

Soto v Baldor Specialty Foods Inc.
2020 NY Slip Op 32851(U)
August 27, 2020
Supreme Court, Kings County
Docket Number: 502700/19
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of August, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

TINA SOTO,

Plaintiff,

- against -

Index No. 502700/19

BALDOR SPECIALTY FOODS INC., ARTURO SANTANA, A/K/A ARTHURO SANTANA and MTLR CORP.,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

36-56

Opposing Affidavits (Affirmations) _____

57-61

Upon the foregoing papers in this personal injury action arising out of a motor vehicle accident, defendants Baldor Specialty Foods Inc., Arturo Santana a/k/a Arturo Santana and MTLR Corp. (collectively, defendants) move (in motion sequence [mot. seq.] two), by order to show cause, for an order, pursuant to CPLR 2221 (a) and 5015 (a): (1) vacating the default order entered against them on March 3, 2020, which struck defendants' answer and set the matter down for an inquest, and (2) vacating plaintiff's note of issue and certificate of readiness.

Defendants move to vacate this court's March 3, 2020 order striking defendants' answer "because of an attorney's mistake in reading the printed court calendar posted in

the hallway.” Defense counsel Michael G. Dempsey (attorney Dempsey) submits an affidavit attesting that the March 3, 2020 order “was issued in error.” According to attorney Dempsey, pursuant to a so-ordered stipulation, the case was calendared for an appearance in the Alternative Dispute Resolution (ADR) Part on March 3, 2020. Attorney Dempsey attests that he “traveled to the Kings County courthouse on March 3, 2020, to appear for the conference[,]” “[h]owever, I was not in the courtroom at the calendar call due to mistake on my part with respect to the calendar posted in the hallway.” Attorney Dempsey explains that he “reviewed the computerized printout of the day’s calendar that was posted in the hallway” but “I did not [see] this case listed on it.” Attorney Dempsey further attests that “[a]fter observing that the case was not listed on the calendar, I mistakenly believed that the ADR conference had been either canceled or adjourned due to the upcoming Compliance Conference that was already scheduled for March 17, 2020.” Consequently, attorney Dempsey “was not present for the ADR calendar call despite being present in the courthouse on March 3, 2020.

Attorney Dempsey asserts that “I regret my law firm’s failure and seek the Court’s relief because it was inadvertent and occurred in spite of my best efforts to meet our obligation.” Defendants argue that attorney Dempsey’s affidavit “provides a detailed explanation and a reasonable excuse for his non-appearance on March 3, 2020.”

Defendants also submit the affidavit of defendant Arturo Santana (Santana), driver of the Baldor truck that was involved in the subject accident, in which Santana attests that:

“I was working for Baldor on December 15, 2017 when an

accident occurred near the intersection of First Avenue and East 95 Street in Manhattan between my truck and an MTA bus.

“On the day of the accident, my truck was in the middle lane on First Avenue. I was stopped at a red light at East 95th Street. When the light changed to green, I started to drive straight ahead but was only going only about 10 miles per hour when suddenly an MTA bus swerved from my right without signaling. It was snowy outside and the road was slippery. When the bus suddenly swerved into my lane, it was impossible to stop my truck in time in spite of my immediate effort to avoid an impact.”

Defendants assert that “Mr. Santana’s affidavit sets forth a meritorious defense to this action because he attests that the driver of the MTA bus suddenly and dangerously changed from the right lane into the middle lane without signaling and created an emergency situation.” Defendants further assert that they have moved to vacate the default “expeditiously” and that “[p]laintiff will not suffer any prejudice, but Defendants will suffer irreparable prejudice b[y] being deprived of vital discovery and the opportunity to have Plaintiff examined by a physician.”

Plaintiff, in opposition, argues that “this is the second time that this has happened.” Plaintiff’s counsel explains that his colleague appeared in the ADR Part on February 10, 2020, defense counsel failed to appear and the court entered a default and struck defendants’ answer, after which the parties stipulated to reinstate defendants’ answer. Consequently, plaintiff’s counsel refused attorney Dempsey’s request that he consent to vacate the March 3, 2020 order. On the merits, plaintiff’s counsel claims that the MTA bus driver’s report contradicts Santana’s description of the subject accident. Plaintiff’s counsel further argues that plaintiff would suffer prejudice because “had we been aware

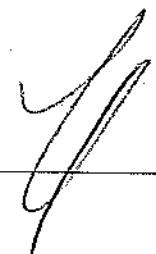
of this version from Mr. Santana we would have brought in the municipality” and the statute of limitations against the municipality has now run.

Where a default in appearing in court results from law office failure, the court may “exercise its discretion in the interest of justice to excuse delay or default . . .” pursuant to CPLR 2005 (see *JP Morgan Chase Bank, N.A. v Russo*, 121 AD3d 1048, 1049 [2014]). Here, in the court’s discretion, defendants’ motion to vacate their default, restore their answer and vacate the note of issue and certificate of readiness is granted. However, this court will not condone any future failures on defendants’ part to appear for an ADR conference, and will not entertain any future motions to vacate should defendants fail to appear for a rescheduled ADR conference. Accordingly, it is hereby

ORDERED that defendants’ motion (in mot. seq. two) is granted to the extent that this court’s March 3, 2020 order is vacated, defendants’ answer is restored and the note of issue and certificate of readiness are vacated. An ADR conference will be rescheduled.

This constitutes the decision and order of the court.

E N T E R

J. S. C.

Justice Lawrence Knipel