

Blair v Kennedy Event Servs., Inc.
2018 NY Slip Op 33370(U)
December 19, 2018
Supreme Court, New York County
Docket Number: 159144/2016
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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TROY BLAIR,

Index No. 159144/2016

Plaintiff

- against -

DECISION AND ORDER

KENNEDY EVENT SERVICES, INC., GREATER
NEW YORK CITY AFFILIATE OF THE SUSAN
G. KOMEN BREAST CANCER AWARENESS
FOUNDATION, INC., and SUSAN G. KOMEN
FOUNDATION, INC., LEAD DOG MARKETING
GROUP INC., and GROUNDWORK OPERATIONS,
LLC

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff seeks damages for injuries he suffered September 13, 2015, when he struck a metal banner frame while riding his bicycle in a bicycle lane on Central Park West in New York County. Plaintiff alleges that the banner frame was placed in the bicycle lane when defendants were setting up for the Susan G. Komen Race for the Cure held that day in Central Park.

Plaintiff served his summons and complaint on Michael Olear, a co-owner of defendant Kennedy Event Services, November 23, 2016. Olear forwarded the complaint to Kennedy Event Services' insurance agent December 8, 2016, but Kennedy Event Services never answered. Plaintiff served his motion for a default judgment on Kennedy Event Services' liability February 10, 2017, which the court (Mendez. J.) granted without opposition in an

order dated March 20, 2017. C.P.L.R. § 3215. On April 6, 2017, plaintiff served Olear with notice of entry of this order. On February 2, 2018, Kennedy Event Services moved to vacate this default judgment. C.P.L.R. § 5015(a)(1). To vacate the default judgment, Kennedy Event Services must demonstrate a reasonable excuse for the default in answering and a meritorious defense to the action. Shmuklyer v. Feintuch Communications, Inc., 158 A.D.3d 469, 470 (1st Dep't 2018); Johnson-Roberts v. Ira Judelson Bail Bonds, 140 A.D.3d 509, 509 (1st Dep't 2016); Terrapin Indus., LLC v. Bank of New York, 137 A.D.3d 569, 570 (1st Dep't 2016); Rodgers v. 66 E. Tremont Hgts. Hous. Dev. Fund Corp., 69 A.D.3d 510, 510 (1st Dep't 2010).

II. KENNEDY EVENT SERVICES' EXCUSE FOR ITS DEFAULT

Kennedy Event Services' reasonable belief that its insurer was defending the action after Kennedy Event Services forwarded the summons and complaint to its insurance agent is a reasonable excuse for its default. Tanpinco v. Royal Caribbean Intl., 79 A.D.3d 484, 484 (1st Dep't 2010); Rodgers v. 66 E. Tremont Hgts. Hous. Dev. Fund Corp., 69 A.D.3d at 510; Heskel's W. 38th St. Corp. v. Gotham Constr. Co. LLC, 14 A.D.3d 306, 307 (1st Dep't 2005). Olear attests that he received the summons and complaint in late November 2016, forwarded it to his insurance agent December 8, 2016, and expected that the insurer would handle the defense of the action. His insurance agent's email, albeit a year later in December 2017, that the agent had referred the action to the insurer in January 2017 supports Olear's

expectation. The lapse of a year, however, raises a serious question why Olear did not check with the agent or the insurer regarding the status of the action during that time.

During 2017, Olear continued to forward documents to the insurance agent as if the insurer was defending the action. These communications further support Olear's expectation that the insurer was handling the action, demonstrating a reasonable excuse for Kennedy Event Services' default. Tanpinco v. Royal Caribbean Intl., 79 A.D.3d at 484; Rodgers v. 66 E. Tremont Hgts. Hous. Dev. Fund Corp., 69 A.D.3d at 510; Heskel's W. 38th St. Corp. v. Gotham Constr. Co. LLC, 14 A.D.3d at 307.

After the summons and complaint served in November 2016, however, among the documents Olear received in early 2017 were plaintiff's motion for a default judgment served February 10, 2017, and the order granting the default judgment served April 6, 2017. These documents alerted Olear that Kennedy Event Services' insurer was not defending the action, rendering any continued belief that its insurer was handling its defense unreasonable. Gecaj v. Gjonsj Realty & Mgt. Corp., 149 A.D.3d 600, 604-605 (1st Dep't 2017). Kennedy Event Services does not explain why Olear did not follow up with its insurance agent before December 2017, after referring the complaint to the agent in January 2017, and then forwarding both plaintiff's motion for a default judgment served in February 2017 and the order granting the default judgment served in April 2017. Nor does Kennedy Event Services explain why its insurer allowed over a year to lapse after

learning of the complaint, before taking any steps to defend the action, never responded to plaintiff's motion for a default judgment, and still allowed over nine months to elapse before responding to the default judgment.

While these explanations are lacking, the record also lacks any showing that Kennedy Event Services defaulted willfully or with any dilatory motive or that plaintiff suffered any prejudice from the 13 months of delay between Kennedy Event Services' deadline for answering and its motion to vacate its default. Corcino v. 4303 Baychester, LLC, 147 A.D.3d 467, 467 (1st Dep't 2017); Rivera v New York City Dept. of Sanitation, 142 A.D.3d 463, 464 (1st Dep't 2016); Romero v. Alezeb Deli Grocery Inc., 115 A.D.3d 496, 496 (1st Dep't 2014); Tanpinco v. Royal Caribbean Intl., 79 A.D.3d at 484. See Gecaj v. Gjonsj Realty & Mgt. Corp., 149 A.D.3d at 607-608. The court has not entered any judgment on damages, which await the disposition of the remainder of the action. See Gecaj v. Gjonsj Realty & Mgt. Corp., 149 A.D.3d at 602-603. The action against co-defendants has not progressed beyond the initial stages of disclosure, to any point where Kennedy Event Services could not readily catch up with the exchange of bills of particulars and documentary disclosure. The parties did not schedule a Preliminary Conference until after they appeared for this motion. Significantly, plaintiff does not claim, let alone show, that he will be prejudiced by seeking disclosure from Kennedy Event Services relating to an injury about which he first complained two years ago. See id. at 607-

608.

In sum, the delay in this action was less than a year between service of plaintiff's motion for a default judgment and this motion, rather than multiple years. See id. at 601, 603, 605-606. During that delay, moreover, the reminder of the action has not advanced significantly, such that vacatur of one defendant's default will hold the action back and impede its advancement. Under all these circumstances, as well as the strength of Kennedy Event Services' defense discussed below, and exercising discretion in favor of a disposition on the merits, the court excuses Kennedy Event Services' default. Johnson-Roberts v. Ira Judelson Bail Bonds, 140 A.D.3d at 509; Rodgers v. 66 E. Tremont Hgts. Hous. Dev. Fund Corp., 69 A.D.3d at 510. See Gecaj v. Gjonsj Realty & Mgt. Corp., 149 A.D.3d at 602-603, 607.

III. KENNEDY EVENT SERVICES' MERITORIOUS DEFENSE

Plaintiff alleges that his bicycle struck a metal frame left in the bicycle lane. Olear, the site supervisor for Kennedy Event Services at the event where plaintiff was injured, attests that Kennedy Event Services was not retained to deliver, transport, load, unload, or assemble any banner or metal frame and that neither he nor any Kennedy Event Services employee performed any such work on the day of the event. Although plaintiff presents photographs showing a Kennedy Event Services truck parked adjacent to the bicycle lane, he presents no evidence supporting his contention that this positioning of the truck forced other workers and their equipment or materials into

the bicycle lane. Kennedy Event Services thus demonstrates a meritorious defense to the action. Caesar v. Harlem USA Stores, Inc., 150 A.D.3d 524, 524 (1st Dep't 2017); Corcino v. 4303 Baychester, LLC, 147 A.D.3d at 467; Rivera v New York City Dept. of Sanitation, 142 A.D.3d at 464.

IV. CONCLUSION

For all the reasons explained above, the court grants the motion by defendant Kennedy Event Services, Inc., to vacate the order dated March 20, 2017, granting plaintiff a default judgment against Kennedy Event Services, Inc. C.P.L.R. § 5015(a)(1). Defendant Kennedy Event Services shall serve and file an answer to the complaint within 20 days after service of this order with notice of entry, see C.P.L.R. § 3012(a), and shall serve the order with notice of entry on the General Clerk's Office.

DATED: December 19, 2018

Lucy Billings

LUCY BILLINGS, J.S.C.

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J.S.C.