

Lender v Rausher

2014 NY Slip Op 33831(U)

May 12, 2014

Supreme Court, Nassau County

Docket Number: 601222/13

Judge: James P. McCormack

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

_____ x

KEITH LENDER,

Plaintiff(s),

-against-

DANIEL ERIC RAUSHER, ESQ.

Defendant(s).

_____ x

TRIAL/IAS, PART 40
NASSAU COUNTY

Index No.: 601222/13

Motion Seq. No.: 002
Motion Submitted: 2/26/14

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....X
- Affirmation in Opposition/Supporting Exhibits.....X
- Reply Affirmation.....X

Defendant moves for an Order vacating a default judgment pursuant to CPLR § 5015(a), granting Defendant time to interpose an Answer, compelling Plaintiff to accept the Answer, and setting the matter down for a Preliminary Conference. Plaintiff opposes Defendant’s application.

This is an action sounding in legal malpractice. Plaintiff hired Defendant, an attorney, to represent him in a personal injury matter in 2006. Plaintiff claims Defendant’s negligent handling of the personal injury matter resulted in the case being dismissed and plaintiff being unable to recover for his injuries. Plaintiff then commenced

the within malpractice action by service of a Summons and Complaint dated May 15, 2013. Annexed to Plaintiff's moving papers are two affidavits of service, one indicating service by mail of the Summons and Complaint dated May 16, 2013, and one indicating personal service on a personal of suitable age at Defendant's place of business on June 28, 2013. When Defendant failed to serve an Answer, Plaintiff's counsel made attempts to call Defendant. By letter to Defendant dated July 25, 2013, Plaintiff indicated an Answer must be filed within seven days or Plaintiff would move for a default. Defendant did not respond. Plaintiff brought a motion for a default judgment and the application was granted by this Court on October 23, 2013. The within motion was then filed on or about November 26, 2013, at least four months after service of the Summons and Complaint.

To successfully vacate a default judgment pursuant to CPLR § 3215, Defendant must establish a reasonable excuse for the default and a meritorious defense. *Baldwin v. Mateogarcia*, 57 A.D.3d 594 (2nd Dept. 2008), *Swedish v. Beizer*, 51 A.D.3d 1008 (2nd Dept. 2008). Herein, Defendant offers a number of excuses including a type of law office failure excuse. Defendant does not blame an attorney who represented him, but his own errors as an attorney. Defendant claims he suffered a "significant automobile accident" on July 14, 2013 that caused him to miss three months of work and that both before and after the accident he was out of New York State "due to family health reasons and professional obligations". He further states that, as a sole practitioner, he was

“overwhelmed” by his trial calendar and that he had trouble “identifying and obtaining appropriate counsel”. Defendant offers to discuss his medical issues with the Court “*in camera*”.

The determination of the reasonableness of an excuse lies within the discretion of the court. *Glukhman v. Bay 49th St. Condominium, LLC* 100 A.D.3d 594 (2nd Dept. 2012). While illness of counsel can constitute a reasonable excuse, *Chery v. Anthony*, 156 A.D.2d 414 (2nd Dept. 1989), such allegations must be substantiated, *Tuthill Fin., L.P v. Ujeta* 102 A.D.3d 765 (2nd Dept. 2013), *Farm Credit Leasing Servs. Corp., v. Rubashkin*, 107 A.D.3d 663 (2nd Dept. 2013). Herein, Defendant offers no substantiation for his claim of injuries or incapacitation due to a serious car accident, or illness as a result of vague, unstated medical conditions. There is no statement regarding hospitalizations, or the dates he needed to be out of the state. While the Court understands Defendant’s wish for some privacy regarding his medical conditions, some indication of what was preventing him from responding to the Complaint is necessary to excuse his failure. He offers none.

Regarding law office failure, to qualify as a reasonable excuse, counsel must provide “detailed allegations of fact explaining the law office failure,” *HSBC Bank USA, Nat. Ass’n v. Wider*, 101 A.D.3d 683 (2nd Dept. 2012), citing *Cantor v. Flores*, 94 A.D.3d 936. Defendant’s affidavit is devoid of detailed factual allegations which would substantiate his claim of law office failure. *St. Luke’s Roosevelt Hosp. V. Blue Ridge Ins.*

Co, 21 A.D.3d 946 (2nd Dept. 2005). Defendant simply states a heavy calendar overwhelmed him. He offers nothing else in support of this statement. See *Ortega v. Bisogno & Myerson*, 38 A.D.3d 510 (2nd Dept. 2007).

In light of the foregoing, the Court finds Defendant's assertions of medical issues, personal issues and law office failure insufficient reasonable excuses to support vacating the default judgment.

As the court finds the reasonable excuse is not valid, there is no reason to address the issue of a meritorious defense. *Cantor v. Flores*, supra.

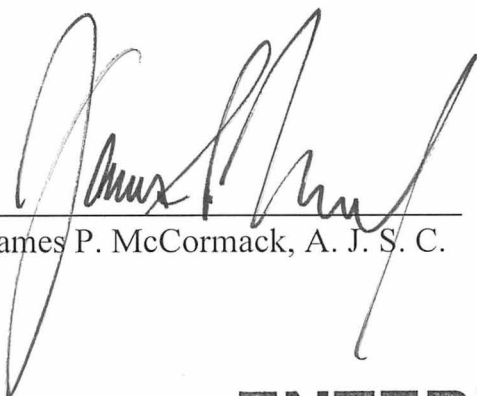
Accordingly, it is hereby;

ORDERED, that the Defendant's motion to vacate the default pursuant to CPLR § 5015(1) and other relief is DENIED in its entirety; and it is further

ORDERED, that all findings and directives contained in the Order of this Court dated October 23, 2013, remain in full force and effect.

The foregoing constitutes the Decision and Order of the Court.

Dated: May 12, 2014
Mineola, N.Y.



Hon. James P. McCormack, A. J. S. C.

ENTERED

MAY 14 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE