San Lim v MTA Bus Co.
2019 NY Slip Op 32294(U)
August 1, 2019
Supreme Court, New York County
Docket Number: 153702/2018
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ADAM SILVERA** — ***Justice***

PART **IAS MOTION 22**

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SAN LIM,

Plaintiff,

- v -

MTA BUS COMPANY, SHAWN TOBIN

Defendant.

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INDEX NO. 153702/2018

MOTION DATE 05/23/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is ordered that defendant MTA Bus Company's (hereinafter referred to as "defendant MTA") motion to vacate the default judgment against defendant Shawn Tobin is denied for the reasons set forth below.

Plaintiff commenced this action against defendants seeking monetary damages for personal injuries resulting from a motor vehicle accident. Plaintiff commenced this action by summons and complaint dated April 23, 2018. Defendant Tobin failed to file an answer and a judgment was entered against him on January 2, 2019. Defendant MTA now moves to: (1) vacate the default judgment against defendant Tobin pursuant to CPLR §§5015(a)(1), 5015(a)(4), and 317; (2) dismiss the action against defendant Tobin pursuant to CPLR §3211(a)(8); (3) reargue plaintiff's prior motion for a default judgment pursuant to CPLR §2221(d); and (4) renew plaintiff's prior motion for a default judgment pursuant to CPLR §2221(e). Plaintiff opposes and defendant MTA replies.

In order to vacate a default judgment pursuant to CPLR §5015(a)(1), a motion must be made within one year of service of a copy of the judgment with notice of entry and defendant has

the burden of demonstrating both: (1) a reasonable excuse for the default; and (2) a meritorious defense to the action. *See Navarro v A. Trenkman Estate, Inc.*, 279 AD2d 257, 258 (1st Dep't 2001); *Cedeno v Wimbledon Building Corp.*, 207 AD2d 297, 297 (1st Dep't 1994).

CPLR §317 permits a defendant who has not been personally served, and has failed to appear, to defend the action within one year after the defendant obtains knowledge of entry of the judgment, but in no event more than five years after such entry, "upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense." *Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co.*, 67 NY2d 138, 141 (1986)(internal citations omitted). This section does not require the defendant to demonstrate a reasonable excuse for the delay. *Id.* at 141.

Here, defendant MTA argues that the default judgment against defendant Tobin must be vacated as defendant Tobin was never properly served, and that defendant Tobin has a meritorious defense to this action in that an accident report indicates that plaintiff allegedly fell while the subject bus stopped at a red light. Preliminarily, the Court notes that, in support of such argument, defendant MTA relies entirely on a statement purportedly written and signed by defendant Tobin on July 19, 2017. Although counsel for defendant MTA baldly states that defendant MTA created a contemporaneous record of the accident, such statement is not sworn and is unauthenticated. Notably, no one with personal knowledge employed by defendant MTA has offered an affidavit stating that the statement was written and signed by defendant Tobin, or that such document was made or kept in the normal course of business. Thus, such hearsay document is insufficient to establish a meritorious defense such that defendant MTA's reliance on CPLR §§317 and 5015(a)(1) fail.

As to defendant MTA's argument that the default judgment against defendant Tobin must be vacated pursuant to CPLR §§5015(a)(4) and 3211(a)(8) for lack of jurisdiction, defendant MTA has failed to establish that plaintiff's affidavit of service is improper, or that service upon defendant Tobin was not effectuated. In support of defendant MTA's argument, it proffers the affidavit of Baby Kurup, an Associate Staff Analyst employed by defendant MTA. Such affidavit states that defendant Tobin no longer worked for defendant MTA as of August 17, 2017. Based entirely on Ms. Kurup's affidavit, defendant MTA argues that defendant Tobin was not an employee at the time of service such that he was not served at his actual place of business. However, the affidavit proffered by defendant MTA is a mere five (5) paragraph affidavit made by someone with no personal knowledge. After careful review of Ms. Kurup's affidavit, the Court notes that Ms. Kurup does not state that she has personal knowledge of the facts to which she attests. Moreover, she fails to state what her job responsibilities are, whether she has access to defendant Tobin's employment file, whether she was employed by defendant MTA at the time of service upon defendant Tobin, or how she has any knowledge of defendant Tobin's alleged employment dates. As Ms. Kurup's affidavit, which is made with no personal knowledge, and, thus, has no probative value, is the sole evidence relied upon by defendant MTA to support its argument that defendant Tobin was not an employee at the time of service, such argument fails.

For the same reasons as stated above, defendant MTA's motion to renew and reargue is denied. CPLR 2221(d)(2) permits a party to move for leave to reargue a decision upon a showing that the court misapprehended the law in rendering its initial decision. "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." *William P. Pahl Equip. Corp. v*

Kassis, 182 AD2d 22, 27 (1st Dep't 1992), *appeal denied in part, dismissed in part* 80 NY2d 1005 (1992) (internal quotations omitted). Here, defendant MTA has failed to establish that the Court misapprehended the law or facts in this case as, detailed above, defendant MTA failed to establish that defendant Tobin was not an employee at the time of service.

CPLR§2221(e) permits a party to move for leave to renew a decision to assert "new facts not offered on the prior motion that would change the prior determination or...demonstrate that there has been a change in the law that would change the prior determination". CPLR §2221(e). Here, the Court notes that defendant MTA has failed to show how the purported new evidence is new, or why such facts were not provided in the prior motion. Moreover, defendant MTA has failed to support such "new" facts with anything other than unsubstantiated statements. As such, defendant MTA's motion to renew and to reargue is denied.

Accordingly, it is

ORDERED that the defendant MTA's motion to vacate the default judgment against defendant Tobin is denied in its entirety; and it is further

ORDERED that, within 30 days of entry, plaintiff shall serve upon defendant MTA Bus Company a copy of this decision and order, together with notice of entry.

This constitutes the Decision and Order of the Court.

8/1/2019
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE