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| <b>Bobet v Rockefeller Ctr. N., Inc.</b>                                                                                                                                                                                       |
| 2009 NY Slip Op 33444(U)                                                                                                                                                                                                       |
| March 17, 2009                                                                                                                                                                                                                 |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 110819/04                                                                                                                                                                                                       |
| Judge: Debra A. James                                                                                                                                                                                                          |
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## SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES

PART 59

Justice

JULIO BOBET,

Plaintiff,

Index No.: 110819/04Motion Date: 08/05/08

- v -

Motion Seq. No.: 05ROCKEFELLER CENTER NORTH, INC., TIME, INC.,  
RESTAURANT ASSOCIATES, INC., and ONESOURCE  
HOLDINGS, INC.,Motion Cal. No.: 17Defendants.

The following papers, numbered 1 to 9 were read on this motion to vacate.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits

Answering Affidavits - Exhibits

Replying Affidavits - Exhibits

| FILED       |  | PAPER NUMBERED |
|-------------|--|----------------|
| MAR 23 2009 |  | 1 - 3          |
|             |  | 4 - 7          |
|             |  | 8 - 9          |

Cross-Motion: ☒ Yes ☐ NoCOUNTY CLERK'S OFFICE  
NEW YORK

Upon the foregoing papers,

The court shall grant the motion and deny the cross-motion.

Plaintiff moves pursuant to CPLR 5015 and 2005 to vacate this court's Orders dated February 5, 2008 on Motion Sequences Nos. 3 & 4 which resolved defendants' summary judgment motions by dismissing plaintiff's complaint as plaintiff failed to submit opposition to the relief sought therein. Defendants Rockefeller Center North, Inc., and Time Inc., cross-move for costs and attorney's fees pursuant to CPLR 8303 and 22 NYCRR 130-1.1. It should be noted that by prior Order dated January 26, 2005, this

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITIONCheck if appropriate: ☐ DO NOT POST ☐ REFERENCEMOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

action was dismissed against Rockefeller Center, Inc., and by separate Order dated September 27, 2005, the Third Third-Party action against McDonalds Corporation was discontinued.

It is agreed by all parties that plaintiff must demonstrate that the default sought be vacated is excusable and that plaintiff has a meritorious defense. CPLR 5015 (a) (1); Weekes v Karayianakis, 304 AD2d 561, 562(2d Dept 2003). In this case, plaintiff concedes that the motions were defaulted in the Submissions Part on September 25 and October 16, 2007, and that at the December 18, 2007, oral argument on the motion, per diem counsel for the plaintiff was informed that third-party defendant Ramac Corporation had moved not only to dismiss the third-party complaint, but also the plaintiff's direct case.. Per diem counsel indicated that plaintiff's counsel was unaware that dismissal of the complaint was sought in the summary judgment motions. The court set a further briefing schedule and adjourned the motions to February 5, 2008 to allow for plaintiff's opposition and any reply papers. On the February 5, 2008, oral argument date per diem counsel for the plaintiff raised the same excuse and the court granted dismissal on plaintiff's default on the motions.

Plaintiff's counsel seeking to vacate the default argues law office failure and concedes that the court was generous in initially allowing plaintiff an adjournment to submit opposition

papers. Plaintiff's counsel argues that he was misinformed by the per diem attorney attending the December 18, 2007 argument that the matter had been merely adjourned and that he was unaware of the court's reasons for adjourning the matter. Defendants in opposition argue that even accepting the excuse proffered by plaintiff's counsel, a cursory review of the motion papers would have revealed that the motion was being made against plaintiff's claims.

The court in its discretion finds that plaintiff's default is excusable. This case is most closely analogous to Weekes v Karayianakis (304 AD2d 561, 562 [2d Dept 2003]) where the court found

Under the circumstances of this case, the Supreme Court improvidently exercised its discretion in rejecting the plaintiff's excuse of law office failure. The plaintiff's counsel appears to have been inadvertently misled by information he was given by an attorney he had hired on a per diem basis concerning the adjournment of the defendant's cross motion for summary judgment. The plaintiff's failure to submit papers in opposition to the defendant's cross motion for summary judgment was neither willful nor deliberate. Moreover, the plaintiff demonstrated a meritorious cause of action. Thus, the plaintiff's motion to vacate her default should have been granted.

Weekes v Karayianakis, 304 AD2d 561, 562 (2d Dept 2003). In this case, plaintiff has not defaulted in appearing before this court on the dates and times scheduled and counsel's misunderstanding as to the relief sought by the defendants is excusable in light of the posture of this action.

As noted previously, by prior Order dated January 26, 2005, and filed Judgment dated March 2, 2005, this action was dismissed against Rockefeller Center, Inc. Yet on Motion Sequence No. 4 filed on September 20, 2007, Rockefeller Center, Inc., moved for summary judgment even though it had obtained judgment more than two years before the motion was filed. Indeed, Rockefeller Center, Inc., here cross-moves for attorney's fees even though it is no longer in the case. This court has not been made aware of any stipulation restoring Rockefeller Center, Inc., to this action. Thus, it appears that plaintiff counsel's confusion may not be wholly inexcusable.

The cases relied upon by defendants are inapposite because counsel in those cases failed to appear before the court without excuse. See Correa v Ahn, 205 AD2d 575 (2d Dept 1994) (no excusable default where plaintiffs' counsel also failed to appear to oppose the motions); Hunt v New York City Housing Authority, 280 AD2d 391 (1st Dept 2001) (same).

The plaintiff must also demonstrate a meritorious claim to sustain the motion. Contrary to the arguments made by the defendants, the Court has found that a party's default on a summary judgment motion may be vacated even where the Court finds that party may not have prevailed on the merits of the summary judgment motion stating

Although we are persuaded that plaintiffs' motion for summary judgment should have been granted on the merits,

the showing necessary to vacate a default judgment is not as strict as that required to defeat a motion for summary judgment. Thus, we agree with the statement of the Appellate Division, Third Department, in Matter of Harley v Assessor of Town of Hoosick, (121 AD2d 776, 777), that "respondents' submission of several affidavits of persons having firsthand knowledge of the facts relevant to respondents' various defenses was sufficient as a statement of potentially meritorious defenses to the petition, at least for purposes of opening their default to the motion for summary judgment and having that motion addressed by Special Term on its merits".

Hunter v Annexstein, 141 AD2d 449, 451 -452 (1<sup>st</sup> Dept 1988). In this case unlike Hunter, the court has not considered the merits of the parties' claims on summary judgment and therefore must determine here whether plaintiff's defenses to summary dismissal are meritorious.

In this case the deposition testimony of OneSource witness Anthony Curatolo is sufficient to sustain plaintiff's burden on this application. Defendants' summary judgment motions were based on defenses of lack of notice. However, Curatolo testified that prior to the date of the accident he made complaints to the assistant building manager about restaurants leaving bags of garbage by the freight elevator about "every other week" (EBT transcript of Anthony Curatolo at 58). Whether this deposition testimony raises an issue of fact sufficient to defeat defendants' summary judgment motion is most properly decided on full briefing by the parties. The testimony is however sufficient to establish a defense to the motion that should be determined on its merits.

While the court would have preferred to consider the motion by supplement to the original papers, the decisions in Hunter and Harley require that the court afford the parties the opportunity to brief the merits of summary judgment and also logistically allow the parties to make their applications without prejudice. Therefore, the court shall direct that the parties shall have 60 days following the service of this Order with notice of entry by plaintiff to file summary judgment motions.

Accordingly, it is

ORDERED that plaintiff motion to vacate is GRANTED; and it is further

ORDERED that defendants' cross-motion is DENIED; and it is further

ORDERED that this court's Orders dated February 5, 2008 on Motion Sequences Nos. 3 & 4 which granted defendants summary judgment are hereby vacated; and it is further

ORDERED that the parties are directed to serve and file motions for summary judgment within 60 days of service of this Order with notice of entry by plaintiff upon defendants; and it is further

ORDERED that this action is hereby RESTORED to the court's active pre-note of issue calendar and the plaintiff shall have 60

**Dated:** March 17, 2009

~~CONFIDENTIAL~~ J.S.C.  
DEBRA A. JAMES  
J.S.C.

-7-