

Bonifacio v Gomez
2020 NY Slip Op 32172(U)
May 6, 2020
Supreme Court, Queens County
Docket Number: 708462/2017
Judge: Pam Jackman Brown
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NEW YORK SUPREME COURT - QUEENS COUNTY

FILED

IAS Part 19

5/12/2020

SHORT FORM ORDER

3:30 PM

Present: HON. PAM JACKMAN BROWN, JSC

**COUNTY CLERK
QUEENS COUNTY**

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MERCEDES ALTAGRACIA BONIFACIO, Index no.: 708462/2017

Plaintiff,

Motion Date:

-against-

Motion Seq.No.: 001 & 002

**JOSE E. GOMEZ and
RAFAEL A. RODRIQUEZ,**

Defendants.

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The following e filed papers numbered on Motion sequence #1 and #2; 6 - 28, read on for both motions. Motion sequence #1, Plaintiff seeks an Order for default judgment against both Defendants on the issue of liability. Motion sequence #2 Defendants seek and Order dismissing the Complaint pursuant to CPLR 3215[c].

	<u>PAPERS E-FILE NUMBERED</u>	
	Papers	Exhibits
Notice of Motion sequence #1 - Exhibits, Affidavit(s), Affirmation(s), Annexed,	6 - 7	8 - 13
Affirmation in Opposition to the Motion sequence #1 - Exhibits Annexed,	15	16 - 18
Reply in support of motion sequence #1	26	
Notice of Motion sequence #2 - Exhibits, Affidavit(s), Affirmation(s), Annexed,	20 -22	23 - 24
Affirmation in Opposition to the Motion sequence #2 - Exhibits Annexed	25	

Reply in support of motion sequence #2	27 - 28	
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Upon the foregoing papers it is ordered that the motions are combined herein for disposition pursuant to this Decision/Order as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained in a motor vehicle accident on April 30, 2015. This action was commenced with the filing of a Summons and Verified Complaint on June 19, 2017. The complaint alleges that Plaintiff was operating a vehicle on Corona Avenue, at or near its intersection with 102nd Street, in the County of Queens, when a motor vehicle operated by Defendant Jose E. Gomez (hereinafter referred to as “Gomez”) and owned by Defendant Rafael A. Rodriquez (hereinafter referred to as “Rodriquez”) struck Plaintiff’s vehicle in the rear. Plaintiff alleges serious injuries including but not limited to, the right shoulder, right knee, cervical and lumbar spine herniated discs and which she alleges that she continues to suffer up to and including the present time.

According to the Plaintiff's motion papers, Rodriquez was personally served with a copy of the Summons and Complaint on or about July 1, 2017, and Gomez was served on or about July 25, 2017, by substituted service. Therefore, Gomez had until August 25, 2017, which was thirty (30) days from July 25, 2017, to timely interpose an answer. Likewise, Rodriquez had until August 1, 2017, which was thirty (30) days from July 1, 2017, to interpose his answer. To date, no answer has been interposed by either Defendants.

On December 10, 2019, over two (2) years after service was effected, Plaintiff filed the instant motion, sequence #1, for default judgment against the Defendants. Defendants oppose the motion and filed motion sequence #2 for dismissal of this action on the ground that Plaintiff failed to move for a default judgment within one year of Defendants’ default (*see* CPLR §3215[c]). The motion by Defendants is opposed by Plaintiff.

Discussion

CPLR § 3215 © provides that “[i]f the Plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.” To avoid dismissal of the complaint as abandoned under such circumstances, a Plaintiff must offer a reasonable excuse for the delay in moving for leave to enter a default

judgment, and must demonstrate that the complaint is meritorious (*Kay Waterproofing Corp. v Ray Realty Fulton, Inc.*, 23 AD3d 624, 625 [2d Dept 2005]; see *London v Iceland Inc.*, 306 AD2d 517 [2d Dept 2003]; *Geraghty v Elmhurst Hosp. Ctr. of N.Y. City Health & Hosps. Corp.*, 305AD2d 634 [2d Dept 2003]).

In the first instance, the Court notes that while Plaintiff did not initiate proceedings for the entry of a judgment within one year after the Defendants' default, the record reveals Plaintiff's efforts to prosecute the action including the proffering of separate correspondence to each Defendant and a facsimile to their insurance carrier, all dated April 20, 2018, reminding them that their answer had not been submitted and to notify their insurance carrier, and the separate notice directly to the insurance carrier. Thus, Plaintiff has not abandoned the instant action. Therefore, the Court finds that the action should not be dismissed. (see *Icon Equipment Distributors, Inc. v Gordon Environmental & Mechanical Corp.*, 272 AD2d 579 [2d Dept 2000], *lv dismissed* 96 NY2d 769 [2001]; *Patterson v Patterson*, 220 AD2d 731, 732 [2d Dept 1995]). In any event, Plaintiff has offered sufficient cause for the delay in entering a default judgment (see, CPLR 2005; *Lopez v City of New York*, 179 AD2d 388, 389 [1st Dept 1992]); and Plaintiffs' verified complaint is sufficient to demonstrate the meritorious nature of her cause of action (see, *Manago v Giorlando*, 143 AD2d 646 [2d Dept 1988];, *Grosso v Hauck*, 99 AD2d 750 [2d Dept 1984])

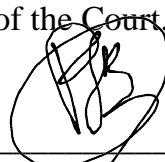
In furtherance of the denial of the motion to dismiss, Defendants have made no showing that they were prejudiced by any purported delay in the prosecution of this action. (See *Byk-Chemie GmbH v Efka Chemicals, B.V.*, 161 AD2d 196, 197 [1st Dept 1990]). Although the excuse proffered for Plaintiff's delay, "law office failure" "is not compelling, the extent of Plaintiff's counsel's inadvertence must be weighed against the merits of Plaintiff's claim and the lack of prejudice to Defendants (see *LaValle v Astoria Constr. & Paving Corp.*, 266 AD2d 28 [1st Dept 1999]). Accordingly, the Court, in the exercise of its discretion, the motion sequence #2 made by Defendants to dismiss, pursuant to CPLR § 3215 © is denied in its entirety.

Under motion sequence #2, strong public policy favors the disposition of matters on their merits (see *Gerdes v Canales*, 74 AD3d 1017 [2d Dept 2010]; *Bunch v Dollar Budget, Inc.*, 12 AD3d 391 [2d Dept 2004]). Thus, the Court finds that a default judgment against Defendants, upon their default in answering the verified complaint, is not warranted. Admittedly, Plaintiff did not timely move for such a judgment within the requisite one-year period (*Gleason v Gottlieb*, 35 AD3d 355, 357 [2d Dept 2006]). However, "[w]here, as here, both parties are derelicts, one in answering the complaint, the other in taking a default, the interests of justice would best be served by putting them back to a point where neither was in default." (*Brokaw v Cohen*, 117 Misc 2d 31, 33 [Sup Ct, New York County 1982]).

Accordingly, Motion sequence # 1 and Motion sequence #2 are all denied in their entirety. Defendants must serve and file a Verified Answer with 30 days of service of this Order with Notice of Entry.

The above constitutes the Decision and Order of the Court.

Dated: May 6, 2020
Jamaica, NY



Hon. Pam Jackman Brown, JSC

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