

**Pierre-Louis v Flambouyant Bus Corp.**

2020 NY Slip Op 30784(U)

February 19, 2020

Supreme Court, Dutchess County

Docket Number: 2017-50719

Judge: Peter M. Forman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

VERTULIE O. PIERRE-LOUIS,

Plaintiff,

- against -

FLAMBOUYANT BUS CORPORATION and EUGENE C.  
HAMILTON, and ALYSSA LOUISE DEVOE

Defendants.

DECISION & ORDER

Index No.: 2017-50719

Motion Sequence No. 3

FORMAN, J., Acting Supreme Court Justice

The Court read and considered the following papers in deciding Plaintiff’s motion:

	<u>Papers Submitted</u>
Notice of Motion .....	1
Affirmation of Ronald Ramo, Esq. ....	2
Affidavit of Plaintiff .....	3
Memorandum of Law .....	4
Exhibits (1-11) .....	5-15
Affirmation of William Grae, Esq., in Opposition .....	16
Exhibit .....	17
Affirmation of Ronald Ramo, Esq., in Reply .....	18
Exhibits (12-14) .....	19-21

Plaintiff moves for an order (i) vacating this Court’s November 3, 2018 Order of Dismissal pursuant to CPLR 5015(a)(1); (ii) upon vacatur, permitting Plaintiff to amend its complaint; and (iii) upon vacatur, transferring this action to Nassau County pursuant to CPLR §510. Defendants<sup>1</sup> oppose the requested relief. For the reasons set forth herein, Plaintiff’s motion is denied in its entirety.

<sup>1</sup> Despite being served with this motion (via NYSCEF), Defendant Alyssa Louise Devoe has not submitted opposition. For the remainder of this Decision and Order, any reference to “Defendants” shall refer only to Flamboyant Bus Corporation and Eugene C. Hamilton.

PROCEDURAL BACKGROUND

Plaintiff commenced this personal injury action against Defendants by the filing of a summons and verified complaint with the Queens County Clerk on or about September 13, 2016. Defendants demanded a change of venue but Plaintiff refused to consent. Thereafter, on March 27, 2017, Defendants moved before this Court for an order to change venue to Dutchess County. The motion was granted without opposition from Plaintiff on April 24, 2017. The Court set the matter down for a preliminary conference on May 15, 2017. On that date, Plaintiff moved by order to show cause for an order enjoining further proceedings in Dutchess County, vacating the Court's Order granting a change of venue, and/or permitting Plaintiff to discontinue the action without prejudice. The Court advised that it would entertain oral argument on Plaintiff's request for interim injunctive relief at the May 15<sup>th</sup> preliminary conference. Plaintiff's counsel failed to timely appear at the conference. The Court entered a preliminary conference order (noting the absence of Plaintiff's counsel) and, later that day, signed the proposed order to show cause without the requested interim injunctive relief. By Decision and Order dated July 11, 2017, the Court (Sproat, J.) denied Plaintiff's motion in its entirety.

Upon Justice Sproat's retirement, the matter was transferred to this court in or about December of 2017. At a compliance conference on February 28, 2018, the Court was advised that Plaintiff had failed to comply with disclosure directives in the preliminary conference order. Specifically, Plaintiff had failed to provide authorizations, Plaintiff's employment records, a sufficient supplemental bill of particulars, and a response to a good faith demand letter from Defendants' counsel. The Court, frustrated with Plaintiff's counsel's lack of knowledge about the

case, advised that “trial counsel” would no longer be permitted to attend discovery conferences and that the attorney of record should be present<sup>2</sup>.

At a subsequent conference on August 22, 2018, and in spite of the Court’s clear prior directives, Plaintiff appeared via *per diem* counsel. When it became clear that this attorney was not fully familiar with the case and that discovery had not progressed, the Court placed a call to Plaintiff’s counsel’s office. When Plaintiff’s counsel could not be reached, the matter was adjourned to September 24, 2018<sup>3</sup> for a further conference. The Court directed (again) that Plaintiff’s counsel appear personally and warned that if he failed to do so, the Court would entertain a request for sanctions and a motion to dismiss for failure to prosecute.

On September 24, 2018, Plaintiff’s counsel again failed to appear. By 10:00 a.m. (the conference was scheduled for 9:30 a.m.), Plaintiff’s counsel had not appeared and had not communicated in any manner with the Court and/or opposing counsel. The Court called Plaintiff’s counsel’s office and was put on hold for an extended period of time before eventually being put into voicemail. The Court, after outlining on the record the pattern of neglect and intransigence engaged in by Plaintiff’s counsel [*see* NYSCEF Docket #64, Ex. 2], granted Defendants’ oral application to dismiss and directed counsel to submit a proposed order on notice to Plaintiff. On October 19, 2018, per the Court’s instructions, Defendants’ counsel submitted a proposed order of dismissal, on notice to Plaintiff’s counsel. Plaintiff’s counsel did not object to the proposed order or submit a proposed counter-judgment. By Order dated November 3, 2018, the Court dismissed the action [*see* NYSCEF Docket #58]. At the request of Defendants’ counsel, in order to prevent

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<sup>2</sup> On or about September 29, 2017, William Schwitzer & Associates, P.C., submitted a notice of appearance as “trial counsel.” The Court advised Mr. Schwitzer – who, in appearances before the Court, seemed to lack a working knowledge of the facts and legal issues involved in the matter – that he would not be entitled to appear and insisted that an attorney with knowledge of the case would be required to appear.

<sup>3</sup> The matter was originally adjourned to September 28, 2018. At the request of counsel, the matter was subsequently re-scheduled for September 24, 2018 at 9:30 a.m.

what counsel perceived to be gamesmanship and forum shopping on the part of Plaintiff's counsel [see *NYSCEF Docket #64, Ex. 2*], the Court directed that the dismissal was without prejudice, to the extent that Plaintiff re-filed the action in Dutchess County.

Plaintiff filed the instant motion on August 6, 2019, nearly eleven months after counsel's failure to appear and the Court's dismissal of the action, and almost nine months after service of the order of dismissal with notice of entry. In support of the motion to vacate, Plaintiff argues: (i) the action was improperly dismissed under CPLR 3216; (ii) there was a reasonable excuse for counsel's failure to appear at the September 24, 2018 conference; and (iii) Plaintiff has a meritorious cause of action.

#### DISCUSSION

"Although CPLR [3216] [may] not have been an appropriate ground upon which to dismiss the complaint ... dismissal of the complaint was appropriate pursuant to 22 NYCRR 202.27[b] since the plaintiff failed to appear for the scheduled [September 24, 2018] conference" [*Wells Fargo Bank, N.A. v. McClintock*, 174 AD3d 950, 951-951 (2d Dept. 2019); see also *Geffner v. Mercy Medical Center*, 167 AD3d 571, 573 (2d Dept. 2018) ("Pursuant to 22 NYCRR 202.27(b), a court has the discretion to direct dismissal of a complaint where the plaintiff fails to appear or is not ready to proceed.")].

"In order to vacate a dismissal pursuant to 22 NYCRR 202.27, the movant must demonstrate a reasonable excuse for the failure to proceed and a potentially meritorious cause of action" [*Financial Freedom Acquisition, LLC v. Unknown Heirs to the Estate of Kenner*, 172 AD3d 1173, 1175 (2d Dept. 2019) (citing *Geffner, supra*); see also *Deutsche Bank Natl. Trust Co. v. Fishbein*, 2020 NY Slip Op. 00260, 113 NYS3d 896 (2d Dept. January 15, 2020); *Hayes v. Akhter*, 174 AD3d 512 (2d Dept. 2019)]. "The determination of whether an excuse is reasonable

lies within the sound discretion of the Supreme Court” [*Deutsche Bank Natl. Trust Co. v. Fishbein*, 2020 NY Slip Op. 00260 at \*1 (citations omitted); see also *Quercia v. Silver Lake Nursing Home, Inc.*, 176 AD3d 1244 (2d Dept. 2019)]. While CPLR 2005 recognizes law office failure as an excuse for a default, “a pattern of willful default and neglect should not be excused” [*Wright v. City of Poughkeepsie*, 136 AD3d 809, 809 (2d Dept. 2016); see also *OneWest Bank, FSB v. Singer*, 153 AD3d 714, 716 (2d Dept. 2017) (“it was not the Legislature’s intent to routinely excuse such defaults and mere neglect will not be accepted as a reasonable excuse”) quoting *Incorporated Vil. of Hempstead v. Jablonsky*, 283 AD2d 553, 553-54 (2d Dept 2001)].

Plaintiff’s counsel’s non-appearance on September 24, 2018, was not an isolated occurrence. To the contrary, the Court finds that the failure to appear on that date was part of a pattern of willful default and neglect engaged in by Plaintiff’s counsel. Plaintiff’s counsel, by his own admission, was late or failed to appear at multiple court conferences [see Ramo Aff., NYSCEF Docket #61, ¶¶ 7-9; 19; 27-29], including a failure to timely appear for oral argument on his own motion to vacate the order changing venue to Dutchess County (which had been granted on default) [*id.* at ¶¶ 7-9] and for the conference September 24, 2018, after the Court had clearly warned that his failure to appear would lead to dismissal. Additionally, despite repeated directives from the Court to the contrary, Plaintiff’s counsel continued to send “trial counsel” to cover court conferences. The attorneys that appeared as trial counsel generally lacked knowledge about the case and were unprepared, thus wasting the Court and counsel’s time at each conference.

Plaintiff’s counsel has also offered no reasonable excuse for the approximately one-year delay in moving to vacate the default. Counsel states in his memorandum of law [see NYSCEF Docket #63, p 5] that he and his client intended to re-file the action in Dutchess County and then move for a change of venue. Plaintiff’s counsel asserts, however, that he discovered in June of

2019 that Defendant Alyssa Devoe had moved out of the state, thus preventing him from re-filing the action because he would not be able to obtain personal jurisdiction over her. Plaintiff's counsel does not explain, however, why it took almost nine months (October 2018 – June 2019) to re-file his complaint before discovering that Defendant Devoe had moved. All Plaintiff needed to do was purchase a new index number and file a duplicate copy of the summons and complaint. That this was not done further underscores the Court's finding of delay and neglect.

Based upon the foregoing, the Court finds that Plaintiff's counsel's failure to appear at the September 24, 2018 conference was part of "a pattern of willful default and neglect which cannot be excused" [*Wright*, 136 AD3d at 809 (citations omitted); *see also Hayes*, 174 AD3d at 513]. Since Plaintiff failed to demonstrate a reasonable excuse for its default, the Court need not consider whether it demonstrated a potentially meritorious cause of action [*Deutsche Bank Natl. Trust Co. v. Fishbein*, 2020 NY Slip Op. 00260 at \*1 (citations omitted); *Hayes*, 174 AD3d at 513; *Financial Freedom Acquisition, LLC*, 172 AD3d at 1175]. Accordingly, Plaintiff's motion to vacate this Court's Order of Dismissal dated November 3, 2018 is denied.

Given the Court's ruling on the motion to vacate, Plaintiff's motion to amend the complaint and transfer venue to Nassau County is denied as academic. It is therefore

ORDERED, that Plaintiff's motion is denied in its entirety.

The foregoing constitutes the Decision and Order of the Court.

Dated: February 19, 2020  
Poughkeepsie, New York

  
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Hon. Peter M. Forman, A.J.S.C.

To: All Counsel of Record via ECF