Mignone v Tequipment, Inc.
2016 NY Slip Op 30480(U)
March 8, 2016
Supreme Court, New York County
Docket Number: 154799/2013
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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MICHAEL MIGNONE, JUSTIN DELLUOMO, PETER SCHIFANO, JOHN MAGUIRE, LOUIS MAGLIO, GREG GONZALEZ, JASON INFANTE, JOSEPH DOIRIN, AND ERIC MONSERRATE,

Plaintiffs,

-against-

TEQUIPMENT, INC., ROBERT SUGARMAN, DAMIAN SCARFO, VITO SCAGLIONE, RICK RODRIGUEZ, AND FRANK SMITH,

Defendants.

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DECISION AND ORDER

Index Nos. 154799/2013
Mot. Seq. 001

HON. ANIL C. SINGH, J.:

Plaintiffs move pursuant to CPLR 4403 and 22 NYCRR 202.44(b) for an order: a) to vacate the dismissal of the above-entitled action, and b) to restore the case to the pre-trial calendar.

Background

On May 23, 2013, plaintiffs commenced action by filing a complaint against defendants. Plaintiffs filed an RJI and Request for a Preliminary Conference on August 13, 2013. The parties then exchanged document demands and

Interrogatory requests; exchanged documents and Interrogatories; and sought supplemental discovery.

This Court scheduled a Preliminary Conference for March 12, 2014, and with no side being present, adjourned the matter to May 7, 2014. On May 7, 2014, the Preliminary Conference was called, but again with no side being present, this Court adjourned the matter to August 27, 2014. On August 27, 2014, this Court, *sua sponte*, dismissed the action pursuant to 22 NYCRR 202.27.

It is axiomatic that a party seeking to vacate a judgment on the basis of excusable default pursuant to Section 22 NYCRR 202.27 must demonstrate both: (a) reasonable excuse and, (b) a meritorious cause of action (Benson Park Associates, LLC v. Herman, 73 A.D.3d 464, 465 [1st Dept., 2010]).

In considering whether to exercise its discretion to vacate the judgment, the court must consider such relevant factors as the extent of the delay, prejudice or lack of prejudice to the opposing party and lack of willfulness, as well as the strong public policy in favor of resolving cases on the merits (Smith v. Getty Petroleum Marketing, Inc., 103 A.D.3d 790, 791 [2d Dept., 2013]).

Plaintiffs have asserted that the judgment should be vacated on the basis of an excusable default on a minimal showing of the potential merit of the cause of action. (CPLR 5015[a][1]). Although both parties did not attend all three

scheduled Preliminary Conferences, plaintiffs have the obligation to prosecute the case. Plaintiffs filed an RJI and Request for Preliminary Conference on August 13, 2013. It was not until fifteen months after the Court dismissed the case on August 27, 2014, that the plaintiffs sought to restore the case and to place the action on the trial calendar, on November 5, 2015.

"The determination of whether an excuse is reasonable in any given instance is committed to the sound discretion of the motion court." (Sarker Business Systems, Inc. v. City Builders, Inc., 2015 WL 2090366, 1 [N.Y. Sup. 2015]), see also (Giglio v NTIMP, Inc., 86 AD3d 301, 308 [2d Dept 2011]). Plaintiffs state that the reason for waiting fifteen months after the case had been dismissed to file a motion to vacate the dismissal was because of the number of parties and the difficulty in scheduling everyone's Examinations Before Trial ("EBT's"). Plaintiffs were awaiting notification of the Preliminary Conference date to work out a schedule for the EBT's.

Although plaintiffs took an extraordinarily long time, fifteen months after the date of the dismissal, to file this motion, the court finds excusable default.

Both parties state that that did not receive notice that the Preliminary Conference was scheduled. It was not incumbent on plaintiffs' adversary to advise plaintiffs that the action had been dismissed. (Brown v AP & ASBP Holding Co., Inc., 22 AD3d 416 [1st Dept 2005]). Although, defendants fault plaintiffs' counsel

for not learning about the dismissal sooner, they themselves were not aware of it either, and clearly could not have relied on it. In fact, defendants agreed to set up a Preliminary Conference by email as late as October 05, 2015. [Plaintiff's Exhibit A]. When there is no pattern of delay, the excuse is very specific, and there is no operative prejudice, plaintiffs here have established a reasonable excuse for not appearing at the Conference. See, (Bowman v. Beach Concerts, 50 A.D.3d. 391 [1st Dept. 2008]).

A motion to restore requires a minimal showing of potential merit. (Levy v. NYCHA, 287 AD2d 281 [1st. Dept. 2001]) (granting motion to restore case based on lesser showing on merits as compared to defending motion for summary judgment). Plaintiffs allege that they were wrongfully terminated from the defendant's employment. Plaintiffs have demonstrated the merits of this action. The verified complaint alleges at paragraph 78-85 that plaintiffs were required to drill into asbestos filled walls in public and private schools in New York City. Plaintiffs contend that when they objected to their hazardous working conditions, they suffered retaliation from defendants, resulting in termination in violation of New York's Labor Law. As such, Plaintiffs have plainly demonstrated that their Labor Law claims have potential merit.

Dismissal was not based upon a single inadvertent failure to appear at a Preliminary Conference but the fact that both plaintiffs and defendants did not

appear for all three Conferences demonstrates that there had been a miscommunication. A generalized assertion of law office failure can constitute "good cause" to vacate a default in light of this Court's strong public policy in favor of resolving matters on the merits. (Lamar v. NYC, 68 AD3d 449, [1st. Dept. 2009]). Here, plaintiffs have shown good cause to vacate the dismissal because both plaintiffs and defendants failed to appear in Court. It appears clear that the parties were not on notice that the case had been dismissed. The parties sought to continue the litigation.

Accordingly, it is hereby

ORDERED that a plaintiff's motion to vacate the dismissal of this action and restore the case to the pre-trial calendar is granted and it is further

ORDERED that this case does not meet the threshold for the Commercial Division, therefore this case is reassigned to a General IAS Part.

Date: March 8, 2016
New York, New York

Anil C. Singh