

Georgia Props. Inc. v Sklar
2017 NY Slip Op 32508(U)
November 27, 2017
Supreme Court, New York County
Docket Number: 153513/2017
Judge: Robert D. Kalish
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH
Justice

PART 29

GEORGIA PROPERTIES INC.,

INDEX NO. 153513/2017

Plaintiff,

MOTION DATE 10/25/17

- v -

MOTION SEQ. NO. 002

FRIMET SKLAR and DAVID SKLAR,

Defendants.

The following papers, numbered 26–40, were read on this motion for relief from an order of dismissal.

Notice of Motion—Affirmation in Support—Affidavit in Support—Exhibits A–E

■ Nos. 26–34

Notice of Cross-Motion—Affirmation in Opposition to Motion and in Support of Cross-Motion—Exhibits A–B—Memorandum of Law in Opposition to Motion and in Support of Cross-Motion

■ Nos. 35–39

Affirmation in Opposition to Cross-Motion and in Further Support of Motion

■ No. 40

Motion by Plaintiff Georgia Properties Inc. pursuant to CPLR 5015 (a) (1) for relief from an order dismissing this action and for restoration of the action to the trial calendar is granted. Cross-motion by Defendants Frimet Sklar and David Sklar pursuant to Rules of the Chief Administrator of the Courts (22 NYCRR) §§ 130-1.1 and 130-2.1 for attorney's fees, costs, and sanctions is granted in part.

BACKGROUND

Plaintiff failed to appear for preliminary conferences on September 5, 2017, and September 12, 2017. As such, the Court dismissed the instant action on September 12, 2017 pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.27 (c).

1. Plaintiff's Allegations

Plaintiff alleges in its papers in support of its instant motion that its counsel's law office, Horing Welikson & Rosen, P.C. ("Horing"), assigned an

attorney to handle the preliminary conference scheduled for September 5, 2017, at 2:15 p.m. (Affirmation of Augustin ¶ 3.) Plaintiff further alleges that counsel for Defendants, Frankfurt Kurnit Klein & Selz, P.C. (“Frankfurt”), called Horing at 2:30 p.m. to check if an Horing attorney would be appearing at the conference. (*Id.*) Plaintiff further alleges that the Horing attorney assigned to the conference could not attend it. (*Id.*) Plaintiff further alleges that Horing spoke to Frankfurt’s attorney, who “said that he would adjourn the case to [October 3, 2017].” (*Id.*)

Plaintiff argues it was reasonable for Horing to assume that Frankfurt was going to adjourn the conference to October 3, 2017. (*Id.* ¶ 10.)

In fact, the Court had adjourned the case to September 12, 2017. (Maulsby affirmation, exhibit B.) Plaintiff alleges it received notification of this adjournment but that “it was not reviewed based upon the assumption the case had been adjourned to [October 3, 2017] as agreed. . . .” (Affirmation of Augustin ¶ 7.) Plaintiff further alleges that Frankfurt has said it never agreed to adjourn the conference to October 3, 2017 and that it would not agree to restore the case. (*Id.* ¶¶ 6, 9.)

II. Defendants’ Allegations

Defendants allege in their papers in opposition to the instant motion that Horing informed Frankfurt that Horing’s attorney could not appear for the September 5, 2017 conference and asked if Defendants would agree to adjourn the conference. (Affirmation of Maulsby ¶ 13.) Defendants further allege that Frankfurt would not agree to adjourn the conference. (*Id.*) Defendants further allege that their counsel appeared for the September 5, 2017 conference and that the Court then adjourned the case to September 12, 2017, at 2:15 p.m. (*Id.* ¶¶ 15–16.) Defendants further allege that an “E-Track” notification was sent to counsel for all parties on the morning of September 6, 2017, informing them of the upcoming September 12, 2017 adjourn date for the conference. (*Id.* ¶ 17.)

Defendants argue that Plaintiff’s motion is without merit and that missing two consecutive court conferences is not excusable. (*Id.* ¶¶ 3, 27.) Defendants further argue that they have incurred legal fees and expenses for their two conference appearances in this action and in responding to both the instant motion and Plaintiff’s prior motion, which was withdrawn. (*Id.* ¶ 28.)

Plaintiff argues in reply that Defendants' cross-motion is frivolous.
(Affirmation of Welikson ¶ 9.)

DISCUSSION

I. Plaintiff's Motion for Relief from an Order of Dismissal

Uniform Rules for Trial Courts (22 NYCRR) § 202.27 provides

“At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows: . . .

“(b) If the defendant appears but the plaintiff does not, the judge may dismiss the action”

“A motion to vacate a dismissal for failure to appear at a scheduled court conference [per Uniform Rules for Trial Courts (22 NYCRR) § 202.27] is governed by CPLR 5015.” (*Donnelly v Treeline Cos.*, 66 AD3d 563, 564 [1st Dept 2009].) On a motion for relief pursuant to CPLR 5015 (a) (1), upon the ground of excusable default, the movant must submit a reasonable excuse for its default and establish a meritorious claim. (*See Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]; *see also Caesar v Harlem USA Stores, Inc.*, 150 AD3d 524 [1st Dept 2017].) “What constitutes a reasonable excuse generally lies within the sound discretion of the motion court.” (*Gecaj v Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600, 602 [1st Dept 2017] [internal quotation marks omitted].) “The quantum of proof needed to prevail on a CPLR 5015 (a) (1) motion is less than that required when opposing a summary judgment motion.” (*Inwald Enters., LLC v Aloha Energy*, 153 AD3d 1008, 1008 [3d Dept 2017].) “There exists a strong public policy in favor of disposing of cases on their merits.” (*Gecaj* at 602 [internal quotation marks omitted].)

In the instant motion, the Court finds that Plaintiff has provided a reasonable excuse for its default. The Court finds further that Plaintiff has established a meritorious claim through its verified complaint and affidavit. As such, the Court finds that Plaintiff's default was excusable.

II. Defendants' Cross-Motion for Attorney's Fees, Costs, and Sanctions

Pursuant to Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1, the Court may award reasonable attorney's fees or costs in the form of reimbursement for actual expenses reasonably incurred or impose financial sanctions on any party or attorney who engages in frivolous conduct. Frivolous conduct is defined for the purposes of this rule as that which:

- (1) "is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) "is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) "asserts material factual statements that are false."

(Rules of the Chief Administrator of the Courts [22 NYCRR] § 130-1.1 [c].)

Here, the Court finds that the conduct of Plaintiff and plaintiff's counsel was not frivolous for the purposes of the instant cross-motion. As such, the Court does not make an award to Defendants under Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1.

Notwithstanding Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1, pursuant to Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-2.1, the Court may award reasonable attorney's fees, costs in the form of reimbursement for actual expenses reasonably incurred, or financial expenses on any attorney who fails to appear at a scheduled conference without good cause. Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-2.1 (b) provides that

"In determining whether an attorney's failure to appear at a scheduled court appearance was without good cause and in determining the measure of sanctions or costs to be imposed, the court shall consider all of the attendant circumstances, including but not limited to:

- (1) "the explanation, if any, offered by the attorney for his or her nonappearance;

- (2) “the adequacy of the notice to the attorney of the time and date of the scheduled appearance;
- (3) “whether the attorney notified the court and opposing counsel in advance that he or she would be unable to appear;
- (4) “whether substitute counsel appeared in court at the time previously scheduled to proffer an explanation of the attorney's nonappearance and whether such substitute counsel was prepared to go forward with the case;
- (5) “whether an affidavit or affirmation of actual engagement was filed in the manner prescribed in Part 125 of the Uniform Rules for the Trial Courts of the Unified Court System;
- (6) “whether the attorney on prior occasions in the same action or proceeding failed to appear at a scheduled court action or proceeding;
- (7) “whether financial sanctions or costs have been imposed upon the attorney pursuant to this section in some other action or proceeding; and
- (8) “the extent and nature of the harm caused by the attorney's failure to appear.”

In the instant cross-motion, the Court has considered all the attendant circumstances and finds that Plaintiff's failure to appear at the September 5, 2017 preliminary conference was without good cause. As such, the Court finds that an award to Defendants of \$250.00 in attorney's fees from Horing is appropriate.

CONCLUSION

Accordingly, it is

ORDERED that Plaintiff Georgia Properties Inc.'s motion pursuant to CPLR 5015 (a) (1) for relief from an order dismissing this action and for restoration of the action to the trial calendar is granted; and it is further

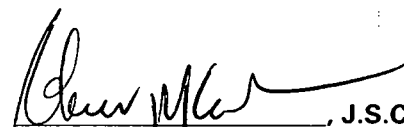
ORDERED that, within 20 days of entry of this order, Plaintiff shall serve a copy of this order with notice of entry upon Defendants, upon the County Clerk (Room 141B), and upon the Clerk of the Trial Support Office (Room 158M), who is directed to restore the case to the trial calendar under the original calendar number; and it is further

ORDERED that Horing Welikson & Rosen, P.C. shall, without any charge to its client, Plaintiff Georgia Properties Inc., pay to Defendants Frimet Sklar and David Sklar the sum of \$250.00 to compensate them for the attorney's fees incurred by them due to their attorney's having attended a preliminary conference to no purpose; and it is further

ORDERED that counsel are directed to appear for a preliminary conference at 71 Thomas Street, Room 104, New York, New York 10013 on December 12, 2017, at 2:15 p.m., at which time Plaintiff will provide written proof of the payment of the sum of \$250.00 to the Clerk of Part 29.

The foregoing constitutes the decision and order of the Court.

Dated: November 27, 2017
New York, New York


J.S.C.
HON. ROBERT D. KALISH
J.S.C.

1. Check one:.....

2. Check if appropriate:..... MOTION IS:

3. Check if appropriate:.....

- | | |
|--|---|
| ☐ CASE DISPOSED | ☒ NON-FINAL DISPOSITION |
| ☐ GRANTED | ☐ DENIED |
| ☐ GRANTED IN PART | ☒ OTHER |
| ☐ SETTLE ORDER | ☐ SUBMIT ORDER |
| ☐ DO NOT POST | ☐ FIDUCIARY APPOINTMENT |
| ☐ REFERENCE | |