

Reznik v Silverstein, Gitlin Dental Offs., P.C.
2010 NY Slip Op 31408(U)
June 2, 2010
Sup Ct, NY County
Docket Number: 602460/2008
Judge: Richard B. Lowe
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

~~ON~~ RICHARD B. LOWE, III

PART 56

Index Number : 602460/2008

REZNIK, LEONID

vs

SILVERSTEIN, GITLIN

Sequence Number : 006

RENEWAL

INDEX NO. _____

MOTION DATE 1/29/10

MOTION SEQ. NO. _____

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

~~MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION~~

FILED

JUN 08 2010

NEW YORK COUNTY CLERK'S OFFICE

~~ON~~ RICHARD B. LOWE, III

Dated: 6/2/10

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):

6-8-10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----X

LEONID 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 Office, P.C., d/b/a Vatrenko,
Gitlin & Reznik 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: 602460/2008

Plaintiff,

-against-

DECISION AND ORDER

SILVERSTEIN, GITLIN DENTAL OFFICES, P.C., d/b/a
VATRENKO, GITLIN & REZNIK DENTAL OFFICES,
P.C., and
MICHAEL GITLIN and IRINA VATRENKO,

Defendants.

-----X

FILED
JUN 08 2010
NEW YORK
COUNTY CLERK'S OFFICE

RICHARD B. LOWE, III, J:

Plaintiff moves pursuant to CPLR §2221(e) for leave to renew his motion to vacate the default judgment.

BACKGROUND

On June 11, 2009, the Defendants sought a default judgment against Plaintiff based upon the failure to answer or otherwise respond to Defendants' Counterclaims. Plaintiff did not respond to the Defendants' motion, nor did he request an adjournment of the motion. This Court, however, *sua sponte*, granted the Plaintiff an adjournment until July 23, 2009 to oppose

the motion. On July 22, 2009, Defendants and Plaintiff attended a court-ordered mediation. After the mediation, the parties went to the offices of Edwin Peralta Millan (“Plaintiff’s counsel”), to discuss a potential settlement. Defendants allege that Plaintiff’s counsel seemed to be quite capable to participate, and did not appear at all impaired or disabled.

On July 23, 2009, Plaintiff again failed to respond to the Defendants’ motion, and the motion for a default judgment was submitted to this Court without opposition. On September 10, 2009, Defendants’ motion was granted, and settlement of the order was directed. The Defendants provided a proposed order with a settlement date of October 28, 2009. Plaintiff did not respond to the Notice of Settlement.

On October 30, 2009, Plaintiff moved by order to show cause to vacate this Court’s order granting the default judgment. In his papers, Plaintiff’s counsel did not argue that he failed to respond due to complications with his health.

Having not provided the court with grounds to vacate the default judgement, this Court denied the Plaintiff’s motion to vacate. On December 3, 2009, this Court signed an Order granting the Defendants final judgment as to liability only on their causes of action.

The Plaintiff now moves for leave to renew his motion to vacate the default judgment. Plaintiff moves on the grounds that there are new facts, which were not offered on the prior motion that would change the prior determination of this Court. The purported new facts are: (1) Plaintiff’s medical condition, which causes him severe fatigue; (2) Plaintiff’s counsel is a solo practitioner and his one person staff member failed to properly bring Defendants’ answer and counterclaims to his attention until June 12, 2009; (3) Plaintiff’s counsel fell into an intermittent paralyzing depression due to law office failure and his illness; and (4) when Plaintiff’s counsel inquired of the court whether he could submit his opposition untimely and

over the objection of opposing counsel, he was instructed he could not and his recourse was to file a motion to vacate the default judgment.

DISCUSSION

I. Motion for Leave to Renew Prior Motion Pursuant to CPLR § 2221(e)

CPLR § 2221(e) states that a motion for leave to renew:

1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion.

The First Department has held that “[a]n application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court.” (*Foley v Roche* 68 A.D.2d 558, 568 [1st Dep’t 1979]). However, “the Supreme Court has discretion to grant renewal even upon facts known to the movant at that time.” (*J.D.Structures, Inc. v Waldbaum*, 282 A.D.2d 434, 436 [2d Dep’t 2001]; see *Gadson v New York City Hous. Auth.*, 263 A.D.2d 464, 464 [2d Dep’t 1999] (“The requirement that a motion for leave to renew be based upon newly-discovered facts is a flexible one and a court, in its discretion, may grant renewal upon facts known to the moving party at the time of the original motion.”)) Nevertheless, the First Department has held that “[r]enewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation.” (*The Matter of Beiny v Wynard*, 132 A.D.2d 190, 210 [1st Dep’t 1987]).

Plaintiff's counsel had knowledge of his medical condition as early as March 3, 2009 for which testing for capacity to withstand treatment procedures commenced. Plaintiff's counsel alleges this medical condition contributed to his law office failure. However, nowhere in Plaintiff's counsel's initial motion did he raise this issue. As Plaintiff's counsel was aware of this at the time the prior motion was made, he may not offer this as a new defense.

Plaintiff's counsel also argues that he failed to offer the information regarding his medical condition because he was reluctant to make it a matter of public record. While the court is sympathetic to the position Plaintiff's counsel was in, it cannot now accept this as a reason for the repeated unresponsiveness. There were alternatives for Plaintiff's counsel including requesting a conference with the court off the record. It is unfortunate that counsel waited until this stage of the litigation to offer his explanation because it is now at a point where the court cannot except it as it would unduly prejudice the opposition (*See Albin v First Nationwide Networking Mortg Co.* 188 AD2d 575 [2nd Dept 1992])(there must be an absence of prejudice in order to set aside a default judgment).

Plaintiff's counsel avers that he should be granted leave to renew and his motion granted because his failures to respond were not willful or dilatory, but rather due to his law office failure and illness. There were multiple defaults in this matter, and this is not simply a one or two time instance. Plaintiff's counsel's argument is not compelling in light of the fact that on July 22, 2009, Plaintiff's counsel met with Defendants at a court-ordered mediation session. After the mediation, he went on to attend a settlement meeting at Plaintiff's counsel's office. This all occurred one day prior to the date his response to Defendant's motion for a default judgment was due. Defendants allege that Plaintiff's counsel did not appear disabled in the least, nor did he request additional time to respond.

Lastly, and perhaps most importantly, Plaintiff's counsel's new facts are not supported by an affidavit from any treating physician sustaining his claim of illness, nor is any evidence given to support the fact that his illness was so debilitating where he could not perform his duties to his client on the separate occasions when there was a default.

This motion is also denied because the proper vehicle for relief would have been CPLR 5015. The Supreme Court has held that "a motion to renew pursuant to CPLR 2221 is not the proper procedural vehicle to address a final judgment." (*Maddox v Schur*, 53 A.D.3d 738, 739 [3d Dep't 2008].) Rather, the Supreme Court should treat a plaintiff's motion as a "motion pursuant to CPLR 5015 to be relieved from the prior order of dismissal and its resulting judgment." (*Id.*) Since Plaintiff's counsel already had a final judgment by this Court's denial of his motion by order to show cause, Plaintiff is estopped from pursuing a motion to renew pursuant to CPLR 2221.

I. Motion to Vacate Pursuant to CPLR § 5015

CPLR § 5015(a) in relevant part states that:

(a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or
2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404.

a. Motion to Vacate Pursuant to CPLR § 5015(a)(1)

Even if Plaintiff's counsel had brought a motion pursuant to CPLR § 5015, the motion would fail. Pursuant to CPLR § 5015(a)(1), the movant must provide a reasonable excuse for the neglect, which subsequently resulted in a default judgment. Although the Court may exercise

judicial discretion and deliver a judgment based on the facts as presented in the present case, “[i]t was not the intent of the remedial legislation to routinely excuse all defaults.” (*Pedone v Avco Financial Services, Inc.*, 102 A.D.2d 885, 886 [2d Dep’t 1984].) The Supreme Court has held that “[a] party moving to be relieved of an order or judgment on the ground of excusable default must nonetheless establish both that there is a reasonable excuse for the delay, and that there exists a meritorious claim or defense.” (*Id.* at 885-86.) Because Plaintiff’s counsel has demonstrated a “pattern of default [and] neglect, the default should be considered intentional and, therefore, not excusable.” (*State Farm Mutual Automobile Insurance Co. v Cyriaque*, 881 N.Y.S.2d 367, 367 [2d Dep’t 2009] (“We note that in view of our finding that defendant failed to establish a reasonable excuse for the default, it is unnecessary for us to address the issue of whether a meritorious defense was demonstrated.”).) Furthermore, in *Salvagne v TransAmerica*, 93 A.D.2d 761, 761 [1st Dep’t 1983], the First Department held that “[t]he record reflects a continuous pattern of default and neglect so as to preclude the court from exercising its discretion to excuse defendant’s failure to appear in opposition to plaintiff’s motion for summary judgment.” Where, as here, the movant has engaged in persistent neglect by failing to respond and producing multiple defaults, the motion must be denied.

b. Motion to Vacate Pursuant to CPLR § 5015(a)(2)

Pursuant to CPLR § 5015(a)(2), the movant must provide “newly discovered evidence . . . which would have produced a different result, and which could not have been discovered in time” Furthermore, in regards to CPLR §5015(a)(2), the First Department has held that applications are “addressed to the discretion of the trial court.” (*Olwine, Connelly, Chase, O’Donnell & Weyher v Valsan, Inc.*, 226 A.D.2d 102, 103 [1st Dep’t 1996].) However, “[t]he party seeking relief pursuant to CPLR 5015(a)(2) must

show that the newly discovered evidence is material, is not merely cumulative, is not of such a nature as would merely impeach the credibility of an adverse witness and that it would probably change the result previously reached. It must also be shown that the material *could not have been discovered previously* by the exercise of due diligence.” (*Id.* (emphasis added).) In the instant case, Plaintiff’s counsel knew of his alleged medical condition at the time of the motion, and there is no compelling evidence that had these facts been offered on the prior motion, the result would have been different. Thus, the Court finds that in the instant case, the information being offered to vacate the judgment is not new, nor is the reason for not offering it in the prior motion reasonable in light of the alternatives Plaintiff’s counsel could have used. Accordingly, Plaintiff’s motion for leave to renew is denied.

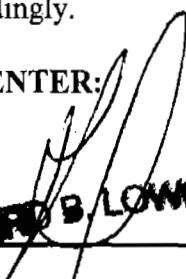
CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Plaintiff’s motion for leave to renew prior motion is denied and the Clerk of the court is directed to enter judgment in favor of Defendants, and the Clerk of the court is directed to enter judgment accordingly.

Dated: June 2, 2010

ENTER:


~~RICHARD B. LOWE, III~~

RICHARD B. LOWE, III, J.S.C.

FILED
JUN 08 2010
NEW YORK
COUNTY CLERK'S OFFICE