

Law Firm of Harry Issler, PLLC v White

2014 NY Slip Op 30959(U)

April 8, 2014

Sup Ct, New York County

Docket Number: 111273/08

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

THE LAW FIRM OF HARRY ISSLER, PLLC and
HARRY ISSLER,

Plaintiffs,

INDEX NO. 111273/08

-against-

JAMES M. WHITE,

MOTION SEQ. NO. 004

Defendant.

The following papers, numbered 1 to 3, were read on this motion by the plaintiffs to vacate an Order of this Court dated December 16, 2011 and to restore the case to the active calendar.

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

FILED
PAPERS NUMBERED
1
2
APR 16 2014
3

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

COUNTY CLERK'S OFFICE
NEW YORK

In this proceeding, the Law Firm of Harry Issler, PLLC and Harry Issler (Issler) (collectively, plaintiffs) seek to collect attorneys fees from James M. White (defendant). Before the Court is a motion by plaintiffs for an order restoring this case to the active calendar and vacating the Court's Order, dated December 16, 2011 (Prior Order or December 16, 2011 Order), and allowing plaintiffs to file papers in opposition to defendant's previous motion to dismiss. In opposition, defendant, *pro se*, cross-moves for an order dismissing the plaintiffs' motion with prejudice "pursuant to CPLR 3211(a)(prior proceedings). . . as well as an order vacating the award dated 12/17/2011¹ and filed 12/20/2001 [sic]." Thus, defendant seeks in his cross-motion to vacate the same Prior Order that the plaintiffs seek to vacate in their motion. Issler files an affidavit in response to defendant's cross-motion.

¹ The correct date of this Court Order is December 16, 2011 which was entered on December 20, 2011 (see defendant's exhibit A; see also defendant's affidavit in support, ¶ 2).

BACKGROUND

This action arises from a dispute between plaintiffs and defendant over outstanding attorneys fees from plaintiffs' representation of defendant. On August 20, 2008, the plaintiff commenced this proceeding seeking \$ 56,995.71 in fees from defendant. Pursuant to Rule 136 of the of the Chief Administrator of the Courts, the parties went to arbitration over the dispute. An arbitration hearing was held on January 26, 2010, and in a decision rendered on the same date wherein plaintiff was granted an arbitration award of \$ 41,995.71, which was found to be "reasonable under all the circumstances" (Notice of Motion, exhibit F). On or about May 13, 2010², plaintiffs filed motion sequence 001 and moved to confirm the January 26, 2010 arbitration award and for the entry of a judgment on behalf of the plaintiffs against the defendant in the sum of \$41,995.71, with interest and costs and disbursements, amounting in all to the sum of \$42,570.67. In a decision and order dated July 6, 2010, the Court granted the motion to confirm on default and instructed the plaintiffs to submit a settled order. Thereafter, plaintiffs served a notice of settlement on the defendant along with a copy of the proposed judgment. The settled order was signed by this Court on October 5, 2010 and filed on October 7, 2010. The judgment was subsequently entered with the County Clerk on October 13, 2011.

In the interim, in August 2010, plaintiffs moved their law offices from 110 East 59th Street, 25th Floor, New York, New York 10022 to 50 Sutton Place South, New York, New York. Issler proffers that plaintiffs properly informed the United States Postal Service (USPS) and the defendant about their change in address.

On or about May 25, 2011³, plaintiffs filed motion sequence 002, seeking the same relief

² See Notice of Motion (motion sequence 001) dated April 20, 2010 and entered on SCROLL on May 13, 2010.

³ See Notice of Motion (motion sequence 002) dated May 25, 2011 and entered on SCROLL on June 16, 2011.

sought in motion sequence 001, to wit, an order confirming the January 26, 2010 arbitration award. Issler asserts that he filed the same motion for the second time "because for some mysterious reason, the aforementioned judgment 'became missing' from the court file" (see Affirmation in Support ¶ 25). In opposition to plaintiffs motion, on June 20, 2011, the defendant filed a cross-motion to vacate and dismiss the arbitration award. On or about July 11, 2011, plaintiffs filed an affirmation in reply.

In a Decision and Order on motion sequence 002, dated July 27, 2011, this Court found plaintiffs' motion "is permitted to be withdrawn. Defendant's cross motion is denied as moot" as this application was redundant to motion sequence 001 which had already been granted (Notice of Motion, exhibit P). Subsequent thereto, on August 8, 2011, defendant moved by Order to Show Cause (OSC) seeking again to vacate and set aside the judgment entered against the defendant on October 5, 2010 (motion sequence 003). The return date of the OSC was September 21, 2011. The Court granted the service provisions drafted by the defendant, which required that the OSC be served upon "The Law Firm of Harry Issler, PLLC and Harry Issler, plaintiff, at his office located at 110 East 59th Street, 25th Floor, New York, New York 10022 via *certified mail and regular mail* on or before August 17, 2011" (Notice of Motion, exhibit M) (emphasis added). On September 9, 2011, defendant filed an affidavit of service with the County Clerk's office which indicated that the OSC had been served on plaintiffs at the address above, but only by regular mail (Notice of Motion, exhibit N).

On September 21, 2011, the argument date on motion sequence 003 was adjourned first to November 9, 2011 and then to December 14, 2011. At the call of the case for argument on December 14, 2011, the plaintiff did not appear and did not submit opposition papers to defendants motion. After the defendant submitted an affidavit of service of his OSC on the plaintiffs, the Court granted defendant's motion to vacate the judgment in a Decision and Order dated December 16, 2011 and entered on December 20, 2011 (Notice of Motion, exhibit R).

[* 4]

On July 25, 2013, the Clerk of the Court vacated the judgment in accordance with the December 16, 2011 Order.

On October 4, 2013, plaintiffs filed the herein motion (motion sequence 004) seeking to vacate this Court's December 16, 2011 Order, and allowing the plaintiffs to submit papers in opposition to the defendant's prior motion to vacate brought in motion sequence 003.

DISCUSSION

In support of this motion, Issler proffers that he was not served with defendant's OSC (motion sequence 003) which is why he did not appear in Court or submit papers in opposition addressing the allegations in the OSC. He asserts that this Court required defendant's August 8, 2011 OSC to be served upon the plaintiffs by certified mail and first class mail, yet defendant only sent it by regular mail (see Notice of Motion, exhibit N). Issler asserts that he moved his law office in August 2010, more than one year before defendant allegedly served him with the OSC by regular mail at his former office address at 110 E 59th Street, 25th floor, New York, New York (*see id.*), and in his affidavit that his law office was properly listed with the USPS as 50 Sutton Place South, New York, New York. Moreover, Issler states that he sent notice of his address change to defendant prior to August 1, 2010. Plaintiff also states that while this Court granted defendant's motion on December 16, 2011 and ordered defendant to serve the County Clerk with a copy of the Order, defendant did not do so until July 25, 2013, almost two years from the date of this Court's decision.

In opposition defendant asserts, *inter alia*, that he sent Issler copies of his papers at the address he knew to be his last place of business, which was 110 E 59th Street, 25th floor, New York, New York. Defendant maintains that Mr. Harlan B. Thompson, who formerly represented Issler, still occupies this space and had continued to forward Issler's mail. However, defendant does not address plaintiffs' argument regarding his failure to comply with the service provisions in his OSC.

* 5]

"It is well established that in order to obtain relief from a judgment or order on the basis of an excusable default pursuant to CPLR 5015 (a) (1), the moving party must provide a reasonable excuse for the failure to appear and must further demonstrate that the case or defense has merit" (*Carroll v Nostra Realty Corp.*, 54 AD3d 623, 623 [1st Dept 2008]; see *Goldman v Cotter*, 10 AD3d 289 [1st Dept 2004]; *Mediavilla v Gurman*, 272 AD2d 146 [1st Dept 2000] ["a party must provide a reasonable excuse for the failure to appear and demonstrate the merit of the cause of action or defense"]; *Benson Park Assoc., LLC. v Herman*, 73 AD3d 464, 465 [1st Dept 2010]). The determination of the sufficiency of the offered excuse rests within the sound discretion of the court (see *Goldman*, 10 AD3d at 291; *Mediavilla*, 272 AD2d at 148). Similarly regarding 22 NYCRR § 202.27, "[a] court should vacate a default upon the showing of a meritorious claim and a reasonable excuse for failure to appear" (*Goodwin v New York City Hous. Auth.*, 78 AD3d 550 [1st Dept 2010]; *Jones v New York City Hous. Auth.*, 13 AD3d 489 [2d Dept 2004]).

It is undisputed that defendant failed to comply with the service provisions in his OSC dated August 8, 2011 by failing to satisfy the certified mail service requirements. Defendant's failure to comply with the service provisions requires vacatur of the order granting his application (see *Matter of Rotanelli v Board of Elections of Westchester County*, 109 AD3d 562, 562 [2d Dept 2013] ["the method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with"]). Further, the plaintiffs had moved their law office to a new address more than a year prior to defendant's alleged service of the OSC on plaintiffs. Thus, plaintiffs' assertion that they were not given notice by defendant of his motion is a reasonable excuse for failing to appear. Moreover, plaintiffs have asserted a meritorious claim. As such, plaintiffs have met their burden to establish that vacatur of this Court's Prior Order dated December 16, 2011 and entered on December 20, 2011, is warranted (see *Goodwin*, 78 AD3d at 550). Accordingly, the Judgment entered on October 13, 2011 in

favor of plaintiffs and against the defendant shall be restored and granted full force and effect.

CONCLUSION

Accordingly and upon the foregoing papers, it is,

ORDERED that the portion of plaintiffs' motion for an Order vacating the Court's Order, dated December 16, 2011 is granted, and the Order of this Court dated December 16, 2011 and entered on December 20, 2011 is hereby vacated; and it is further,

ORDERED that the Judgment entered with the Judgment Clerk on October 13, 2011 in favor of the plaintiffs and against the defendant is restored and granted full force and effect; and it is further,

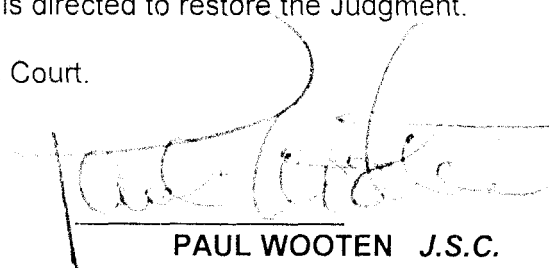
ORDERED that the portion of plaintiffs' motion allowing the submission of opposition to the defendant's previous motion to vacate the judgment is denied moot; and it is further,

ORDERED that defendant's cross-motion to dismiss the Court's Order, dated December 16, 2011 with prejudice, pursuant to CPLR 3211(a), is denied; and it is further,

ORDERED that plaintiffs' are directed to serve a copy of this Order with Notice of Entry upon defendant and upon the Clerk of the Court who is directed to restore the Judgment.

This constitutes the Decision and Order of the Court.

Dated: 4-8-14


PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: : DO NOT POST REFERENCE

FILED

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