

Carlstrand v Aerco Intl., Inc.
2019 NY Slip Op 32241(U)
July 29, 2019
Supreme Court, New York County
Docket Number: 190194/17
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13

Justice

RICHARD CARLSTRAND and ANNA CARLSTRAND,

Plaintiff

INDEX NO. 190194/17

MOTION DATE 07-29-2019

- Against -

AERCO INTERNATIONAL, INC.,

MOTION SEQ. NO **009**
MOTION CAL. NO

Defendant.

The following papers, numbered 1 to 4 were read on this motion

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____	<u>3-4,</u>
Replying Affidavits _____	

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that this motion to vacate this court’s order dated July 17, 2019 which granted defendants Kohler, Co., and Domco Products of Texas, Inc., a default judgment dismissing plaintiff’s claims against them for punitive damages, is granted. The default judgment is vacated and the claims for punitive damages is re-instated. Defendants Kohler, Co., and Domco Products of Texas, Inc.’s cross-motion for a judgment dismissing the punitive damages claim is denied.

Plaintiffs commenced this action in July 2017 to recover against the defendants for personal injuries sustained by plaintiff Richard Carlstrand due to asbestos exposure from the defendants’ products. The complaint contained prayers for punitive damages against all defendants. The case was assigned to the April 2018 In Extremis cluster, was transferred to this court on May 13, 2019 and was scheduled for a pre-trial conference on May 29, 2019. At the May 29, 2019 pre-trial conference, in open court, because the plaintiff is living and In Extremis, the court adjourned the case to July 30, 2019 for trial.

On June 27, 2019 counsel for Plaintiff notified the defendants that they would be seeking punitive damages. The defendants Kohler, Co., (hereinafter "Kohler") and Domco Products of Texas, Inc., (hereinafter "Domco") moved under Motion Sequence 001, by order to show cause, to dismiss the Punitive damages claims asserted in plaintiffs' complaint as against them. The Defendant Pfizer moved under Motion Sequence 002 for the same relief. The defendants moved on the grounds that the plaintiff violated the CMO Sections VII.C and IX.M in that they failed to indicate at any time prior to June 27, 2019 that they intended to seek punitive damages and in that they failed to meet and confer with the defendants to discuss the possibility of entering into a stipulation of discontinuance of the punitive damages claim. Defendants further allege that they have not received any discovery on the punitive damages claim.

The Order to Show cause was presented to this court for signing on July 1, 2019 and the court scheduled the motion to be heard on July 17, 2019, allowing for plaintiffs to submit opposition papers on the return date of the motion. On the return date of the motion no one appeared for plaintiffs to oppose the motion, no opposition papers were filed as of the time for argument, and the court granted the defendants motions on default. Plaintiffs now move to vacate their default in appearing on the motions. Defendants Kohler and Domco oppose the motion and cross-move to dismiss. Defendant Pfizer resolved its claims with plaintiffs and as to this defendant this motion is withdrawn.

Plaintiffs lawyer alleges that due to the number of identical motions filed by different defendants and returnable on different days, many of which had been adjourned, these motions were mis calendared by his office. Furthermore, on July 3, 2019 counsel's mother was severely injured when she was struck by a motor vehicle and counsel, as an only child, has had to deal with this personal tragedy while at the same time trying to keep abreast of all the different dates on these motions. Plaintiffs allege law office failure as a reason for their default.

On June 20, 2017 the court promulgated a new Case Management Order (CMO). The implementation and contents of this new CMO was affirmed by the Appellate Division First Department in

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

a decision dated September 2018. The new CMO in its Section VII.C states:

“... In cases on the Active or Accelerated Dockets, where the complaint already contains a prayer for punitive damages at the time that this Case Management Order becomes effective, plaintiff shall consider whether it intends to seek punitive damages against a named defendant or defendants. Plaintiff and defendants shall confer and where plaintiff agrees that it will not proceed with a punitive damage claim against a given defendant plaintiff shall sign a stipulation dismissing the prayer for punitive damages pursuant to Section XXII.A of this CMO...”

Section IX.M states:

“...Where Plaintiff asserts a punitive damage claim against a defendant, plaintiff shall answer defendants’ standard interrogatories and document requests seeking information related to punitive damages per the CPLR, and defendant shall answer plaintiffs’ standard interrogatories and document requests seeking information related to punitive damages per the CPLR. The parties shall confer about the possibility of a stipulation dismissing the prayer for punitive damages as set forth in Section VII.C. before responding to standard interrogatories and document requests seeking information concerning punitive damages.”

The motion to vacate the default judgment is granted. “Upon an application satisfying the requirements of ... subdivision (a) of rule 5015, the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure.” (CPLR 2005). “A court which renders a judgment or order may relieve a party affected from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of excusable default.” (CPLR 5015(a)(1)).

To vacate a default, the defaulting party is required to demonstrate a reasonable excuse for the default and a potentially meritorious opposition to the motion. The court has the discretion to accept law office failure as a reasonable excuse for a default where the claim of law office failure is supported by a detailed and credible explanation of the default at issue (Remote Meter Technology of N.Y.,

Inc., v. Aris Realty Corp., 83 A.D.3d 1030, 922 N.Y.S.2d 440 [2nd. Dept. 2011]). Plaintiffs have provided a detailed and credible explanation for the default and a potentially meritorious opposition to the motion. Accordingly, in the court's discretion plaintiffs' motion to vacate their default under motion sequence 001 is granted. Upon vacatur of the default, the relief defendants Kohler and Domco seek under motion sequence 001 is denied. Plaintiffs' claims for punitive damages against these defendants is re-instated.

Defendants were on notice, through plaintiffs' complaint, that plaintiffs would be seeking punitive damages against them. Plaintiff re-iterated their claims for punitive damages against these defendants on June 27, 2019. In accordance with the CMO Sections VII.C and IX.M the parties were to confer about the possibility of entering a stipulation dismissing the prayer for punitive damages. Obviously, the possibility of a stipulation dismissing the prayer for punitive damages does not appear to exist.

Furthermore, in accordance with CMO IX.M plaintiff was to answer defendants' standard interrogatories and document requests seeking information concerning punitive damages. However, the moving papers do not contain a copy of such interrogatory or document request. Although this is not a motion seeking discovery, to the extent plaintiffs have not answered any of defendants' interrogatories or document requests on their punitive damages claim, defendant should have made a timely motion to compel or preclude before the end of all discovery. In this long pending action with a determined pre-trial discovery schedule, where the parties have access to a special master overseeing discovery, where a plaintiff is In Extremis with the possibility of succumbing to his illness at any moment, a motion made last minute, on the eve of trial is, in this court's discretion, denied as late (Campaign for Fiscal Equity, Inc., v. State, 265 A.D.2d 277, 697 N.Y.S.2d 272 [1st.Dept. 1999]; Grassel v. Department of Education of City of New York, 158 A.D.3d 501, 73 N.Y.S.3d 130 [1st. Dept. 2018]).

Accordingly, it is the decision and ORDER of this court that the motion to vacate this court's order which granted defendants Kohler, Co., and Domco Products of Texas, Inc.'s motion dismissing plaintiffs' Punitive Damages claims as against them on default is granted, and it is further

ORDERED, that Plaintiffs' default under motion sequence 001 is vacated, and it is further

ORDERED, that Plaintiffs' claims for punitive damages against defendants Kohler, Co., and Domco Products of Texas, Inc., are reinstated, and it is further

ORDERED, that the motion by defendants Kohler, Co., and Domco Products of Texas, Inc., to dismiss plaintiffs' punitive damages claims against these defendants, filed under motion sequence 001 , and their cross motion under this motion sequence 009 are denied, and it is further


ORDERED, that Plaintiffs serve a copy of this order with notice of entry upon the trial support clerk located in the General Clerk's Office and upon the County Clerk, pursuant to e-filing protocol, and it is further

ORDERED that the Trial Support Clerk and the County Clerk are directed to restore the punitive damages claims against the defendants Kohler Co., and Domco Products of Texas, Inc., upon receipt of a copy of this order with notice of entry.

ENTER:

**MANUEL J. MENDEZ
J.S.C.**

Dated: July 29, 2019


**Manuel J. Mendez
J.S.C.**

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE