Pawnee Leasing Corp. v Esquivel
2020 NY Slip Op 33178(U)
August 19, 2020
Supreme Court, Bronx County
Docket Number: 23847/2018E
Judge: Wilma Guzman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 7

PAWNEE LEASING CORPORATION,
Plaintiff,

-against-

BARBARA ESQUIVEL,
Defendant.

Index No. 23847/2018E
Motion Calendar No.
Motion Date: March 30, 2020
Motion Sequence No. 3

DECISION/ ORDER
Present:
Hon. Wilma Guzman

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to:

Papers	Numbered
Notice of Motion, Affidavits and Exhibits Annexed	**1**
Affirmation in Opposition and Exhibits Annexed	**2**
Replying Affidavits	**3**

Upon the foregoing papers, the Decision/Order on this Motion is as follows:

Plaintiff PAWNEE LEASING CORPORATION (hereinafter referred to as "Plaintiff") moves this Court for an order pursuant to CPLR § 5015 (a) to vacate this Court's decision and order dated February 21, 2020 which denied Plaintiff's motion for summary judgement against Defendant BARBARA ESQUIVEL (hereinafter referred to as "Defendant") and granted Defendant's cross motion for summary judgement. Defendant has submitted opposition, and a reply has been submitted thereto. Upon due deliberation, the decision of this Court is as follows.

This action was first commenced by Plaintiff on April 9, 2015 against Defendant, and against RGD Wine and Dine Group LLC (hereinafter referred to as "Lessee") and co-guarantor Robert Deiaco (hereinafter referred to as "Guarantor") (hereinafter referred to jointly as "Judgement-debtors") based upon the lessee's defaults under a lease agreement together with the Guarantor. Plaintiff alleged that they entered into a lease agreement with the Lessee, and then with the guarantor, but both had defaulted on payments due to the Plaintiff. A judgement was rendered in favor of the Plaintiff on April 6, 2017 in the amount of $40, 363.72 under the index #651191/2015 at the Supreme Court of the State of New York, Bronx County against Judgement-debtors. The summary judgement granted to Plaintiff dismissed the action as to Defendant for failure to serve Defendant. Subsequently, on or about March 21, 2018, Plaintiff commenced the instant action via Summons and Complaint against Defendant. On or about September 9, 2019, Plaintiff filed their first motion for summary judgement, motion sequence number one (1). On or about September 27, 2019, Defendant filed its original cross motion and opposition

papers. Both parties filed a Stipulation on or about October 9, 2019, to adjourn the hearing from November 4, 2019 to November 13, 2019. However, the Court never received the stipulation, and subsequently denied both Plaintiff's motion for summary judgement and Defendant's cross- motion from motion sequence 1 based upon both parties' failure to appear at hearing on November 4, 2019. Both parties have submitted documentary evidence of this stipulation and both parties concede to failing to appear in Court due to their mutual understanding that the hearing had been adjourned to November 13, 2019. This Court, *sua sponte*, vacates the Decision and Order dated November 4, 2019.

Following this Court's decision, Plaintiff did not move to vacate the order. Instead, Plaintiff re-submitted nearly the exact same motion papers seeking summary judgement against Defendant once again, beginning motion sequence number two (2). Defendant submitted papers in opposition as well as a Cross-Motion seeking to dismiss the Complaint. Upon Plaintiff's counsel's failure to appear for oral argument on January 13, 2020, this Court denied Plaintiff's motion for summary judgement, and granted Defendant's Cross-motion dismissing the action by Decision and Order dated February 21, 2020. Plaintiff now moves this Court for an order pursuant to CPLR § 5015 to vacate this Court's February 21, 2020 order.

Standard of Review

CPLR § 5015 (a), relief from judgement or order on motion, states that "the court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry". "N.Y. C.P.L.R. 5015 (a) (1) allowed a party to vacate a default upon demonstration of a reasonable excuse and a meritorious defense to the underlying action." Empire Ins. Co. v. Zamiaty, 161 A.D.2d 178, 554 N.Y.S.2d 562 (1st Dept. 1990).

In their motion, Plaintiff argues that counsel's failure to appear for oral argument on January 13, 2020 was due to failure of the New York State Unified Court System, UCS, E-Courts system and United Lawyer Service to notify him of the rescheduled date, which his law firm uses to schedule attorney appearances. Plaintiff alleges that, following the Court's decision on November 4, 2019, they re-filed for Summary Judgement (Motion Sequence 2). After Defendant filed opposition and a cross motion, the Plaintiff, on December 15, 2019, filed an opposition to the cross motion and a reply to Defendant's opposition. After being notified of a decision rendered on Motion Sequence 2 dated February 21, 2020,

Plaintiff's counsel alleges that they then discovered that the return date had been adjourned to January 13, 2020, a change which he was never notified of. This failure of notification, Plaintiff alleges, caused the non-appearance for oral argument on January 13, 2020. Plaintiff alleges that this failure to appear was not willful nor was it an act of disrespect for this Court's motion procedures. For these reasons, Plaintiff urges the Court to vacate its February 21, 2020 Decision and Order and allow the parties to argue this matter on its merits.

Plaintiff has failed to meet the first requirement to vacate an order by not providing a reasonable excuse. Although the court may consider law office failure as an excuse, the Plaintiff has failed to provide any documentary evidence that the January 13, 2020 date did not appear on the E-courts website nor that he had never been notified of this adjourned date. Furthermore, a search of the index number of this case on the E-courts website clearly displays the January 13, 2020 court date. In his affirmation in support, Plaintiff also clearly states that they filed reply papers for Motion Sequence 2 on December 15, 2019, the night prior to the original date of court appearance on December 16, 2019, a date that also appears on the E-courts website. Having filed these reply papers on the night prior to the December 16, 2019 court date, Plaintiff displays an awareness of the December 16, 2019 court date and should have continued to monitor the activity on this case, thus noticing the January 13, 2020 court date. Plaintiff has not offered a reasonable excuse for their failure to call the Court or Justice Guzman's part or chambers to clarify any misgivings about the progress of their own motions or to make themselves aware of all necessary court appearances. An attorney affirmation indicating that Plaintiff was not aware of the appearance for oral argument, does not suffice as a sufficient excuse to warrant vacating the default Order.

Assuming, *arguendo*, Plaintiff had raised a reasonable excuse to explain their failure to appear for oral argument, Defendant, in his opposition has provided sufficient reason to deny the Plaintiff's motion. Defendant explains that Plaintiff's action is outside the Statute of Limitations for the state of Colorado. The Plaintiff is a corporation organized and existing under the laws of the State of Colorado. Plaintiff allegedly entered into a lease agreement with defendant Barbara Esquivel, resident of the Bronx, New York. Defendant was listed as a guarantor on the lease agreement, and was alleged to have been the Vice President of the lessee, RGD Wine and Dine Group, a corporation located and operating out of New York City, New York. Defendant argues that CPLR § 202 requires that an action commenced in New York but accruing outside of the state of New York must adhere to both the Statute of Limitations for New York state and the state in which the action accrued. C.R.S. § 13-80-101 (1) (a),

the Colorado State Law which applies to a claim of breach of contract has a statute of limitations of three years. The law states that an action for breach of contract must be commenced within three years from when the breach occurred. In this case, the breach of contract, as alleged by Plaintiff, occurred on June 9, 2014 in Colorado with a default of payment. The instant action was commenced by Plaintiff on March 21, 2018, which is outside of the three-year expiration date of the Colorado statute of limitations. Furthermore, the parties in this case, by signing the lease agreement, consented to the jurisdiction of the State Courts of Colorado. The lease agreement explicitly states that "any judicial proceedings in relation to any matter arising under this Lease, the parties further agree, … shall be adjudged or determined by the District Court for the County of Larlmer, Colorado." Due to the foregoing, the Court denies the Plaintiff's motion to vacate its Decision and Order dated February 21, 2020.

Accordingly, it is,

ORDERED AND ADJUDGED that the Court *sua sponte* vacates the Decision and Order of this Court dated November 4, 2019. It is further,

ORDERED and ADJUDGED that Plaintiff PAWNEE LEASING CORPORATION's motion for an order pursuant to CPLR § 5015 (a) to vacate this Court's Decision and Order dated February 21, 2020 is hereby denied in its entirety. It is further,

ORDERED and ADJUDGED that Plaintiff PAWNEE LEASING COPORATION serve a copy of this Order with Notice of Entry within thirty (30) days from the date of entry, upon all parties herein and upon the clerk of the Court.

This constitutes the Decision and Order of the Court.

8/19/20
DATE

Hon. Wilma Guzman, J.S.C.