

Smolen v Hernandez
2017 NY Slip Op 31745(U)
August 17, 2017
Supreme Court, New York County
Docket Number: 157617/2016
Judge: Paul A. Goetz
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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ
J.S.C.
Justice

PART 22

DANA SHOLEN
-v-
ADAM L. HERNANDEZ, ET AL

INDEX NO. 157617/2016
MOTION DATE _____
MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits <u>(MSU1)</u> <u>(MSU2)</u>	No(s).	<u>1</u>	<u>1</u>
Answering Affidavits — Exhibits _____	No(s).	<u>2+3</u>	<u>2</u> <i>corrected</i>
Replying Affidavits _____	No(s).	<u>4</u>	<u>3</u>

Upon the foregoing papers, it is ordered that this motion is

Plaintiff's motion for a default judgment pursuant to CPLR § 3215 (MSN 1) and Defendants Adam L. Hernandez and Starushka Taxi Inc.'s (Defendants Downtown Taxi Management LLC and Bundi Cab Corp. have not submitted any opposition and have not appeared in this action) order to show cause to compel acceptance of their late answer and to stay the action pending completion of the criminal case against Hernandez (MSN 2) are consolidated for decision herein and Plaintiff's cross motion to the order to show cause for sanctions are decided as follows:

Default and Compel Acceptance of Late Answer

Counsel for Hernandez and Starushka Taxi aver in support of their order to show cause that the they were unable to timely answer, in part, because the carrier was confirming coverage. Citing *Helper v Dan's Supreme Supermarket, Inc.* (92 AD2d 561 [2nd Dept 1983]) Plaintiff argues that the excuse that the carrier needed more time to interpose an answer is insufficient as a matter of law. While that portion of *Helper* finding that delays caused by the carrier to confirm coverage is akin to law office failure may still be good law, that portion of the decision holding that law office failure is insufficient as a matter of law to

Dated: AUG 17 2017 1015 _____, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

-v-

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

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establish good cause to compel acceptance of a late answer is not. In support of its holding, the Court in *Helfer* cites inter alia *Eaton v Equitable Life Assur. Soc. of US* (56 NY2d 900). In *Tewari v Tsoutsouras* (75 NY2d 1 [1989]), the Court of Appeals questioned the continued validity of *Eaton*. Moreover, other than a 1985 case from the Third Department (*N. MacFarland Builders, Inc. v Raymond E. Kelley, Inc.*, 107 AD2d 972 [3rd Dept 1985]), no other case cites to *Helfer* and it is now well established that law office failure may constitute a reasonable excuse (*Cantarelli SPA v Della Cella Co., Inc.*, 40 AD3d 445 [1st Dept 2007]; *US Bank, NA v Bukobza*, 142 AD3d 1070 [2nd Dept 2016]). "Although certain law office failures may constitute reasonable excuses, a claim of law office failure should be rejected if the conduct is part of a pattern of persistent and willful inaction, dilatory behavior or willful default and neglect" (*Imovegreen, LLC v Frantic, LLC*, 139 AD3d 539 - 540 [1st Dept 2016] [internal quotations marks and citations omitted]). Failure to appear for several court appearances, respond to discovery demands, oppose discovery motions, and ignoring communications from opposing counsel and the Court constitute "persistent and willful inaction, dilatory behavior or willful default and neglect" (*Id.*). Here there is no persistent and willful inaction on the part of Defendants Hernandez and Starushka Taxi. Moreover, through the affidavit of Adam L. Hernandez, Defendants Hernandez and

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: _____ 2 of 5 _____, J.S.C.

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Upon the foregoing papers, it is ordered that this motion is

Starushka Taxi establishes a meritorious defense that Hernandez's the vehicle operated by Hernandez did not come into contact with Plaintiff. (*Id.*). Finally, there is no prejudice to Plaintiff in directing acceptance of the late answer.

Stay

Hernandez and Starushka Taxi argue a stay is necessary in this action because Hernandez is facing criminal charges (Case number 03261-2016) relating to the same incident involved in this case. They submit the affirmation of Hernandez's criminal attorney asserting that Hernandez will assert his 5th Amendment privilege against self-incrimination if deposed or directed to testify in this action. While a stay may cause delay and inconvenience to Plaintiff, not granting a stay would cause Starushka Taxi to suffer the severe prejudice of being deprived of a defense (*Britt v Int'l Bus Services*, 255 AD2d 143 [1st Dept 1998]). Consequently, a stay pursuant to CPLR 2201 pending the conclusion of Hernandez's criminal case is appropriate (*Id.*).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: _____ 3075 _____, J.S.C.

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Upon the foregoing papers, it is ordered that this motion is

Sanctions

The court may impose sanctions against any party or attorney in a pending civil actions when the party and or attorney engages in frivolous conduct (22 NYCRR § 130-1.1). Conduct is frivolous if it is completely without merit in law, is undertaken to delay, harass or maliciously injure another or is asserts material factual statements that are false (*Id.*). "Sanctions are retributive, in that they punish past conduct. They also are goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the Bar at large. The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics" (*Levy v Carol Management Corp.*, 260 AD2d 27, 34 [1st Dept 1999]). Here, the positions taken by Hernandez and Starushka Taxi's in their papers in opposition and in support of their order to show cause are not completely without merit in law, their conduct has not been undertaken to unduly delay this action and they have not asserted material factual statements that are false, therefore, sanctions pursuant to 22 NYCRR § 130-1.1 are not appropriate.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

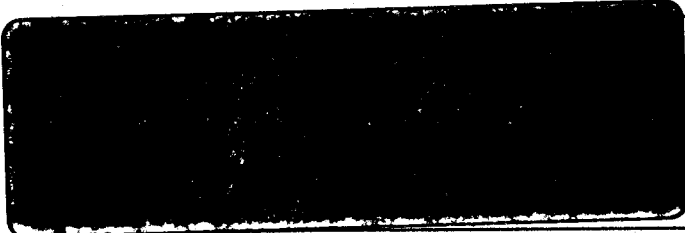
Dated: _____ 495 _____, J.S.C.

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Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Accordingly, it is hereby

ORDERED that Plaintiff's motion for a default judgment is granted to the extent that the Clerk is directed to enter a default judgment against Defendants Downtown Taxi Management LLC and Bundi Cab Corp. and denied as to Defendant's Adam L. Hernandez and Starushka Taxi Inc.; and it is further

ORDERED that Plaintiff is directed to accept Defendant Hernandez and Starushka Taxi's answer, service of same is deemed completed, and Hernandez and Starushka Taxi are directed to e-file their answer within 20 days; and it is further

ORDERED that Plaintiff is directed to serve a copy of this order with notice of entry on Defendants Downtown Taxi Management LLC and Bundi Cab Corp. within 20 days; and it is further

ORDERED that this action is STAYED pending the conclusion of Hernandez's criminal case (Case number 03261-2016); and it is further

ORDERED that Plaintiff's cross motion for sanctions is DENIED.

This constitutes the Decision and Order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/17/17
AUG 17 2017

(595)

Paul A. Goetz J.S.C.

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