

AFB Freight Sys. v Catalano
2015 NY Slip Op 31475(U)
August 5, 2015
Supreme Court, New York County
Docket Number: 154765/2014
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
*Justice*PART 7In the Matter of the Application of AFB FREIGHT
SYSTEMS,

Petitioner,

INDEX NO. 154765/14

-against-

MOTION SEQ. NO. 002

GARY CATALANO,

Respondent.

The following papers were read on this motion by respondent to vacate a default judgment.

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

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: ☐ Yes ☒ No

Gary Catalano (respondent) moves, pursuant to CPLR 5015, to vacate a previous Order of this Court dated June 7, 2014 and entered on June 10, 2014, in which this Court granted petitioner's request for a stay of arbitration, on default pursuant to 22 NYCRR § 202.27, due to the fact that respondent did not submit opposition papers and for his failure to appear at the call of calendar for oral argument on June 4, 2014. Petitioner submits opposition to respondent's motion.

Pursuant to CPLR 5015(a)(1), "a party seeking to vacate a judgment on the basis of excusable default must demonstrate both a reasonable excuse and a meritorious defense" (*Benson Park Assoc., LLC v Herman*, 73 AD3d 464, 465 [1st Dept 2010]; see also *Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co.*, 67 NY2d 138, 141 [1986]; *Goldman v Cotter*, 10 AD3d

289 [1st Dept 2004]). The determination of the sufficiency of the offered excuse rests within the sound discretion of the court (*see Goldman*, 10 AD3d at 291).

In support of his application respondent submits the affidavits of Jeffrey Hitchings (Hitchings), an associate at Vinal & Vinal representing respondent, and Heather Sherman (Sherman), the office manager at Vinal & Vinal, in support of his motion. In his affidavit Hitchings stated that upon receiving the Order to Show Cause (OSC), he called opposing counsel to request an adjournment and was given consent to adjourn without a condition (Hitchings Affidavit, exhibit I, p.1). Hitchings also stated he later became aware of opposing counsel's condition to the adjournment but that he did not address it as he believed there was an existing valid agreement between the parties to adjourn. Further, Hitchings thought that another attorney in the office or Sherman would handle the matter from thereon (Hitchings Affidavit in Opposition to Petitioner's Response, p. 4). Sherman states in her affidavit that after speaking to opposing counsel and faxing over the stipulation for an adjournment she did not take further action because she believed Hitchings would take over (Sherman Affidavit, exhibit J, p. 2).

Both affidavits discussed above indicate there was a lack of communication in the office and that respondent's attorneys all believed the adjournment was being handled, which amounts to law office failure. Respondent demonstrated that his failure to respond to petitioner's Order to Show Cause and appear at the call of the calendar for argument on June 4, 2014 "was not wilful, but was purely the result of a misunderstanding by his counsel that is tantamount to law office failure" (*Santiago v Valentin*, 125 AD3d 459, 459-460 [1st Dept 2015]; *see also Berry v Hand in Hand Prop. Corp.*, 2013 NY Slip Op 33545[U] [Sup Ct, NY County 2013] [Court found reasonable excuse on the basis of law office failure where defendant believed counsel for plaintiff agreed to an adjournment, however defendant did not prepare a stipulation for such and no adjournment ensued]).

Furthermore, the affidavits submitted by respondent demonstrate that he has a potentially meritorious defense that his injuries fall within No-Fault coverage. Respondent alleges his injuries arose out of the use or operation of a motor vehicle within the meaning of the No-Fault statute because he was allegedly injured while unloading items from petitioner's delivery truck. Insurance Law provides that a person is entitled to first-party benefits from the insurer of a vehicle "for loss arising out of the use or operation . . . of such motor vehicle" (Insurance Law § 5103[a][1]). While "use or operation" is not defined in the statute "(cf. Insurance Law 5102), but the Mandatory Personal Injury Protection Endorsement required by the regulations implementing the no-fault statute states that 'use or operation of a motor vehicle . . . includes the loading or unloading of such vehicle' (11 NYCRR 65.12[e])" (*Walton v Lumbermens Mut. Cas. Co.*, 88 NY2d 211, 213 [1996]). Here, respondent asserts a potentially meritorious defense that his injuries qualify under no fault on the basis that the vehicle was the proximate cause of his injuries, and his injuries would not have occurred if he were not on petitioner's truck preparing to unload items. Under the above circumstances, and "[i]n light of the strong public policy in favor of deciding cases on their merits" the default judgment entered against the respondent should be vacated (*Santiago*, 125 AD3d at 459).

CONCLUSION

Accordingly, it is

ORDERED that respondent Gary Catalano's motion, pursuant to CPLR 5015(a) to vacate a previous Order of this Court dated June 7, 2014 and entered on June 10, 2014, is granted; and it is further,

ORDERED that petitioner's previous motion is hereby restored to the active calendar; and it is further,

ORDERED that respondent Gary Catalano shall submit opposition papers, if any, to petitioner's original motion to petitioner and the Court by August 14, 2015; and it is further,

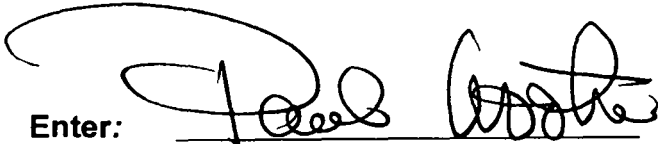
ORDERED that petitioner is directed to submit hard copies of its original papers to the Court by September 25, 2015; and it is further,

ORDERED that respondent shall serve a copy of this Order with Notice of Entry upon the petitioner and the General Clerk's Office, which is directed to restore this matter to the active calendar; and it is further,

ORDERED that the parties are directed to appear for oral argument on petitioner's motion in Part 7, 60 Centre Street, Room 341 on September 30, 2015 at 9:30 a.m., and the General Clerk's Office is directed to calendar the motion accordingly.

This constitutes the Decision and Order of the Court.

Dated: 8/5/15

Enter: 
PAUL WOOTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: : ☐ DO NOT POST ☐ REFERENCE