

Northern Source, LLC v Kousouros

2012 NY Slip Op 33203(U)

February 22, 2012

Sup Ct, NY County

Docket Number: 650325/2008E

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN

PART 12

Index Number : 650325/2008
NORTHERN SOURCE, LLC
vs
KOUSOUROS, JAMES
Sequence Number : 004

INDEX NO. 650325/2008
MOTION DATE
MOTION SEQ. NO. 004
MOTION CAL. NO.

~~SUBSTITUTE COUNSEL~~

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

Table with 1 column: PAPERS NUMBERED

Cross-Motion: [] Yes [] No

Upon the foregoing papers, it is ordered that this motion

MOTION IS GRANTED IN ACCORDANCE WITH THE JUDGED DECISION AND ORDER.

Dated: 2/22/12

[Signature] J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

NORTHERN SOURCE, LLC,
Plaintiffs,

Index No. 650325/2008E
Mot. Seq. No. 004

- against -

DECISION AND ORDER

JAMES KOUSOUROS,
Defendant.

-----X

For the Plaintiff:
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By: Claude Castro, Esq.
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For Defendant:
Law Firm of Allan Laurence Brenner
By: Allan L. Brenner, Esq.
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Papers considered in review of this motion to vacate
Notice of motion, Castro affirmation and annexed exhibits A - G
Brenner affirmation in opposition and annexed exhibits 1 - 15
Castro reply affirmation in further support

E-file document number(s):
31 - 31-8
32 - 32-15
34

PAUL G. FEINMAN, J.:

Plaintiff, Northern Source, LLC, moves to vacate the court’s order, dated February 9, 2010, and to restore this matter to the calendar for resolution on the merits. Defendant, James Kousouros, opposes. For the reasons provided below, plaintiff’s motion is denied.

In this legal malpractice action, plaintiff’s motion for summary judgment was denied by another justice of this court in a decision and order, dated May 12, 2009, and the parties were directed to appear for a preliminary conference on June 2, 2009 (*Northern Source, LLC v Kousouros*, Sup Ct, NY County, May 18, 2009, Shulman, J., index no. 650325/2008, mot. seq. no. 001). According to plaintiff’s attorney, thereafter, “as a result of certain disputes with its former counsel, this matter was not placed on the [t]rial [c]alendar for resolution on the merits ...,” and instead plaintiff’s former counsel, Wachtel & Masyr LLP, filed a motion, dated July 1, 2009, to be relieved as counsel. The affidavit of service filed with the motion shows that it was served on both

plaintiff and defendant's attorney. That motion was disposed of by a short-form order, dated August 17, 2009, stating, "...it is ordered that this motion is granted, no opposition. Settle order providing for a 30 day stay" (see *Northern Source, LLC v Kousouros*, Sup Ct, NY County, Aug. 17, 2009, Tolub, J., index no. 650325/2008, mot. seq. no. 002).

On September 20, 2009, defendant served a 90-day demand under CPLR 3216 directly to plaintiff, and not Watchtel & Masyr. Subsequently, Watchtel & Masyr filed a proposed order with notice of settlement, dated January 5, 2010, to be presented for settlement to the same justice that had granted its motion to be relieved as counsel in August of 2009. Meanwhile, on February 9, 2010, this court granted, on default, defendant's motion to dismiss for failure to resume prosecution after service of a 90-day notice (*Northern Source, LLC v Kousouros*, Sup Ct, NY County, Feb. 9, 2010, Feinman, J., index no. 650325/2008, mot. seq. no. 003). The court "[o]rdered, that upon proof of service of a copy of this order together with notice of its entry upon plaintiff (not plaintiff's former counsel), the Clerk of Court shall enter judgment dismissing this action in its entirety, together with costs and disbursements" (*id.*). Subsequently, given that Justice Tolub has since retired, the proposed order that had been submitted by Watchtel & Masyr LLP on January 5, 2010, was presented to and signed by this court on February 17, 2010 (Doc. 30, Feb. 17, 2010 order). In doing so, the court crossed-out the portion of the proposed order which had provided for a 30 day stay of all proceedings, stating, "[s]tay is stricken given that the decision directing counsel to settle order was issued 8/17/09 and the Court already directed dismissal of this action as abandoned by order dated 2/9/2010" (*id.* at 2).

In the instant motion, plaintiff seeks to vacate the court's order of February 9, 2010, and the resulting judgment dismissing the action. In support, plaintiff submits an affirmation of its attorney, the pleadings, the motion papers related to its prior motion for summary judgment and Watchtel & Masyr's motion to be relieved as attorney, the August 17, 2009 short-form order, Watchtel &

Masyr's notice of settlement of order, dated January 5, 2010, and a copy of this court's February 17, 2010 order (Docs. 31-1 - 31-8). It does not, however, submit a copy of the February 9, 2010 order and resulting judgment that it now seeks to vacate.

Plaintiff claims that a number of errors on the part of the court in its prior actions with respect to this case. First, it claims that the court should have declined to sign the proposed order submitted by Wachtel & Masyr in January of 2010 as untimely, and, in any case, erred in striking the portion of the proposed order providing a 30 day stay, as required by the previously-assigned justice's August 17, 2009 order and under CPLR 321 (c) (Doc. 31-1, Castro affirm. at ¶ 9). Next, plaintiff argues that the court, in its February 9, 2010 order, erred in granting defendant's motion to dismiss for failure to prosecute on default because the motion should have been stayed until Wachtel & Masyr's proposed order seeking to withdraw was settled and plaintiff was provided with a 30 day stay to obtain new counsel (*id.* at ¶ 10). It further contends that Wachtel & Masyr was still plaintiff's attorney of record at the time the court issued its order on February 9, 2010, because the court had not yet signed the proposed order settling Wachtel & Masyr's motion to withdraw as counsel, and, as such, the court's February 9 order erroneously referred to Wachtel & Masyr as plaintiff's "former counsel" and directly service of a copy of the order directly upon plaintiff (*id.* at ¶¶ 11, 13). Plaintiff adds that if Wachtel & Masyr was its "former counsel" as of February 9, 2010, then plaintiff was entitled to a 30-day stay before a default could have been granted on the motion to dismiss (*id.* at ¶ 12). As a result of these errors, plaintiff's attorney argues that plaintiff's rights were "severely prejudiced" because it was "utterly confused as to when its attorney of [r]ecord was discharged and when it was deprived of the right to the statutorily mandated 30 day stay of all proceedings in order to obtain new counsel to protect its rights in this litigation" (*id.* at ¶ 14).

Defendant argues that plaintiff's motion is untimely pursuant to CPLR 5015 (a) (1), which

requires a party seeking relief from an order or judgment to file a motion to vacate within one year after service of a copy of the judgment or order (Doc. 32, Brenner affirm. at ¶ 15). It also claims that the motion is defective because plaintiff fails to offer any explanation for its delay of more than a year in seeking to vacate the judgment. Further, defendant contends that the record shows that plaintiff has not diligently prosecuted this action, claiming that plaintiff never complied with the directives set out in the preliminary conference order, and referring to the exhibits submitted by Wachtel & Masyr in support of their motion to be relieved as counsel, which suggest that plaintiff's dispute with its former counsel was based on a lack of communication and plaintiff's failure to pay its legal fees (*id.* at ¶ 19). In any case, they argue that plaintiff received notice of all of the salient developments, including Wachtel & Masyr's motion to withdraw and the August 2009 granting that motion, defendant's 90 day notice and defendant's motion to dismiss based on plaintiff's failure to respond to the 90 day notice and the court's February 9 order granting that motion (*id.* at ¶ 20). Finally, defendant claims that plaintiff's motion papers fail to provide sufficient proof of the merits of its underlying claims.

A party seeking to vacate a judgment on the basis of excusable default must demonstrate both a reasonable excuse and a meritorious defense (*see Benson Park Assocs., LLC v Herman*, 73 AD3d 464, 465 [1st Dept 2010]). Assuming arguendo that Wachtel & Masyr's motion to withdraw was deemed abandoned by virtue of their failure to settle order within 60 days, then Wachtel & Masyr would have remained plaintiff's counsel and defendant would have to serve documents upon them. This service was, in fact, made through the e-filing system. According to the "case details" section of the e-filing page associated with this action, plaintiff is represented by Evan Weintraub of Wachtel & Masyr and D. Paul Martin of Claude Castro and Associates PLLC. As such, Wachtel & Masyr has received electronic notifications for every document e-filed in this action, even those

filed after their motion to withdraw as counsel was granted. This means that even though defendant's notice of motion to dismiss for failure to prosecute the action, which was e-filed in January of 2010, was addressed directly to plaintiff, Wachtel & Masyr received electronic notification of these filings. Thus, regardless of whether Wachtel & Masyr technically remained plaintiff's counsel of record in this action due to its failure to timely submit a proposed settle order as directed by the court's order granting Wachtel & Masyr's motion to withdraw, plaintiff's default was not excusable because both plaintiff and its purported counsel had received notice of the motion to dismiss. Moreover, in support of the instant motion, plaintiff relies solely upon the affirmation of its present counsel, who lacks personal knowledge of the facts surrounding plaintiff's default.

Even if a reasonable excuse for plaintiff's default had been shown, plaintiff must also demonstrate the merits of its underlying claims in this action (*see Benson Park Assoc., LLC v Herman*, 73 AD3d 464, 465 [1st Dept 2010]). Generally, the party seeking to vacate a judgment entered on its default must provide an affidavit of merits from either the party or someone else with first-hand knowledge (*see Siegel*, NY Prac § 108). Plaintiff, however, submits only an affirmation of its present attorney, which has no probative value because there is nothing to indicate that the attorney has any first-hand knowledge of the facts at issue in this case. Plaintiff's attorney does attach as an exhibit to his affirmation copies of an affidavit of Peter Aytug, dated November 12, 2008, which was submitted in connection with plaintiff's prior unsuccessful motion for summary judgment (Doc. 31-4, Aytug affid.). None of the exhibits referred to in the Aytug affidavit are included.

Although plaintiff and Wachtel & Masyr had notice of the court's order granting defendant's motion to dismiss in February 2010, plaintiff did not move to vacate within the one-year period provided by CPLR 5015 (a) (1). Furthermore, plaintiff fails to provide any explanation for this delay.

In light of the above, plaintiff's new attorney's focus on the purported defects of the court's prior orders is unavailing. Plaintiff claims that "substantial error was committed" when plaintiff was "deprived on the statutorily mandated 30 day stay when its prior counsel withdrew as counsel from this case ...," that Wachtel & Masyr's motion to withdraw must be deemed abandoned as a matter of law since a proposed order with notice of settlement was not submitted within 60 days, and that defendant's motion to dismiss was not properly served, "thereby depriving this [c]ourt of jurisdiction" (Doc. 34, Castro reply affirm. at ¶ 2). However, none of the "errors" listed by plaintiff have any bearing on the following undisputed facts: (1) plaintiff knew that its former counsel, Wachtel & Masyr, was filing a motion to withdraw as a result of plaintiff's failure to timely pay its legal fees and due to a lack of communication; (2) no actions were taken in the 30-day period after Wachtel & Masyr's motion to withdraw were granted; (3) plaintiff was served with a 90-day and did nothing in response; (4) after expiration of the 90-day period, defendant moved to dismiss for failure to prosecute, serving papers directly upon plaintiff and electronically upon Wachtel & Masyr through the e-filing system; (5) upon plaintiff's default, defendant's motion was granted, directing defendant to serve plaintiff with a copy of the order and notice of entry; (6) plaintiff was served pursuant to the court's February 9, 2010 order, and Wachtel & Masyr received electronic notification through the e-filing system; and (7) notwithstanding actual receipt of this order, plaintiff took no steps to vacate it until June of 2011.

Accordingly, it is

ORDERED that plaintiff's motion to vacate the prior order of this court, dated February 9, 2010, is denied in its entirety.

This constitutes the decision and order of the court.

Dated: February 22, 2012
New York, New York



J.S.C.