Samuel v Castillo
2018 NY Slip Op 32819(U)
September 25, 2018
Supreme Court, Bronx County
Docket Number: 25446/2015E
Judge: John R. Higgit

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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LEONARDO SAMUEL,

Plaintiff,

- against -

FELICIA CASTILLO, HUMBERTO OLIVERO RAMOS, ABC CORP. and/or JOHN DOE and/or JANE DOE (names "ABC CORP." and defendants "DOE" being fictitious since the actual identities are presently unknown), and JOHN P. BRADY,

Defendants.

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DECISION AND ORDER

Index No. 25446/2015E

John R. Higgitt, J.

Upon the order to show cause signed September 4, 2018 and the affirmation and exhibits submitted in support thereof; defendant John P. Brady's September 14, 2018 affirmation in opposition and the exhibits submitted therewith; counsel-movant's September 20, 2018 affirmation in reply; and due deliberation; plaintiff's motion to vacate his default in failing to comply with the February 21, 2018 order of preclusion is denied and counsel-movant's application to be relieved as counsel for plaintiff is granted.

On February 21, 2018, the parties entered into a stipulation, so-ordered by the court (Douglas, J.), stating plaintiff was to provide certain outstanding discovery within 30 days or be precluded from offering evidence at trial. Plaintiff did not provide the required discovery and, upon the preclusive effect of Judge Douglas' order becoming absolute, defendant John P. Brady moved for summary judgment on the ground of plaintiff's inability to establish a prima facie case. The undersigned granted summary judgment and dismissed the complaint on September 5, 2018.

By order to show cause, signed September 4, 2018, plaintiff now moves to vacate his default in failing to comply with the preclusion order. "[T]o obtain relief from the dictates of a

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conditional order that will preclude a party from submitting evidence in support of a claim . . . , the [plaintiff] must demonstrate (1) a reasonable excuse for the failure to produce the requested items and (2) the existence of a meritorious claim" (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 80 [2010]). For his excuse, counsel cites to his various medical infirmities arising from a motor vehicle accident that occurred shortly after entry of the preclusion order that prevented him from complying with the order.

Counsel's excuse of health issues from a car accident preventing his timely compliance with the preclusion order is belied by his assertion in reply that "[t]his matter simply escaped my attention, temporarily, since I am a solo practitioner, falling behind due to my vision loss, plus my daughter's Bat Mitzvah May 5, 2018, and overall lacked [sic] financial resources to hire office help." Defendant challenged the severity of counsel's claimed medical problems, given counsel's ability to perform other tasks related to the litigation of this action (*cf. Berardo v. Guillet*, 86 AD3d 459 [1st Dept 2011]).

Additionally, while the court is sympathetic to counsel's circumstances, the motion does not sufficiently explain his inability to produce the discovery in the seven months following the issuance of the preclusion order or why this application could not be made until now (*see Matter of Paul G.D.H.*, 147 AD3d 699 [1st Dept 2017]), nor does counsel claim to be in a position to now comply with the order or that he was ever in a position to do so. Nor does counsel explain why he did not offer any opposition to defendant's motion for summary judgment.

Moreover, counsel claims he permitted inclusion of preclusion language in the stipulation by way of apology to counsel for being late to the conference. A stipulation, however, is a contract between its signatories (*see Adelsberg v Amron*, 103 AD3d 571 [1st Dept 2013]). A party will not be relieved of his or her obligations under a stipulation absent factors that would

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invalidate a contract such as fraud, collusion, mistake or duress (*see Hallock v State*, 64 NY2d 224 [1984]), none of which is present here. Furthermore, "[t]here is a difference between law office failure and misguided strategy, and this seems to be a case of the latter" (*OCE Business Systems, Inc. v J.I. Sopher & Co.*, 186 AD2d 464, 464 [1st Dept 1992] [internal citation omitted]).

Plaintiff also failed to demonstrate that he has a potentially meritorious claim (*see Hertz Vehicles, LLC v Gejo, LLC*, 161 AD3d 549 [1st Dept 2018]; *Block 2829 Realty Corp. v Community Preserv. Corp.*, 148 AD3d 567 [1st Dept 2017]). While merit may be demonstrated by a pleading verified by the party (*see e.g. Stern Keiser Panken & Wohl, LLP v Hartley Personnel Admin. Servs., Inc.*, 34 Misc 3d 146(A), 2012 NY Slip Op 50159(U) [App Term 2d Dep't 2012]; *Wells Fargo Bank, N.A. v. McCray*, 2013 NY Slip Op 31143(U) [Sup Ct, Queens County May 21, 2013]), the complaint here was verified by counsel, not plaintiff. Furthermore, the complaint was made not upon personal knowledge but entirely "upon information and belief." Plaintiff's verification being in the form prescribed by CPLR 3020(a), the complaint therefore does not constitute proof of merit (*see Henriquez v Purins*, 245 AD2d 337 [2d Dept 1997]; *Covello v Covello*, 119 AD2d 792 [2d Dept 1986]).

Although it is undesirable to punish plaintiff for his counsel's failures, that which is undesirable is sometimes necessary. Here, it is necessary to hold plaintiff responsible for his lawyer's failure to meet deadlines (*see Andrea v Arnone, Hedin, Casker, Kennedy & Drake*, 5 NY3d 514 [2005]).

It is apparent that counsel should be relieved, as "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.16[b][2]).

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Accordingly, it is

ORDERED, that the aspect of plaintiff's motion to vacate his default in complying with the February 21, 2018 order is denied; and it is further

ORDERED, that the aspect of counsel-movant's application to withdraw as attorney for plaintiff is granted, and the Law Office of Saul Fellus is relieved as counsel for plaintiff; and it is further

ORDERED, that the outgoing attorney shall serve a copy of this order with notice of entry upon plaintiff by First Class Mail, no later than October 8, 2018, and that such service shall constitute notice to appoint another attorney pursuant to CPLR 321(c).

Plaintiff is advised that he is now without counsel.

This constitutes the decision and order of this Court.

Dated: September 25, 2018

John R. Higgitt, A.J.S.C.