

**Brown v Empire City Subway Co. (Ltd.)**

2011 NY Slip Op 33046(U)

November 18, 2011

Sup Ct, NY County

Docket Number: 114574/04

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN  
J.S.C.  
Justice

PART 52

Index Number : 114574/2004  
**BROWN, KENNEDY**  
vs.  
**CITY OF NEW YORK**  
SEQUENCE NUMBER : 008  
VACATE

INDEX NO. 114574/04  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 08

Motion to/for \_\_\_\_\_  
\_\_\_\_\_ | No(s). \_\_\_\_\_  
\_\_\_\_\_ | No(s). \_\_\_\_\_  
\_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

*is decided in accordance with the annexed decision.*

## FILED

NOV 21 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 11/18/11

CYNTHIA S. KERN, J.S.C.  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 52

-----X  
KENNEDY BROWN,

Plaintiff,

Index No. 114574/04

-against-

EMPIRE CITY SUBWAY COMPANY (LIMITED),  
PETROCELLI ELECTRIC CO., INC., JAB CONSTRUCTION,  
INC., TROCOM CONSTRUCTION CORP., T.C.  
CONTRACTING, LLC., TRIUMPH CONSTRUCTION  
CORP., YODA, LLC., KONE, INC., DL PETERSON TRUST,  
VVP AMERICA, INC., n/k/a VITRO AMERICA, INC.,  
CHARLES C. WEBER, and "JOHN DOE," as further described  
in the annexed complaint,

Defendants.  
-----X

**FILED**

NOV 21 2011

NEW YORK  
COUNTY CLERK'S OFFICE

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>        </u>
Affidavits in Opposition to Cross-Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

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Plaintiff commenced the instant action against defendants to recover damages for personal injuries he allegedly sustained when on July 24, 2003, he allegedly struck a defective patch while riding his motorcycle in the roadway on Ninth Avenue between West 30<sup>th</sup> and West 31<sup>st</sup> Streets in New York City causing him to lose control over his motorcycle and strike another vehicle. For reasons that will be set forth below, this case was dismissed. Plaintiff now moves to vacate the dismissal and restore this action to the trial calendar pursuant to CPLR 5015 on the ground that the JHO did not have jurisdiction to dismiss the case. Plaintiff's motion is denied for

the reasons set forth below.

Plaintiff commenced the instant action by serving the City of New York (the "City") with a Summons and Complaint on or about October 13, 2004. An Answer was served by the City on or about November 15, 2004. On May 6, 2010, plaintiff and the City appeared for a Mediation Conference. At this conference, both parties signed a stipulation agreeing to attend a Last Clear Chance Conference on September 13, 2010 and to set a trial date for September 27, 2010. As of May 6, 2010, the day of the conference when the trial date was set, it was known by both parties that plaintiff was in the custody of the Department of Corrections and that plaintiff was not due to be released from custody until March 2011. The September 27, 2010 trial date was then adjourned to November 22, 2010 to give plaintiff's attorney time to obtain an Order directing plaintiff to be produced for trial. Immediately before the trial date of November 22, 2010, plaintiff brought to this court an order to show cause requesting that this court stay the trial. This court declined to sign the order. On November 22, 2010, plaintiff's attorney appeared on behalf of plaintiff before JHO Ira Gammerman without having obtained an order to produce plaintiff and requested an adjournment. JHO Gammerman denied plaintiff's request and indicated that the case would be dismissed because although the trial was adjourned for nearly two months to give the plaintiff's counsel an opportunity to obtain an order to produce the inmate plaintiff for trial, he never obtained this order. JHO Gammerman stated that the "only conclusion [he] could reach" was that plaintiff was not interested in pursuing the case. As of November 22, 2010, this case was marked as dismissed. In both the order to show cause and the hearing before JHO Gammerman, the only reason provided for plaintiff's failure to appear for trial was that plaintiff was incarcerated. There was no mention that plaintiff was in the midst of participating in a drug

treatment program.

As an initial matter, plaintiff's argument that the case was not properly dismissed because it was a determination made by a JHO who lacked jurisdiction to render the order to dismiss the case is now moot as this court signed the transcript of the November 22, 2010 hearing so-ordering the dismissal. To the extent that plaintiff is arguing that the dismissal should be vacated nonetheless, the court declines to reverse the dismissal.

Under current calendar management rules, the trial courts have essentially four options when a case is called for trial and one or more of the parties fails to appear or for some reason is unable to proceed. The trial court has the discretion to (1) adjourn the trial to another date, (2) mark the case "off" or strike it from the calendar pursuant to CPLR 3404, (3) vacate the note of issue pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.21(e), or (4) dismiss the complaint or strike the answer pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.27... If the court chooses the most drastic action, dismissal of the complaint or striking of the answer pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.27, then the court has essentially speeded up the process and has forced the moving party to demonstrate the more stringent standard for restoration, i.e., proof necessary to vacate a default.

*Basetti v Nour*, 287 A.D.2d 126, 134 (2d Dept 2001).

At the November 22, 2010 hearing, JHO Gammerman indicated that the case would be dismissed for the reasons discussed more fully above. As JHO Gammerman chose to dismiss the complaint, the plaintiff, as the moving party must now demonstrate the proof necessary to vacate a default judgment.

Pursuant to CPLR §5015(a)(1), a court may vacate a default judgment if a party can demonstrate excusable default as long as such motion is made within one year after notice of entry of a default judgment is served on the moving party. It is well settled that in order to demonstrate excusable default, a party seeking to vacate a default judgment must establish a reasonable excuse

for the default and a meritorious defense to the underlying action. *See Mercado v. Allstate Life Ins. Co.*, 193 AD2d 476 (1<sup>st</sup> Dept 1993); *see also Arred Enterprises Corp. v. Indemnity Ins. Co.*, 108 AD2d 624 (1<sup>st</sup> Dept 1985).

In the present case, plaintiff has failed to present a reasonable excuse for the default. Plaintiff's current excuse for his delay in prosecuting this action – presented to the court for the very first time on this motion to restore – is that he was in the midst of completing a drug treatment program in prison at the time the trial was scheduled in November 2010 and that he did not want to interrupt that program to be produced for trial because doing so would extend the length of his incarceration. However, plaintiff did not provide this explanation to JHO Gammerman on the November 22, 2010 trial date nor did he provide this excuse to the court in his order to show cause. There was absolutely no mention in either the hearing minutes before JHO Gammerman or the order to show cause before this court in November 2010 that plaintiff was in any drug treatment program. Under these circumstances, his current excuse that he could not appear in November 2010 because he was in a drug treatment program is not a "reasonable excuse."

Accordingly, plaintiff's motion to vacate the dismissal of this action and restore it to the calendar is denied. This constitutes the decision and order of the court.

Dated: 11/18/11

Enter: CR

J.S.C.  
CYNTHIA S. KERN  
**FILED** J.S.C.

NOV 21 2011