

Anron Heating & Air Conditioning, Inc. v AMCC Corp.

2015 NY Slip Op 30215(U)

January 26, 2015

Supreme Court, Bronx County

Docket Number: 302331/11

Judge: Laura G. Douglas

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 11

Index No. 302331/11
Motion Calendar No.
Motion Date:

ANRON HEATING AND AIR CONDITIONING, INC.,
on behalf of itself and all other persons entitled to share in
funds received by AMCC Corp. from the New York City
School Construction Authority in connection with the
Public Improvement known as Bronx Studio School for
Writers & Artists, Solicitation No. SCA07-07942D,
Contract No: C000010219,

Plaintiff,

-against-

DECISION/ORDER

Present:
Hon. Laura G. Douglas
J.S.C.

AMCC CORP., CHARLES MARINO, LIBERTY MUTUAL
INSURANCE COMPANY, NEW YORK CITY SCHOOL
CONSTRUCTION AUTHORITY, FRANCO BELLI
PLUMBING AND HEATING AND SONS, INC.,
J.C. RYAN EBCO/H&G LLC, JORDAN PANEL SYSTEMS
CORP., J.S. McHUGH, INC., and OLD WORK QUALITY
DESIGNS CORP.,

Defendants.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to strike answer and/or preclude, for an award of costs and sanctions, and for default judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion by Defendants AMCC Corp., Charles Marino, and Liberty Mutual Insurance Company, Affidavit of Charles Marino dated December 16, 2013, Affirmation of Allen J. Ross, Esq. dated December 16, 2013, and Exhibits ("A" through "Q").....	1
Memorandum of Law dated December 16, 2013 by Jose A. Aquino, Esq. in Support of Defendants' Motion to Renew.....	2
Affirmation of Michael Mattia, Esq. dated January 14, 2014 in Opposition to Motion and Exhibits ("1" through "27")	3
Memorandum of Law dated January 13, 2014 by Michael Mattia, Esq. in Opposition to Motion.....	4

Affidavit of Paul Belli dated January 13, 2014 in Opposition to Motion and Exhibits (“A” through “R”)..... 5

Reply Affidavit of Charles Marino dated January 29, 2014 and Exhibits (“A” through “D”)..... 6

Reply Affirmation of Allen J. Ross, Esq. dated January 30, 2014 and Exhibit (“A”)..... 7

Reply Affirmation of Frederick Cohen, Esq. dated January 29, 2014..... 8

Reply Memorandum of Law dated January 30, 2014 by Jose A. Aquino, Esq..... 9

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

Defendants AMCC Corp., Charles Marino, and Liberty Mutual Insurance Company (collectively, “AMCC”) seek an order renewing the motion made by defendant Franco Belli Plumbing and Heating and Son’s, Inc. (“Belli”) to strike AMCC’s reply to Belli’s cross-claims and, upon renewal, denying that motion in its entirety. Belli’s motion was granted by this Court’s Order dated November 22, 2013, which awarded Belli a default judgment on its cross-claims against the AMCC defendants. The motion to renew is granted and, upon renewal, the Court adheres to its original decision.

Upon AMCC’s failure to comply with the initial discovery order in this case, this Court issued a further order, dated January 4, 2013, subjecting the AMCC defendants to certain penalties should they fail to produce the items at issue. When AMCC again failed to comply, their reply to Belli’s cross-claims was stricken by this Court’s order dated November 22, 2013.

Counsel for AMCC contends that the law firm was unaware of the discovery orders directing AMCC to furnish certain items to Belli, or of the penalties for failing to comply. AMCC and its counsel attribute their failure to comply with the discovery orders entirely to the handling attorney. The AMCC defendants aver that they first learned of the defaults in mid-June 2013. Thereafter, they submitted certain discovery to Belli, but it was rejected as untimely and incomplete.

The renewal motion is based upon the medical reports of Eric Goldsmith, M.D. dated August 2, 2013 and January 30, 2014, which did not exist at the time that Belli’s motion was submitted on May 22, 2013. Dr. Goldsmith is a psychiatrist who examined the handling attorney in late July 2013. Essentially, AMCC contends that it was only after Belli’s motion was submitted that they learned through Dr.

Goldsmith that their defaults in this litigation were “attributable solely to the debilitated mental state of their attorney assigned to this litigation”. The Court will consider the merits of this newly discovered fact.

Essentially, Dr. Goldsmith’s reports detail certain mental health conditions which are said to have impaired the handling attorney’s ability to function as a litigation attorney, particularly in handling matters for AMCC. The AMCC defendants argue that they should not bear the brunt of the penalty for their attorney’s inability to function due to illness, and that the defaults could not have been willful or contumacious given the attorney’s mental health condition.

In opposition to the instant motion, Belli notes that over the course of almost two years, it made attempts to secure discovery from the AMCC defendants through verbal requests, written discovery demands, letters, court conferences, and motion practice, all to no avail. Belli highlights that three distinct court orders were issued to secure AMCC’s compliance, at considerable time and effort by counsel and by this Court. Belli also points out that AMCC’s response to Belli’s interrogatories was not served until after this motion to renew was filed.

Belli also notes that other attorneys appeared at discovery conferences on AMCC’s behalf, where they were made aware of the outstanding discovery. In fact, AMCC acknowledges that the handling attorney’s failure to furnish documents was brought to the attention of a partner in the law firm representing AMCC in December 2012, who simply accepted the handling attorney’s word that the matter had been “taken care of”. (Cohen Reply Affirmation, paragraphs 6-7).

The mental illness of a party’s attorney can serve as a reasonable excuse to vacate a default where the illness is corroborated by medical documentation (*see Norowitz v. Ponconco*, 96 AD2d 581 [2nd Dept 1983] and *Weitzenberg v. Nassau County Department of Recreation and Parks*, 29 AD3d 683 [2nd Dept. 2006]). In *Weitzenberg*, the defendants’ default was vacated and their answer reinstated where the attorney’s mental illness was corroborated by an affidavit from his psychiatrist, and the mental illness was considered a reasonable excuse for the underlying defaults and affected his ability to function.

Here, however, the history of AMCC’s failure to furnish discovery does not substantiate its claim that the defaults occurred exclusively during a time when the handling attorney was impaired (*see Chery v. Anthony*, 156 AD2d 414 [2nd Dept 1989]). AMCC’s failure to furnish discovery predates the handling attorney’s alleged illness. The only time frame given by Dr. Goldsmith for the handling attorney’s impairment is the period volunteered by the attorney himself - that he had problems with the timeliness and completeness of some filings and documents “over the past 8-12 months”, from July 15, 2012 at the earliest to November 15, 2012 at the latest. Belli’s original discovery notice was served upon AMCC on

February 10, 2012. Multiple parties, including Belli, moved to penalize AMCC for the failure to furnish discovery. Belli's motion was returnable on May 10, 2013. The compliance conference order dated August 2, 2012 directed AMCC to produce the subject discovery. No explanation is given for neglecting these discovery demands, which appear to predate the onset of the handling attorney's impairment.

Dr. Goldsmith's initial submission, an unaffirmed narrative report dated August 2, 2013, states that the handling attorney, during this period, "evidenced a delayed response in his filings to opposing counsel . . . and he avoided interactions with his client". In addition, Dr. Goldsmith noted that "[a]s time advanced, [the handling attorney's] condition deteriorated to such an extent that he dreaded professional contact with his clients and adversaries". Finally, Dr. Goldsmith concludes that the handling attorney's condition "adversely affected his ability to function as a litigation attorney".

Belli's counsel correctly notes that the handling attorney was able to complete many litigation functions during this period, such as making and opposing motions and drafting legal briefs, as well as successfully litigating other cases. These facts belie Dr. Goldsmith's assertions. In addition, left unaddressed by Dr. Goldsmith is how the handling attorney was able to secure and furnish some items of discovery from AMCC in this very case.

In response, Dr. Goldsmith's reply affidavit retracts his initially broad and wide-ranging contentions regarding the handling attorney's inability to function. Instead, Dr. Goldsmith defines the handling attorney's impairment as affecting not his "ability to function as a litigation attorney" or his "interaction with his client [AMCC]" or even complying with discovery, but narrowly "having to make substantial requests from his client for discovery documents". Rather than "avoiding interactions with his client [AMCC]" and having a diminished ability to function as a litigation attorney, Dr. Goldsmith now states that the handling attorney was "able to file and oppose motions, effectively perform some legal functions with respect to numerous discovery conferences and motions before [this Court], and successfully defend and interact with AMCC in other litigations". Apparently, the handling attorney was impaired only when he needed to contact AMCC "repeatedly" because he was unable to "cope with what he perceived would be overwhelming negative responses from [AMCC] in the context of a request for discovery materials". Nowhere does Dr. Goldsmith state what would be considered "substantial" discovery requests or "repeated" contact with AMCC. Conspicuously absent from the motion's supporting papers is an affidavit from the handling attorney verifying Dr. Goldsmith's contentions. The Court cannot defer to the medical reports in light of these material omissions.

Finally, AMCC's counsel concedes that it first learned of the handling attorney's noncompliance

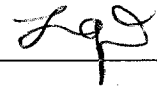
in mid-June 2013 (see Ross Reply Affirmation, paragraph 5). AMCC's counsel contend that responsive documents were then produced to Belli, but were rejected as untimely. However, AMCC presents no proof to document such exchange. Belli acknowledges that AMCC served a response to Belli's interrogatories on December 27, 2013, some six months after AMCC knew about the noncompliance. Correspondence from Belli's counsel reveals that AMCC's earliest attempt at rectifying the noncompliance was July 10, 2013. It appears that AMCC took no immediate action to cure their default. No explanation is given for the delay in bringing the appropriate application upon the discovery of the attorney's purported impairment.

Finally, other attorneys worked on this case for AMCC and made court appearances on its behalf. A partner at the handling attorney's firm was advised of the outstanding discovery, yet decided to simply rely on the handling attorney's assurances, without any personal verification, that the matter had been resolved. The disregard of these attorneys is not excused by any impairment suffered by the handling attorney.

The foregoing constitutes the Decision and Order of this Court.

DATED:

1-26-15
Bronx, New York



HON. LAURA G. DOUGLAS
J.S.C.