

Desai v Azran

2010 NY Slip Op 31946(U)

July 15, 2010

Supreme Court, Nassau County

Docket Number: 012629/09

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 20

SAMIR DESAI and REENA SHARMA, X

Plaintiffs,

Index No.: 012629/09

-against-

**DECISION AND ORDER
AFTER HEARING**

ALYSSA AZRAN, 5 HAMILTON STREET
TRUST and JOHN DOES 1-10,

Defendants.

X

Before this Court for consideration is the matter of whether counsel fees and financial sanctions should be imposed as a consequence of the conduct of the Defendant's attorney, Thomas A. Farinella, Esq., within the purview of 22 N.Y.C.R.R. § 130-2.1 (a). A hearing was held pursuant to the Order of this Court (Marber, J., 4/27/10) on June 22, 2010.

By way of background, the underlying breach of contract action was commenced on or about June 29, 2009, seeking the return of a downpayment in the amount of \$19,800.00. Service of the Summons and Verified Complaint was effectuated by affixing the Summons and Complaint to the door and mailing it to the Defendant at 138 Paulding Street, Staten Island, New York 10314. The Plaintiffs, SAMIR DESAI and REENA SHARMA, subsequently moved for a default judgment, pursuant to CPLR § 3215. A default judgment was granted and the matter was scheduled for Inquest and Assessment of Damages

on February 17, 2010. (LaMarca, J., 12/4/09). On February 18, 2010, Thomas A. Farinella, Esq. filed a Notice of Appearance with the Nassau County Clerk, stating that he represented the Defendant, ALYSSA AZRAN.

The Defendant submitted an Order to Show Cause on March 1, 2010, seeking (1) a stay of the scheduled Inquest which had been adjourned from February 18, 2010; or (2) alternatively, entering an order vacating the default of the Defendant, ALYSSA AZRAN; and (3) an Order awarding counsel fees and costs for the commencement of a frivolous action. The Order to Show Cause was submitted to Justice Diamond and stayed the Inquest. (Diamond, J., 3/1/10). However, the Order to Show Cause was apparently signed by Justice Diamond after the Inquest was actually conducted.

On April 23, 2010, the Plaintiffs' counsel appeared before this Court at 9:30 a.m. on the adjourned return date of the Order to Show Cause. Mr. Farinella, the Defendant's attorney, failed to appear until 12:00 p.m., despite his appearance being required at 9:30 a.m. At approximately 10:15 a.m., Mr. Farinella's office advised the Court's Chambers that he was "stuck in traffic" and would arrive in approximately twenty (20) minutes. However, upon his arrival, the Court was advised by Mr. Farinella that he was in Queens County on a matter for a client. Following his untimely appearance, the Court, pursuant to its Order dated 4/27/10, ordered a hearing, pursuant to 22 N.Y.C.R.R. § 130-2.1 (a), to be held on May 18, 2010, in order to determine what sanctions, if any, should be imposed on Mr. Farinella for his failure to timely appear on April 23, 2010.

On May 18, 2010, counsel for the Plaintiffs appeared for the scheduled hearing.

Mr. Farinella, however, failed to appear. On May 18, 2010 at approximately 9:45 a.m., Mr. Farinella's office telephoned the Court's Chambers stating that he was unable to appear because he was physically ill. A letter was subsequently faxed to Chambers at 10:22 a.m. As detailed in a letter from the Plaintiff's counsel to Mr. Farinella, and copied to the Court, a record was made on May 18, 2010, and the matter was adjourned to June 22, 2010 at 9:30 a.m. The Court directed the Plaintiff's counsel to send a letter to Mr. Farinella advising him that June 22, 2010 would be the final adjournment and that the hearing would address the issue of sanctions for Mr. Farinella's conduct on April 23, 2010 and his failure to appear on May 18, 2010. Additionally, Mr. Farinella was directed to provide any documentation in support of his claim of illness on May 18, 2010 at the June 22, 2010 hearing.

On June 2, 2010, a decision was rendered with regard the Defendant, ALYSSA AZRAN's Order to Show Cause (Mot. Seq. 02). A traverse hearing was ordered to determine the sufficiency of the Plaintiffs' efforts to effectuate service pursuant to the CPLR. (Marber, J., 6/2/10). The hearing was scheduled for July 7, 2010 in the Calendar Control Part.

On June 22, 2010, the date the sanctions hearing had been adjourned to, Mr. Farinella's office called the Court's Chambers and advised Chambers staff that Mr. Farinella had other appearances elsewhere and was expected to arrive for the hearing at approximately 10:30 a.m. Mr. Farinella did appear and advised the Court that he did not have other court appearances but had driven to and from Manhattan to pick up his brother to accompany him at the hearing. At the hearing, the Plaintiffs' counsel and Mr. Farinella were heard regarding

Mr. Farinella's conduct throughout this action.

22 N.Y.C.R.R. § 130-2.1 (a) provides, in pertinent part:

the court, in its discretion, may impose financial sanctions or, in addition to or in lieu of imposing sanctions, may award costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, upon any attorney who, without good cause, fails to appear at a time and place scheduled for an action or proceeding to be heard before a designated court.

22 N.Y.C.R.R. § 130-2.1 (b) provides several attendant circumstances to be considered by the court when determining sanctions, including: any explanation for the nonappearance; the adequacy of the notice of the scheduled appearance; any advance notification of the nonappearance to the court and opposing counsel; whether substitute counsel appeared in court; whether an affidavit or affirmation of actual engagement was filed pursuant to Part 125 of the Uniform Rules for the Trial Courts of the Unified Court System; whether the attorney on prior occasions in the same action failed to appear at a scheduled court proceeding; and the extent of the harm caused by the attorney's failure to appear.

The Court has considered the explanations proffered by Mr. Farinella regarding his untimely appearance on April 23, 2010 and his nonappearance on May 18, 2010, respectively. At the April 23, 2010 appearance, Mr. Farinella, according to his office, was stuck in traffic. However, when he arrived, the Court ascertained that Mr. Farinella was, in fact, in Queens County appearing on another matter. On May 18, 2010, Mr. Farinella informed the Court, via facsimile, that he was ill and unable to appear. Mr. Farinella was directed to bring any documentation to support his claim of illness to the June 22, 2010

hearing. He failed to provide the Court with any documentation to substantiate his illness as he apparently did not seek any medical attention.

Mr. Farinella had adequate notice of the scheduled appearances on April 23, 2010 and May 18, 2010. The April 23, 2010 date was scheduled at the conference held on March 25, 2010. The date of the hearing, May 18, 2010, was stated in the Order of this Court of April 27, 2010.

Mr. Farinella failed to provide advance notification to the Court or to opposing counsel of his intended tardiness and nonappearance on either of the dates at issue. On April 23, 2010, at approximately 10:15 a.m., forty-five (45) minutes after the scheduled appearance time, Mr. Farinella's office stated that he was stuck in traffic. This notification was neither in advance nor factual, as previously noted. On May 18, 2010, the original date of the hearing, Mr. Farinella faxed a letter informing the Court that he was unable to appear. Again, there was no advance notification nor any notification to opposing counsel.

No substitute counsel appeared for Mr. Farinella at either of these proceedings. Mr. Farinella also failed to properly file affidavits or affirmations of actual engagement. Finally, Mr. Farinella has failed to timely appear for scheduled court appearances and hearings throughout this action. By failing to timely appear on these occasions, Mr. Farinella has caused the Plaintiffs to incur unnecessary expenses in the way of attorney fees. Mr. Farinella's only explanation is that he feels this action is frivolous. Mr. Farinella appears to not comprehend that regardless of his opinion of the merits of the matter, his conduct has been contumacious, unprofessional and disrespectful to this Court and his adversary.

In light of the aforementioned attendant circumstances, Mr. Farinella's failure to have timely appeared on April 23, 2010 was without good cause.

Pursuant to 22 N.Y.C.C.R. § 130-2.1 (d), Mr. Farinella had a reasonable opportunity to be heard on the issue of sanctions at the June 22, 2010 hearing.

Based upon the foregoing, the Court hereby awards costs in the form of counsel fees to be paid by Mr. Farinella directly to the Plaintiffs, SAMIR DESAI and REENA SHARMA and their attorney, pursuant to 22 N.Y.C.C.R. § 130-2.1 (a).

In fixing the amount of reasonable counsel fees to be awarded, the Court notes that the Plaintiffs' attorney, Jeffery S. Schwartz, is an experienced practitioner who has documented all the fees charged as a consequence of his representation of the Plaintiffs in this action, which amounted to the sum of \$2,800.00. Said amount is reduced by the Court in its discretion to \$700.00 representing the hours the Plaintiffs' counsel waited for Mr. Farinella to appear on April 23, 2010.

The Court has determined the conduct of Mr. Farinella to warrant the additional imposition of sanctions. Mr. Farinella is to pay to the Lawyers' Fund for Client Protection, established pursuant to Section 97-t of the State Finance Law, the sum of \$500.00.

Accordingly, for the foregoing reasons it is hereby

ORDERED, that Thomas A. Farinella, Esq. shall pay to the Plaintiffs, SAMIR DESAI and REENA SHARMA and the Plaintiffs' counsel, JEFFREY S. SCHWARTZ, ESQ., jointly, the sum of \$700.00 to be sent to the Plaintiffs' counsel, JEFFREY S.

SCHWARTZ, ESQ. within thirty (30) days of the service of a copy of this Order with Notice of Entry; and it is further

ORDERED, that the Plaintiffs' counsel, JEFFREY S. SCHWARTZ, ESQ. shall serve a copy of this Order, with Notice of Entry, within ten (10) days of the date of entry, upon the Defendant's counsel, Thomas A. Farinella, Esq., pursuant to CPLR § 2103 (b) (1), (2) or (3), and shall file proof of such service with the Court; and it is further

ORDERED, that if payment is not made as directed herein, upon presentation of an affidavit of non-payment, the Clerk of the County is directed to enter judgment in favor of SAMIR DESAI and REENA SHARMA and JEFFREY S. SCHWARTZ, ESQ., in the sum of \$700.00 and against Thomas A. Farinella, Esq., and it is further

ORDERED, that Thomas A. Farinella, Esq. shall pay directly to the Lawyers' Fund for Client Protection, 119 Washington Avenue, Albany, New York 12210, the sum of \$500.00. Said payment must be made by August 20, 2010 with proof of payment supplied to this Court and the Clerk of the County of Nassau County by August 30, 2010; and it is further

ORDERED, that if payment is not made to the Lawyers' Fund for Client Protection as directed herein, the Clerk of the County of Nassau County is directed to enter judgment in favor of the Lawyers' Fund for Client Protection in the sum of \$500.00 and against Thomas A. Farinella, Esq.

This decision constitutes the order of the court.

DATED: Mineola, New York
July 15, 2010



Hon. Randy Sue Marber, J.S.C.

ENTERED
JUL 16 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE