

Bennett v Hirsch

2019 NY Slip Op 33862(U)

December 10, 2019

Supreme Court, Bronx County

Docket Number: 29518/2017E

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.

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

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RANDALL BENNETT,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 29518/2017E

YESHIVAH HIRSCH SR and ABRAHAM LUNGER,

Defendants.
-----X

John R. Higgitt, J.

Upon defendant Lunger’s August 7, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; plaintiff Falu’s (action # 4) August 29, 2019 affirmation in response; plaintiff Bennett’s (action # 1) October 9, 2019 affirmation in opposition; and due deliberation; defendant Lunger’s motion, in effect, to vacate the September 12, 2019 order of this court and, upon such vacatur, to consolidate four related actions is granted to the extent indicated below.

In this personal injury action stemming from a motor vehicle accident, defendant Lunger moves to “renew” or “reargue” the court’s September 12, 2019 order, which denied his motion for consolidation because he failed to appear for oral argument on the discovery calendar.

The court will consider defendant Lunger’s motion as one to vacate the prior order (*see Schenk v Staten Is. Univ. Hosp.*, 108 AD3d 661, 662 [2d Dept 2013]). Under CPLR 5015(a), a court may vacate an order on the ground that there was an excusable default. A party seeking relief from a default order denying the party’s prior motion must provide a reasonable excuse for the default and demonstrate the existence of a potentially meritorious motion (*see generally Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co.*, 67 NY2d 138 [1986]; *Navarro v A. Trenkman Estate, Inc.*, 279 AD2d 257 [1st Dept 2001]; *see also Polir Construction, Inc. v Etingin*, 297 AD2d 509 [1st Dept 2002]).

Defendant Lunger asserts that he failed to appear for the discovery motion calendar due to clerical error. Defendant Lunger’s excuse amounts to law office failure, which, under the

circumstances here, constitutes is a reasonable excuse for his isolated default (*see* CPLR 2005; *see also Goodwin v New York City Hous. Auth.*, 78 AD3d 550 [1st Dept 2010]).

With respect to the merits of his motion to consolidate, defendant Lunger demonstrated that there are four Supreme Court actions pending against him and S.R. Hirsch Yeshiva based on the subject motor vehicle accident. The *Bennett* action is in the Bronx, the *Woodard* and *DeJesus* actions are in Kings County, and the *Falu* action is in New York County. The *Bennett* action was commenced first, and a preliminary conference order has been issued.

Under CPLR 602(a) “when actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

Here, the four actions involve common questions of law and fact and they should be consolidated to promote consistency, and avoid unnecessary duplication of effort and resources.

Because defendant Lunger failed to demonstrate that there are exceptional circumstances involving the convenience of material, non-party witnesses, the venue of the consolidated action should be Bronx County, in which the first action was commenced (*see Teitelbaum v PTR Co.*, 6 AD3d 254 [1st Dept 2004]).

Accordingly, it is

ORDERED, that defendant Lunger’s motion to “renew” and “reargue” his prior motion, which “renew” and “reargues” motion is, in effect, a motion to vacate the court’s September 12, 2019 order, is granted; and it is further

ORDERED, that the court’s order of September 12, 2019 is vacated; and it is further

ORDERED, that defendant Lunger’s prior motion to consolidate this action with *Woodard v S.R. Hirsch Yeshiva*, Index No. 500441/2018 (Supreme Court, Kings County), *DeJesus v S.R. Hirsch*

Yeshiva, Index No. 507279/2018 (Supreme Court, Kings County), and *Falu v S.R. Hirsch Yeshiva*, Index No. 151936/2019 (Supreme Court, New York County) is granted; and it is further

ORDERED, that *Woodard v S.R. Hirsch Yeshiva*, Index No. 500441/2018 (Supreme Court, Kings County), *DeJesus v S.R. Hirsch Yeshiva*, Index No. 507279/2018 (Supreme Court, Kings County), and *Falu v S.R. Hirsch Yeshiva*, Index No. 151936/2019 (Supreme Court, New York County) are now consolidated under Bronx County Index No. 29518/2017E; and it is further

ORDERED, that the consolidated action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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RANDALL BENNETT, GARY WOODARD,
RICHARD DEJESUS and WILFREDO FALU,
Plaintiffs,

Index No. 29518/2017E

- against -

YESHIVAH HIRSCH SR and ABRAHAM
LUNGER,

Defendants.
-----X

and it is further

ORDERED that the Clerk of the Supreme Court of Kings County, upon receipt of a certified copy of this order and upon payment of the proper fees, shall transfer to the Clerk of the Supreme Court, Bronx County, all of the papers on file in the action bearing the caption *Woodard v S.R. Hirsch Yeshiva*, Index No. 500441/2018, and it is further

ORDERED that the Clerk of the Supreme Court of Kings County, upon receipt of a certified copy of this order and upon payment of the proper fees, shall transfer to the Clerk of the Supreme Court, Bronx County, all of the papers on file in the action bearing the caption *DeJesus v S.R. Hirsch Yeshiva*, Index No. 507279/2018, and it is further

ORDERED that the Clerk of the Supreme Court of New York County, upon receipt of a certified copy of this order and upon payment of the proper fees, shall transfer to the Clerk of the

Supreme Court, Bronx County, all of the papers on file in the action bearing the caption *Falu v S.R. Hirsch Yeshiva*, Index No. 151936/2019, and it is further

ORDERED that the Clerk of the Supreme Court, Bronx County, upon receipt of a copy of this order with notice of entry, shall, without further fee, assign an index number to the file transferred pursuant to this order; and it is further


ORDERED that upon service on the Clerk of this Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Motion Support Office (Room 217), who is here by directed to mark the court's records to reflect the consolidation.

The parties are reminded of the January 24, 2020 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: December 10, 2019



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