

Rosario v General Behr Corp.
2020 NY Slip Op 33545(U)
September 29, 2020
Supreme Court, Bronx County
Docket Number: 24621/2016E
Judge: Ruben Franco
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

DIANA ROSARIO AND EUGENIO ROSARIO,

Index No. 24621/2016E

Plaintiff,

-against-

**MEMORANDUM
DECISION/ORDER**

GENERAL BEHR CORP. and ENRIQUE C. CLEMENTE,

Defendants.

Rubén Franco, J.:

In this personal injury action, plaintiff Diana Rosario moves to vacate this court’s July 15, 2020 Order denying her application for damages following an inquest, for her failure to provide requested information necessary for the court to make a well-reasoned determination. No opposition to the motion has been filed.

On February 15, 2014, plaintiff was injured when she slipped and fell on the stairs at 1490 Vyse Avenue, in Bronx County, due to an icy condition. On December 8, 2017, a Justice of this court granted a default judgment against defendant General Behr Corp. (General Behr), and ordered an inquest to assess damages against General Behr.

The inquest was held on March 11, 2019, during which plaintiff testified about her injuries and lost wages, however, these were not corroborated with any documentary evidence. Upon completion of the inquest, rather than denying plaintiff’s request for damages for lack of proof, the court allowed plaintiff’s counsel to submit a proposed Order listing the specific injuries and items claimed, as well as the amount sought for each item, and to refer the court to the exact location in the voluminous medical records that substantiate the medical claims, as well as to submit proof for the lost wages claim.

On April 16, 2019, the court's Court Attorney contacted plaintiff's counsel to inquire whether the information and documents requested had been prepared. Counsel informed the Court Attorney that he was on trial but that he would submit the information in two weeks. On November 6, 2019, the Court Attorney again spoke to plaintiff's counsel who informed the Court Attorney that he appreciated the reminder and that he would submit the information "this week." On January 7, 2020, the Court Attorney spoke to Camille, a paralegal in plaintiff's attorney's office who stated that she would inquire about the status of the information sought and that she would "get back" to the Court Attorney; she never did. On February 28, 2020, the Court Attorney sent an email to plaintiff's attorney, once again requesting that the attorney submit the documents and any other information available that would substantiate plaintiff's damages claim. The attorney was given until March 12, 2020 for submission.

The documentary and other information sought to substantiate plaintiff's claims were not submitted, thus, on July 15, 2020, the court issued its Decision and Order denying the application for damages. Plaintiff now seeks to vacate that Order.

Plaintiff's attorney acknowledges that the court requested the information but claims that it was not submitted, stating: "This task was apparently completed by the legal assistant – but I never transmitted the information to the Court Attorney. Due to the status of the case in our system as having the Inquest being held, the calendar reminders were no longer active and I unintentionally failed to follow up for the completion of the Court's request." (Affirmation in Support ¶ 13.)

In *Goldman v Cotter* (10 AD3d 289, 291 [1st Dept 2004]), the court stated:

A party seeking relief from an order or judgment on the basis of excusable default pursuant to CPLR 5015 (a) (1) must provide a reasonable excuse for the failure to appear and demonstrate the merit of the cause of action or defense (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]; *Navarro v A.*

Trenkman Estate, Inc., 279 AD2d 257, 258 [(1st Dept) 2001]; *Mediavilla v Gurman*, 272 AD2d 146, 148 [(1st Dept) 2000]). The determination of the sufficiency of the proffered excuse and the statement of merits rests within the sound discretion of the court (*Navarro v A. Trenkman Estate, Inc.*, 279 AD2d at 258).

This court finds wanting the sufficiency of the excuse proffered by counsel for his failure to submit the requested documents and information. For almost one year the court pursued the attorney, by telephone and email, for the documents and information that would support plaintiff's testimony at the inquest regarding her injuries and other damages. Each time we were offered a promise that they would be forthcoming, but it never happened.

Accordingly, plaintiff's motion to vacate this court's Order dated July 15, 2020, is denied.

This constitutes the Decision and Order of the court.

Dated: September 29, 2020



Rubén Franco, J.S.C.

HON. RUBÉN FRANCO