

Rivera v Saint Vincent's Catholic Med. Ctrs.
2010 NY Slip Op 31080(U)
May 3, 2010
Supreme Court, New York County
Docket Number: 100077/02
Judge: Saliann Scarpulla
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SCANNED ON 5/5/2010

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

PRESENT: Salvatore Scarpulla

PART 19

Index Number : 100077/2002
RIVERA, AGNES
VS.
SAINT VINCENT'S CATHOLIC
SEQUENCE NUMBER : 005
RESTORE ACTION TO CALENDAR

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 is determined in accordance with the accompanying decision/order.

FILED
MAY 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/3/10

Salvatore Scarpulla
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: CIVIL TERM: PART 19

-----X
AGNES RIVERA,

Index Number: 100077/02
Submission Date: 3/3/2010

Plaintiff,

-against-

SAINT VINCENT'S CATHOLIC MEDICAL
CENTERS and FIRST QUALITY MAINTENANCE
LTD.,

DECISION AND ORDER

Defendants.

-----X
For Plaintiff:
Teperman & Teperman, LLC
15 East 40th Street, Suite 302
New York, NY 10016

For Defendant First Quality Maintenance Ltd.:
Cruser, Mitchell & Novitz
175 Pinelawn Road, Suite 301
Melville, NY 11747

For Defendant Saint Vincent's Catholic Medical Centers:
Costello, Shea & Gaffney LLP
44 Wall Street
New York, NY 10005

Papers considered in review of this motion to restore:

Notice of Motion	1
Affirmation in Opposition	2
Affirmation in Opposition	3
Reply Affirmation	4

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, plaintiff Agnes Rivera ("Rivera") moves to restore the action to the trial calendar.

Rivera commenced this action in or about January 2002 seeking to recover damages for injuries she allegedly sustained when she slipped and fell on a wet and slippery floor in defendant Saint Vincent's Catholic Medical Centers' ("St. Vincent's") premises on April 18, 2000. She alleged that the slippery wet floor condition was caused

by defendant First Quality Maintenance, Ltd ("First Quality") which was mopping another area of the floor at the time of the accident.

The parties appeared for a preliminary conference on February 19, 2003 and compliance/status conferences on May 7, 2003, October 22, 2003, February 4, 2004, June 2, 2004, and November 17, 2004. In the November 17, 2004 compliance order, the parties agreed to appear for a status conference on February 9, 2005. Rivera failed to appear for the February 9, 2005 conference and this court dismissed the action pursuant to 22 NYCRR 202.27. In May 2005, Rivera moved to restore the action to the trial calendar. In July 2005, Saint Vincent's filed for bankruptcy protection, automatically staying this action. Rivera failed to appear for oral argument on her motion to restore, thus on August 12, 2005, the court denied Rivera's motion.¹

In September 2005 and December 2005, Rivera moved to restore the action to the trial calendar again. In orders dated September 30, 2005 and January 26, 2006, (Lehner, J.), the respective motions were denied due to the pending bankruptcy proceeding.

Rivera now moves pursuant to CPLR 5015 to restore this action to the trial calendar arguing that there is a meritorious claim, a reasonable excuse for counsel's failure to appear at the February 9, 2005 conference and a lack of prejudice to the defendants. In support of the motion, Rivera's counsel submits an affirmation in which he explains that he inadvertently failed to appear for the February 9, 2005 conference and

¹ Rivera's counsel claims that he did not appear at that oral argument because he had been made aware of the bankruptcy filing.

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that Rivera did not intend to abandon her case. Rivera submits an affidavit explaining the nature of her claim and injuries.

Defendants both oppose the motion arguing that (1) the motion is defective pursuant to CPLR 5015 in that it is untimely and not made by order to show cause; (2) Rivera did not set forth a reasonable excuse for the failure to appear at the February 9, 2005 conference; (3) Rivera did not set forth a meritorious claim; and (4) they are prejudiced by the delay. First Quality maintains that "upon information and belief," St. Vincent's emerged from bankruptcy in 2007 and Rivera could have moved to restore the action to the trial calendar at any time since then but instead, chose to wait over two years to make the instant motion.

Discussion

A motion to vacate a 22 NYCRR 202.27 dismissal is governed by CPLR 5015(a). As such, a motion to vacate must be made within one year of service of a copy of the dismissal order with notice of entry, and be supported by a showing of a reasonable excuse for the failure to attend the conference and a meritorious cause of action or defense. *See Acevedo v. Navarro*, 22 A.D.3d 391 (1st Dept. 2005).

Here, in support of her motion, Rivera submits an affidavit which adequately sets forth a meritorious cause of action. However, in his affirmation, her attorney only states that he "inadvertently" failed to appear at the February 9, 2005 conference without providing any details. Only in his reply papers does he provide a more detailed excuse,

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i.e. that the delay was due to law office failure. In support of that contention, Rivera's counsel submits with the reply papers paralegal Mohammed Khalid Khan's affidavit sworn to on December 11, 2009, explaining that he neglected to calendar the February 9, 2005 conference in the firm's 2005 diary. The court notes that law office failure has been held to constitute a "reasonable excuse" for a failure to attend a conference. *See Caso v Manmall, Inc.*, 68 A.D.3d 470 (1st Dept. 2009); *Bowman v. Beach Concerts, Inc.*, 50 A.D.3d 391 (1st Dept. 2008); *Mediavilla v. Gurman*, 272 A.D.2d 146 (1st Dept. 2000).

Nevertheless, even if Rivera has set forth a meritorious cause of action and a reasonable excuse for the failure to appear at the conference, the court is constrained from granting Rivera's motion to restore at this time. Rivera has submitted no evidence to establish if and when the St. Vincent bankruptcy stay was lifted.² Without any probative evidence indicating when the bankruptcy stay was lifted, the court can not determine whether this motion to restore is timely pursuant to CPLR 5015. Furthermore, even if, as stated by First Quality, St. Vincent's emerged from bankruptcy in 2007 and the stay was

² St. Vincent's Medical Center filed for bankruptcy protection again on April 14, 2010.

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lifted at that time as well, Rivera fails to provide any explanation as to why she waited two years to make this motion.

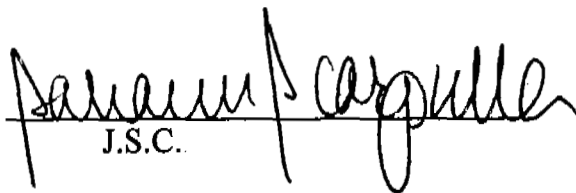
In accordance with the foregoing, it is

ORDERED that plaintiff Agnes Rivera's motion to restore the action to the trial calendar is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
May 3, 2010

ENTER:


J.S.C.

FILED

MAY 05 2010

NEW YORK
COUNTY CLERK'S OFFICE