

Hodson v Vinnie's Farm Market
2011 NY Slip Op 31264(U)
May 12, 2011
Supreme Court, New York County
Docket Number: 104317/2007
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON Justice

PART 55

Hodson, Hope

INDEX NO. 104317107

MOTION DATE _____

- v -

MOTION SEQ. NO. 02

Vinnie's Farm

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to ~~set~~ Vacate

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED	
_____	<u>1-3</u>
_____	<u>4-5</u>
_____	<u>6</u>

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided by the annexed memorandum decision and order.*

FILED

MAY 13 2011

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 5/12/11

JANE S. SOLOMON J.S.C.

- Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
- Check if appropriate: DO NOT POST REFERENCE
- SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X
HOPE HODSON

Index No. 104317/2007

Plaintiff,

DECISION & ORDER

-against-

VINNIE'S FARM MARKET, VINCENT NEGLIA,
and MARIE NEGLIA,

Defendants.

-----X

FILED

MAY 13 2011

NEW YORK
COUNTY CLERK'S OFFICE

SOLOMON, J.:

In March 2007, Plaintiff Hope Hodson (Hodson) initiated a lawsuit against defendants Vinnie's Farm Market, Vincent Neglia and Marie Neglia (Defendants) for injuries suffered in a 2004 dog attack on Defendants' property. Defendants, *pro se*, answered. In 2009, Plaintiff, originally represented by counsel, but then *pro se*, moved to strike the answer on the ground that it was unverified. Defendants did not oppose the motion, and by order dated April 29, 2009 (the Order), the motion was granted on default and the answer was struck (Motion, Ex. A). The note of issue was filed and an inquest on damages was held (Id.). Defendants were not present at the inquest. Judgment was entered on July 31, 2009 in favor of Hodson and against Defendants in the amount of \$201,498.61 (the Judgment). On March 11, 2010, Hodson obtained a writ of execution directing the sale of Defendants real property in satisfaction of the judgment (Id., Ex. B) (the Execution). On July 28, 2010, Defendants filed the instant motion to vacate the Order, Judgment and Execution, and to dismiss the action as abandoned under CPLR 3215(c).

Defendants, now represented by counsel, argue that the motion to strike the answer should have been denied under CPLR 3215(c) because Hodson abandoned the lawsuit by failing to move for a default judgment within one year of service of the unverified answer. This argument is nonsensical. CPLR 3215 applies where a defendant has failed to appear. Here, Defendants appeared and answered; subsequently, the answer was struck, an inquest took place, and the court found in favor of Hodson. CPLR 3215 is inapplicable.

Next, Defendants argue that the Order, Judgment and Execution should be vacated, under CPLR 5015(a)(1), because (1) the court lacked personal jurisdiction over defendant Vinnie's Farm Market, which was never properly served, and was not in existence at the time of the incident (Motion, Ex. C), (2) the individual defendants were both ill and dealing with the death of their daughter, who passed away in 2006, (3) that they could not afford legal counsel, (4) that they were misled by Hodson's initial counsel, who represented that the matter would be discontinued, and (5) that they never received notice of the motion to strike, the Order, the inquest, or the Judgment.

Hodson counters that the motion, brought over one year from the date of the Order, is untimely, that Defendants were properly served notice of each event, and that Defendants do not submit any proof regarding their inability to respond to the

notice due to illness or financial troubles. In support, Hodson submits affidavits of service and proof of mailing and delivery for each of the following: notice of motion and motion (Opposition, Ex. G), notice of entry of the Order (id., Ex. H), notice of inquest (id., Ex. I), and the judgment with notice of entry (id., Ex. M).

CPLR 5015 governs vacatur, and relates as relevant:

(a) On Motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just . . . 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 . . .

(CPLR 5015[a][1]). "Excusable default" is established where the defendant demonstrates both a reasonable excuse for the default and a meritorious defense (see, *Fink v. Antell*, 19 AD3d 215 [1st Dept., 2005]).

Though Defendants failed to bring this motion within one year of entry of the Order, the one year period restriction in CPLR 5015(a)(1) is not a period of limitation and is not rigidly applied where a defendant's excuse is compelling (Siegel, *New York Practice*, 5th Edition, §§ 108 and 427).

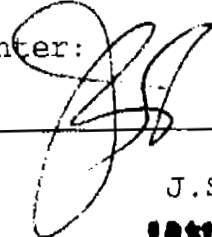
Here, Defendants' excuses are not compelling. They waived any objection to personal jurisdiction by not raising it in a pre-answer motion or in their answer (CPLR 3211[e]). They do not support their claim that they were unable to proceed due

to illness. The claim that Defendants never received notice is disproven by Hodson's submissions, and in light of those submissions, Defendants' reliance on Hodson's former attorney's alleged representations that the case was discontinued is unpersuasive. Finally, though it is undoubtedly a great personal tragedy, the death of Defendants' daughter in 2006 does not legally excuse Defendants' failure to respond to the 2009 motion and the resulting Order, inquest and Judgment.

In light of the foregoing, it is unnecessary to consider whether Defendants have demonstrated a meritorious defense (*Aaron v. Greenberg & Reicher, LLP*, 68 AD3d 533 [1st Dept., 2009]).

Accordingly, it hereby is
 ORDERED that the motion is denied.

Dated: May 12, 2011

Enter: 

 J.S.C.
JANE S. SOLOMON
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