this instant application on October 30, 2009, two days after the settlement date, seeking to vacate his default on the underlying motion.

Discussion

It is the preference of the court to dispose of cases on the merits (see *Santora & McKay v Manzella*, 211 AD2d 460, 463 [1st Dept 1995]). However, to vacate a default pursuant to CPLR 5015(a), the movant must show a reasonable excuse for the default and a meritorious cause of action (see *Telep v Republic Elev. Corp.*, 267 AD2d 57 [1st Dept 1999]).

In this instant application, the attorney's affidavit in support of the motion is devoid of any discussion seeking to establish a reasonable excuse for the failure to oppose the underlying motion for a default judgment. The affidavit does not explain to this court why plaintiff failed to oppose the motion on either the first return date which was set three weeks after the motion was filed, or on the subsequent adjourn date. The court prefers that this matter be heard on its merits and frequently excuses such as law office failure are recognized where there is no pattern of wilfulness or dilatory behavior (see *Chelli v Kelly Group, P.C.*, 63 AD3d 632, 633 [1st Dept 2009]; citing *Harwood v Chaliha* 291 AD2d 234 [1st Dept 2002]; *Dokmecian v ABN Amro N. Am.*, 304 AD2d 445 1st Dept 2003]). However, in this case, it would error to vacate the default where counsel's affidavit is silent and there has been no excuse given to this court for the plaintiff's failure to respond to the motion.

As to a meritorious cause of action, the plaintiff argues that the answer and counterclaims, upon which the default judgment is based, were served untimely. Therefore, according to plaintiff,

he has established a meritorious cause of action mandating the default be vacated. In addition, he argues the answer and counterclaims should be stricken.

On March 17, 2009, this court denied defendants' motion to dismiss the complaint and an order was entered March 25, 2009 (the "March Order"). Defense counsel affirms that the plaintiff did not serve the March Order until April 14, 2009 (Ford Affirmation ¶ 6). In support, defendant submits the relevant Order with Notice of Entry and includes the plaintiff's attached blue back dated as of April 13, 2009 (Ford Affirmation, Ex C). In addition, plaintiff submits proof that the Order with Notice of Entry was served by overnight mail on April 14, 2009 and received by the defendants on April 15, 2009 (Ford Affirmation, Ex D).

"Service of a notice of motion under [CPLR 3211 (a) or (b)] before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days *after service of notice of entry of the order* (CPLR 3211[f])(emphasis added). "[W]here a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period" (CPLR 2103(b)92).

Plaintiff sent the order with notice of entry by overnight mail on April 14, 2009 and it was received on April 15, 2009. Therefore, the answer and counterclaims were due to be served April 25, 2009. Defendants served their answer and counterclaims on April 24, 2009 by facsimile and regular mail (Ford Affirmation Ex E). Accordingly, they were served timely and plaintiff's argument is without merit. As such, the plaintiff is in default of the counterclaims because his reply to the counterclaims was due twenty days later, or by May 14, 2009. Because the plaintiff did not reply, request more time, or otherwise respond, the underlying motion for a default judgment was properly served on June 16, 2009. Plaintiff offers no reason for his failure to reply.

It is improper to vacate a default judgment where the record “reflects a continuous pattern of default and neglect” which precludes a court from exercising its discretion and excuse a party’s failure to appear (*Salvagne v TransAmerica* 93 AD2d 761 [1st Dept 1983]). Consistent and repeated defaults demonstrate a pattern of neglect which may be considered intentional and therefore excusable (*Incorporated Vil. of Hempstead v Jablonsky* 283 AD2d 553 [2nd Dept 2001]). Here, not only is there an unexplained failure by the plaintiff to respond to the default judgment motion, but there also has been a failure by plaintiff to timely respond to the answer and counterclaims. Therefore, the motion to vacate the default judgment is denied.

The plaintiff also takes issue with the Notice of Settlement drafted by the defendant and argues that it goes beyond the relief requested in the Notice of Motion because it provides for dismissal of the complaint. First, the court notes that if there was an objection to the defendants’ Notice of Settlement, the plaintiff should have submitted a counter -order (Uniform Rules of Trial Court 202.48(2)).

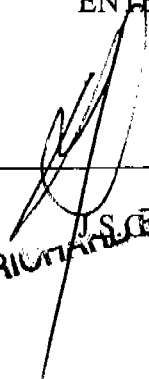
In any event, because the plaintiff failed to reply, the facts supporting the causes of action under the defendants’ counterclaims are deemed admitted, and therefore, the relief requested in the counterclaims granted. Plaintiffs claims are based on his position as a shareholder of the company. Because he did not reply, the defendants’ request in the counterclaims that the individual defendants be deemed to be sole shareholders of the company has been granted (Ford Affirmation Ex E ¶¶ 42-44). Therefore, plaintiffs claims based on his position as a shareholder, are rendered moot. Accordingly, the defendants’ prayer for relief in the answer which seeks dismissal of the plaintiff’s claims in their entirety and judgment in favor of the defendants is properly awarded.

Conclusion

Therefore, based on the foregoing, the motion to vacate this court's September 10, 2009 order is denied.

Dated: November 18, 2009

ENTER:


HON. RICHARD B. LOWE, III

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