

Ju Eun Jang v All Mobile Video, Inc.

2014 NY Slip Op 30933(U)

April 8, 2014

Supreme Court, New York County

Docket Number: 116650/09

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Index Number : 116650/2009
JANG, JU EUN
vs
ALL MOBILE VIDEO
Sequence Number : 005
VACATE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for Vacate judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

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

Dated: 4/8/14

FILED
APR 11 2014
COUNTY CLERK'S OFFICE
NEW YORK

HON. ARLENE P. BLUTH 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 NY
COUNTY OF NEW YORK: PART 22**

Index No.: 116650/09
Mot. Seq. 005

**Ju Eun Jang, Kwang Ho Jang and Suk Ja Jang,
Plaintiffs,**

-against-

**All Mobile Video, Inc. and David Giangola,
Defendants.**

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Plaintiffs' motion for an order vacating Justice Silver's January 29, 2013 decision and order granting defendants' motion for summary judgment dismissing this action on default, which was reduced to a judgment dated March 15, 2013, is denied; the judgment of dismissal stands.

FILED

APR 11 2014

Procedural History

COUNTY CLERK'S OFFICE
NEW YORK

In this motor vehicle action, defendants moved for summary judgment dismissing the complaint on the grounds that none of the plaintiffs sustained a serious injury within the meaning of Insurance Law §5102(d). This motion (sequence 01) was originally returnable on July 16, 2012. At the request of plaintiffs' counsel, defendants consented to an August 27, 2012 adjournment; and then again to a September 13, 2012 adjournment. On September 13, 2012, plaintiffs' attorneys failed to appear at the calendar call, had not served any opposition papers on defendants, and the motion was marked fully submitted on default.

Plaintiffs did not move to vacate their default – they just waited. Four months later, on January 29, 2013, Justice Silver issued a decision and order granting defendants' motion on

3] default and dismissed the case¹. Defendants' attorney served a copy of this order with notice of entry and a proposed judgment with notice of settlement on plaintiffs' counsel on or about February 12, 2013. Still, plaintiffs did nothing to vacate their default for more than one month, until March 14, 2013 when plaintiffs served the instant notice of motion (returnable on April 11, 2013) and supporting papers on defendants. The Court notes that plaintiffs chose not to move to vacate their default by order to show cause. In the meantime, because there was no stay in effect, defendants' counsel appeared before the Judgment Clerk on March 15, 2013 and judgment was entered, in favor of the defendants, dismissing the complaint.

Motion to Vacate Plaintiffs' Default

To successfully vacate a default, a party must demonstrate a justifiable excuse for the default and a meritorious claim. *See Northern Source, LLC v Kousouros*, 106 AD3d 571, 966 NYS2d 377 (1st Dept 2013).

In support of this motion to vacate, Andrew Park, a partner in the firm of Sim & Park, LLP, attorneys for plaintiffs, submits a 305 paragraph affirmation in which he attempts to explain why no one from his office appeared in court on September 13, 2012, the adjourned return date of defendants' serious injury motion. Mr. Park states that Ms. Song, one of the attorneys in his office, was responsible for the motion but he does not explain why Ms. Song did not submit her own affidavit in support of the motion. In the motion folder, there is a stipulation dated April 10, 2013 adjourning the motion. That stipulation was signed by Ms. Song on behalf of Sim & Park;

¹The Court subsequently issued an amended order dated February 15, 2013 which corrected the sequence number from 003 to 001, but was otherwise identical to the original dismissal order.

[*4]
clearly she was available and would be the individual with personal knowledge of the statements made by Mr. Park.

Mr. Park states that Ms. Song “suddenly became ill which she could have not foreseen” (aff. in supp., para. 21), but he does not say when she became ill. Mr. Park further states that after returning to work, Ms. Song sent Justice Silver an ex parte letter dated September 21, 2012 (exh F to moving papers). The letter does not show via a “cc” that a copy was ever sent to defendants’ counsel, nor does Mr. Park state that a copy of the letter was sent to them. There is no indication that Justice Silver ever received it, either.

In that letter, Ms. Song stated that she was associated with the Law Offices of Andrew Park, P.C.² and “(p)rior to the return date of September 13, 2012, I suddenly became very ill and could not attend to my work responsibilities”. Significantly, she did not state on what date she became ill. Nevertheless, she requested additional time to submit opposition papers. Curiously, Mr. Park does not offer any reason why his office did not move by order to show cause back in September 2012 to vacate plaintiffs’ default, or during the four months when the motion was *sub judice*; he merely states that plaintiffs’ default was not willful or deliberate.

In opposition, defendants assert that plaintiffs’ claim of law office failure is conclusory and unsubstantiated, especially because it is unclear precisely when Ms. Song became ill. Additionally, defendants note that because in her letter Ms. Song admitted that her office had already received plaintiffs’ treating doctor’s report in late August, there would have been no basis for the court to grant an adjournment of the September 13, 2012 return date. Defendants argue

²Sim & Park, LLP have been the attorneys of record for the plaintiffs since the commencement of the action.

[*5]
that the default and failure to move to vacate it were in fact deliberate, as there is simply no excuse actual excuse.

In reply (exh A), plaintiffs submit Ms. Song's affirmation dated May 20, 2013 in which she states that she suddenly became ill on September 10, 2012 (which was a Monday) three days before the return date of the motion, and did not return to work until September 19, 2012 (aff., para. 5). No reason is given why her affirmation was not submitted in the moving papers. Ms. Song does not state that she failed to communicate with her office by telephone, email or text after becoming ill on September 10, 2012, she does not state why someone else from her office failed to appear on September 13th, she does not state why she did not move to vacate the default upon her return to the office. In any event, it was clearly the responsibility of plaintiffs' attorneys' office to make sure that someone covered the September 13 court appearance. In his moving affirmation, Mr. Park offers no reason for not having another attorney from his office appear in court, either - he does not deny knowing about the appearance and that Ms. Song was sick and unable to cover it. Nor does he explain why no one moved to vacate the default and why they just waited several months for the decision.

It is obvious that the failure to appear in court on the return date is not the only default at issue here. In her September 21, 2012 letter Ms. Song claimed that she needed an adjournment on September 13, 2013 because plaintiffs' opposition to the motion was not ready. However, she admitted that her office had received plaintiffs' treating doctor's affidavit back in August. Significantly, this conflicts with Mr. Park's statement that his office intended to seek an adjournment on September 13, 2012 because Dr. Seldes had not furnished an affidavit as of September 13, 2012 (aff. in supp., para. 10). The Court notes that the affirmations of Dr. Seldes,

6] submitted here as exhibits I, L and O are undated, and the plaintiffs' affidavits--submitted as exhibits H K, N-- were not executed until September 26, 2012, which of course is almost two weeks after the initial default.

Claims of law office failure which are conclusory and unsubstantiated cannot excuse defaults. *See Galaxy General Contracting Corp. v 2201 7th Avenue Realty, LLC*, 95 AD3d 789, 945 NYS2d 298 (1st Dept 2012). Nor are deliberate defaults as a strategy to gain more time excusable. Plaintiffs have not explained why no one appeared in court on September 13, 2012, the return date of the motion seeking to dismiss their action. The fact that the handling attorney became ill three days earlier is no excuse, especially when plaintiffs had not served any opposition papers despite several extensions. Moreover, plaintiffs have not explained why they did not promptly move by order to show cause to vacate their default in appearing on the return date of a motion seeking to dismiss their case, which is the usual and customary practice and instead waited months until a decision was entered and served upon them and then casually moved by ordinary notice of motion.

Where, as here, a party fails to offer an acceptable excuse for a default, it becomes unnecessary to determine whether a meritorious defense exists. *See Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 921 NYS2d 643 (1st Dept 2011).

Accordingly, plaintiffs' motion to vacate their default in opposing defendants' serious injury motion is denied; the judgment of dismissal stands.

This is the Decision and Order of the Court.

Dated: April 8, 2014
New York, New York



HON. ARLENE P. BLUTH, JSC

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