

Dastain v K. Zark Med., P.C.
2018 NY Slip Op 30819(U)
April 27, 2018
Supreme Court, New York County
Docket Number: 156293/2016
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

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JEAN-YVES DASTAIN, M.D.,

Plaintiff,

- against-

K. ZARK MEDICAL, P.C., HISPANIC MEDICAL,
P.C. and KONSTANTINOS ZARKADAS, M.D.,

Defendants.
----- X

Index No.:

156293/2016

Mot. Seq. 004

GERALD LBOVITS, J.:

Defendants K. Zark Medical, P.C. (K. Zark), Hispanic Medical P.C., and Konstantinos Zarkadas, M.D. (Zarkadas), move pursuant to CPLR 5015(a)(1), for an order vacating this court's January 31, 2018 order, granting plaintiff Jean-Yves Dastain, M.D.'s motion for summary judgment on default as to liability. Defendants further seek to have the action restored to the court's oral argument calendar. Plaintiff opposes the motion, arguing that defendants have failed to establish both a reasonable excuse for the default and a meritorious defense to plaintiff's motion.

BACKGROUND AND FACTUAL ALLEGATIONS

This action stems from an alleged breach of an employment agreement between plaintiff, a licensed physician, and defendants, a medical provider. Plaintiff and K. Zark entered into an employment agreement (employment agreement) on April 18, 2016, which was effective for two years. Pursuant to schedule B of the employment agreement, plaintiff was entitled to various benefits, including a performance bonus and health insurance. Among other things, the terms of the employment agreement provided that either party may terminate the contract for any reason, with ninety days' notice. In addition, K. Zark was able to terminate the employment agreement without prior notice for "cause." The employment agreement states, in relevant part:

"11.2 This agreement may be terminated immediately and without prior notice for 'cause' which shall be determined by the Corporation in its reasonable discretion and which shall be defined to include without limitation any one or more events set forth below. The follow events shall each constitute a sufficient reason for termination for 'cause':

“11.2.3. The commission by the Employee of any act or omission involving moral turpitude, non compliance with corporate rules or protocols, professional incompetence or professional negligence, which adversely affects or which could reasonably be expected to adversely affect, if it became known, the professional reputation and standing of the Corporation in the communities where the Corporation engages in the practice of medicine.

* * *

“11.2.9. The Physician fails or refuses to comply with the reasonable policies, standards and regulations of the Corporation which from time to time may be established and communicated to the Physician.”

Defendants’ notice of motion, exhibit D at 7.

Plaintiff was terminated on June 24, 2016. Shortly thereafter, he commenced this action against defendants, alleging that, in breach of the employment agreement, he was abruptly terminated without cause. Plaintiff’s complaint alleged five causes of action; namely, breach of contract, fraudulent misrepresentation, breach of the implied duty of good faith and fair dealing, piercing the corporate veil as against Zarkadas and violations of the New York Labor Law. Defendants’ notice of motion, exhibit B. On February 14, 2017, this court granted defendants’ partial motion for dismissal (mot seq 001), effectively dismissing all of the causes of action except for the one alleging a breach of contract. Defendants’ notice of motion, exhibit E.

In the remaining cause of action, plaintiff claims that, despite fully performing his obligations under the employment agreement, defendants breached the employment agreement by terminating him without cause and without prior notice. Plaintiff further alleges that, defendants breached the employment agreement by failing to pay him his wages, performance bonus and his health insurance premium. He continues that, as a result, he “has been damaged in the sum of at least \$500,000.00 the exact amount to be proven at trial.” Defendants’ notice of motion, exhibit B, ¶ 42.

On July 21, 2017, defendants’ former counsel, Blodnick, Fazio & Associates, P.C. (BFA), moved by order to show to cause returnable September 13, 2017, to be relieved as counsel for defendants in this action (mot seq 002). On July 26, 2017, plaintiff moved for an order granting summary judgment on the remaining cause of action on the grounds that there are no triable issues of fact (mot seq 003). See NYSCEF exhibit 53. Plaintiff stated that defendants breached a valid employment agreement when it terminated him without providing him with the required 90 days’ notice. Plaintiff alleged that he “did not fail to abide by the terms of my Employment Agreement or otherwise fail to diligently perform my duties at any time. The fact of the matter is that there were no guidelines, regulations, or reasonable standards that I could have ever been deemed to have violated.” NYSCEF, exhibit 62, plaintiff’s aff, ¶ 1 (c).

Plaintiff claimed that he was not provided with any notice that he was not performing his duties, stating “[a]t no time during the course of my employment was I informed by Dr. Zarkadas or by anyone on behalf of [defendants] that I had violated any rules, regulations or protocols of

K. Zark Medical P.C.” *Id.*, ¶ 6. Plaintiff further alleged, that, contrary to the terms of the contract, he was not paid bonus compensation, health insurance and malpractice insurance.

BFA, still acting as defendants’ counsel, opposed the motion, alleging that plaintiff was a difficult and unprofessional employee and that defendants had a sufficient basis to terminate plaintiff for cause. In support of defendants’ contentions, they submitted the affidavits of Zarkadas and Elsie Matias (Matias), the office manager. Zarkadas alleged that plaintiff refused to follow the practice’s procedures regarding scheduling, attendance and the medical screening of patients. Plaintiff was allegedly advised about these procedures on several occasions but did not comply. Zarkadas states that when he requested to speak to plaintiff about these issues, plaintiff “barged into such examination room, screaming at me in front of the patient.” NYSCEF exhibit 76, Zarkadas aff, ¶ 6. The patient then had to be moved to another location. Plaintiff purportedly shouted obscenities and told Zarkadas that he would not comply with the directives. Zarkadas summarized, in pertinent part:

“Plaintiff’s refusal to follow the directions given to him by me and the practice, as well as his insubordination was sufficient cause to terminate his employment. Additionally, the plaintiff’s use of threatening and inappropriate language while screaming at me (with other employees of the practice witnessing this behavior) left me with no choice but to immediately terminate his employment, for cause.”

Id., ¶ 7.

Zarkadas cited sections 11.2., 11.2.3 and 11.2.9 of the employment agreement, and argued that plaintiff’s employment had to be terminated immediately as a result of his behavior. Among other things, Zarkadas noted that plaintiff was paid his salary through the date of his termination and that he was not entitled to a performance bonus.

Matias stated that, during the course of plaintiff’s employment, plaintiff “refused to cooperate and follow several of the practice’s procedures,” including the ones monitoring attendance. NYSCEF exhibit 78, Matias aff, ¶ 3. Matias confirmed that, while she was working, plaintiff “barged into an examination room in which Dr. Zarkadas was seeing a patient.” *Id.*, ¶ 4. Matias alleged that she heard plaintiff yelling at Zarkadas using profane language and that the patient had to be moved to another examination room.

On September 13, 2017, this court granted BFA’s motion relieving them as counsel, and defendants were effectively acting pro se. *See* NYSCEF exhibit 63.

The Instant Action (mot seq 004)

Plaintiff’s motion for summary judgment was fully submitted and an oral argument was scheduled for January 31, 2018. When defendants did not appear for oral argument, this court granted plaintiff’s motion for summary judgment on the basis of liability. Plaintiff was directed to file a note of issue and proceed with an inquest to determine damages. Defendants’ notice of motion, exhibit A.

Defendants now seek to vacate this order and restore the action to the court's oral argument calendar. Defendants argue that they have a reasonable excuse for failing to appear on January 31, 2018. Zarkadas submits an affidavit in which he states that, although he received the email informing him to appear for oral argument, he inadvertently mis-calendared it and failed to appear. "When I got this email, I inadvertently mis-calendared the Court appearance in my calendar, and I failed to appear on January 31, 2018." NYSCEF exhibit 97, Zarkadas aff, ¶ 5. As of that date, he was still acting pro se, and he "fully planned on appearing at the oral argument date and asking for a short adjournment of the motion in order to retain counsel." *Id.*, ¶ 4.

Defendants further argue that they have a meritorious defense to plaintiff's claims. As initially presented in opposition to plaintiff's motion for summary judgment, defendants claimed that the termination was justified. Specifically, plaintiff had allegedly engaged in disruptive and unprofessional behavior, which, in defendants' discretion, was sufficient to terminate him immediately and without prior notice. Defendants cite section 11.2 of the employment agreement, which provides that plaintiff's employment may be terminated immediately and without prior notice for cause, as determined by the Corporation in its reasonable discretion. They claim that the employment agreement, along with the affidavits submitted by Matias and Zarkadas in opposition to plaintiff's motion, create an issue of fact as to whether plaintiff's termination was appropriate.

Plaintiff opposes defendants' motion, arguing that Zarkadas's excuse is insufficient, given that Zarkadas confirmed that he received notice of the date of the oral argument. BFA was relieved of counsel as of September 13, 2017. On this date, defendants were directed to appoint a substitute attorney within 30 days or notify the clerk within this time frame that they intended to proceed pro se. Plaintiff argues that defendants intentionally delayed and deliberately failed to hire new counsel until after the court granted plaintiff's motion for summary judgment on liability. He continues that "[t]here is an unmistakable pattern here of deliberate default. Dr. Zarkadas's excuse is neither 'detailed' nor 'credible'." Kutner affirmation in opposition to defendants' motion to vacate, ¶ 13. Referring back to his motion for summary judgment, plaintiff does not concede that defendants have proffered a meritorious defense.

DISCUSSION

A defendant seeking to vacate a default judgment pursuant to CPLR 5015 (a) (1) "must demonstrate a reasonable excuse for the delay, as well as a meritorious defense to the action. *Rodgers v 66 E. Tremont Hgts. Hous. Dev. Fund Corp.*, 69 AD3d 510, 510 (1st Dept 2010) (internal citations omitted). Whether an excuse is reasonable is based on a number of factors, "including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits." *Young Su Hwangbo v Nastro*, 153 AD3d 963, 965 (2d Dept 2017) (internal quotation marks and citations omitted).

Reasonable Excuse

Defendants have been actively participating in this action. Among other things, they have moved for dismissal and have already submitted their papers and affidavits in opposition to plaintiff's motion for summary judgment. They allege that they were still acting pro se as of January 31, 2018 as their prior counsel had been relieved and that they mistakenly failed to appear for the scheduled oral argument due to a scheduling error. "What constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court." *Rodgers v 66 E. Tremont Hgts. Hous. Dev. Fund Corp.*, 69 AD3d at 510. Here, in the court's discretion, based on the lack of willfulness and the lack of prejudice to the plaintiff, defendants have established a reasonable excuse for the delay in failing to appear. Moreover, "[i]n light of the strong public policy of this State to dispose of cases on their merits," defendants should be provided with an opportunity to make their oral arguments to the court. *Id.* at 511 (internal citation omitted).

Meritorious Defense

Plaintiff brought a motion for summary judgment on the claim for breach of contract, alleging that, among other things, he has been damaged in the sum of at least \$500,000.00. He claimed that defendants breached the employment agreement by improperly terminating him without any notice. Plaintiff argued that he performed his duties under the employment agreement and that, as there were no set guidelines or reasonable standards provided to him, he could not have violated any.

Defendants refute plaintiff's contentions, alleging that, as plaintiff was terminated for cause, they were not required to provide him with any notice. Under the terms of the employment agreement, plaintiff could be terminated immediately, without any notice, by the Corporation, in its reasonable discretion. The employment agreement listed various events that would constitute sufficient reason for immediate termination, including the failure to comply with office policies and professional incompetence. Defendants have submitted affidavits alleging that plaintiff intentionally failed to comply with office policies and that he acted unprofessionally in front of patients and staff.

Based on the foregoing, the court finds that defendants are able to put forth a meritorious defense to plaintiff's motion for summary judgment by raising issues of fact as to whether plaintiff's alleged conduct is the basis for a "for cause" termination under the terms of the employment agreement.

Accordingly, defendants' motion to vacate the order dated January 31, 2018, granting summary judgment on default as to liability only, is granted, on condition that defendants pay \$400.00 motion costs to plaintiff. *See e.g. Pagan v Estate of Pedro Anglero*, 22 AD3d 285, 285 (1st Dept 2005) ("plaintiff's motion [to vacate the prior order is] granted and the complaint reinstated on the condition that plaintiff's attorney pay \$1,500 to defendants Shepps' attorney within 20 days of service of a copy of this order with notice of entry").

NYSCEF DOC. NO. 122

RECEIVED NYSCEF: 05/03/2018

Accordingly, it is hereby

ORDERED that defendants K. Zark Medical, P.C., Hispanic Medical P.C., and Konstantinos Zarkadas, M.D.'s motion to vacate this court's January 31, 2018 order granting plaintiff Jean-Yves Dastain, M.D.'s motion for summary judgment on default is granted on the condition that defendants pay \$400.00 motion costs to plaintiff within 20 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the note of issue dated April 9, 2018 shall be vacated and the action shall be restored to the court's oral argument calendar scheduled for August 1, 2018, at 2:15 p.m. in Part 7, room 345, at 60 Centre Street, and the parties are required to submit a courtesy copy of their papers to the Part by June 15, 2018; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry on the County Clerk and upon the Trial Support Office; and it is further

ORDERED that, in the event that defendants do not comply with the foregoing and appear on the aforementioned date, plaintiff may schedule an inquest for damages.

Dated: April 27, 2018

J.S.C.

HON. GERALD LEBOVITS
J.S.C.