Pierson v New York City Dept. of Educ.
2011 NY Slip Op 34156(U)
July 7, 2011
Supreme Court, New York County
Docket Number: 105088/06
Judge: Barbara Jaffe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

HARRY M. PIERSON,

Plaintiff,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION ,

Defendant.

----------x

Index No.	105088/06
Motion Date:	3/2/11
Motion Seq. No.:	001
Calendar No.:	30

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Theresa B.Wade, Esq.
Law Offices of Michael G. O'Neill
30 Vesey Street, 3rd Floor
New York, NY 10007
(212) 581- 0990

For defendant:
Daniel Chiu, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street, Room 2-115
New York, NY 10007
(212) 788-1158

By notice of motion dated March 2, 20011, defendant moves pursuant to CPLR 5015 and 2221 for an order vacating the order dated February 14, 2011, and restoring defendant's motion for summary judgment to the calendar, or, in the alternative, granting defendant's motion to renew or reargue. Plaintiff opposes the motion.

I. BACKGROUND

On February 8, 2011, counsel were scheduled to appear before me for oral argument on defendant's motion for summary judgment. Defendant failed to appear and the motion was denied on February 14, 2011 for that reason. On February 15, 2011, defendant received a copy of the February 14 order. (Affirmation of Daniel Chiu, Esq., dated Feb. 16, 2011 [Chiu Aff], Exh. A).

II. CONTENTIONS

Defendant denies having received notice of the oral argument date, alleging that it is customary in this court that, when an appearance is scheduled, a notice is sent by mail to one of the parties who is instructed to notify all other parties of the date. Defendant thus asks that the February 14 order be vacated, claiming that its failure to appear for oral argument was the result of excusable neglect, and alleges that its motion is meritorious. Defendant also maintains that it acted diligently in moving to vacate the February 14 order within eight days of the date of its missed court appearance. (Chiu Aff.).

In opposition, plaintiff's counsel alleges that while she too received no notice by mail, she received one via e-mail from E-Courts that detailed the date of the oral argument and she denies that the e-mail contained an instruction that she notify defendant of the date. Nonetheless, she also claims that she left defense counsel a voice-mail message on February 8 advising that the motion was to be heard that day, and asserts that defendant's excuse is vague and conclusory. Plaintiff thus argues that defendant failed to provide a reasonable excuse for its failure to appear for oral argument or demonstrate that its motion for summary judgment is meritorious and warrants restoration to the calendar, contending that there exist numerous triable issues of fact. (Affirmation of Theresa B. Wade, Attorney, dated February 28, 2011, Exh. A).

In reply, defense counsel denies receiving plaintiff's counsel's voice-mail message, and argues that his mistaken belief that he would be notified of an oral argument date if such was scheduled constitutes a reasonable excuse for his failure to appear. (Reply Affirmation, dated Mar. 8, 2011).

III. ANALYSIS

A party moving to vacate an order rendered on default must establish a reasonable

excuse for its default and a meritorious claim. (CPLR 5015[a][1]; *Daimlerchrysler Ins. Co. v Seck*, 82 AD3d 581 [1st Dept 2011]).

Here, defendant provided a non-conclusory reason for its failure to appear for oral argument (*see eg Donnelly v Treeline Co.*, 66 AD3d 563 [1st Dept 2009] [lack of receipt of notice of court date may be valid excuse for failure to appear at conference]; *ICBC Broadcast Holdings-NY, Inc. v Prime Time Advertising, Inc.*, 26 AD3d 239 [1st Dept 2006] [defendant's failure to appear for oral argument sufficiently excused by counsel's failure to correctly ascertain date of oral argument]; *Levy v New York City Hous. Auth.*, 287 AD2d 281 [1st Dept 2001] [reasonable excuse provided through attorney's denial of receipt of notice of conference]), and in light of its diligence in moving to vacate the February 14 order and the absence of any prior conduct indicating a pattern of dilatory behavior, defendant has offered a reasonable excuse for its default (*see Daimlerchrysler Ins. Co.*, 82 AD3d at 592 [order should have been vacated as defendant showed failure to oppose motion was neither willful nor part of pattern of dilatory behavior]; *Wise v Blue*, 289 AD2d 131 [1st Dept 2001] [court providently exercised discretion in vacating order entered upon defendants' failure to appear for oral argument as they demonstrated reasonable excuse for default and merit of their motion]).

Moreover, defendant established that its motion for summary judgment may be meritorious; whether it may ultimately be granted is not dispositive. (*See Zaidi v New York Bldg. Contrs., Ltd.*, 61 AD3d 747 [2d Dept 2009] [defendant's submissions sufficient to establish existence of meritorious defenses]; *Mut. Marine Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417 [1st Dept 2007] [evidence submitted on initial summary judgment motion demonstrated existence of meritorious defense, and whether party could prevail on motion was issue to be determined as part of that motion]). There is also a strong preference for resolving cases on the merits.

(*Daimlerchrysler Ins. Co.*, 82 AD3d at 582).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion is granted to the extent of vacating the February 14, 2011 decision and order and restoring defendant's motion for summary judgment for oral argument; and it is further

ORDERED, that the parties are directed to appear for oral argument on the motion on July 26, 2011 at 9:30 am in room 280 at 80 Centre Street, New York, New York.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: July 7, 2011
New York, New York

JUL 07 2011

FILED

JUL 12 2011

NEW YORK
COUNTY CLERK'S OFFICE