Yaghmour v Mittal
2020 NY Slip Op 33569(U)
October 27, 2020
Supreme Court, Kings County
Docket Number: 517442/16
Judge: Lawrence S. Knipel

At an IAS Term, Part NJTRP 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 October, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

----------X

SUAD YAGHMOUR,

Plaintiff,

Index No. 517442/16
Mot. Seq. No. 5

- against –

NIRANJAN MITTAL, NIRANJAN K. MITTAL, PHYSICIANS, PLLC,

Defendants.

----------X

The following e-filed papers read herein:	NYSCEF Doc. No.
Order to Show Cause and Affidavit/Affirmations Annexed with Exhibits	79-99
Memoranda of Law	103-104, 105

[1]Upon the foregoing papers, defendants, Niranjan Mittal (Mittal) and Niranjan K. Mittal, Physicians, PLLC move, in motion (mot.) sequence (seq.) five, by order to show cause, to vacate the default judgment herein, dated June 25, 2020 and entered June 26, 2020 (the judgment) and to reinstate their answer. In signing the order to show cause, the court stayed enforcing the judgment pending hearing of the instant motion.[2]

---

[1] Referenced in the absence of opposing or reply affidavit(s) or affirmation(s).

[2] The Hon. Joseph J. Maltese, associate justice of the Appellate Division Second

Background

Plaintiff commenced this action on October 4, 2016 for gender discrimination involving unlawful termination based on plaintiff's pregnancy. Defendants retained attorney Edmundo Roman-Perez (Perez) to defend the action. On December 16, 2016, defendants interposed an answer.

On May 9, 2017 and October 12, 2017, the parties appeared for a preliminary and compliance conference, respectively, at which time orders were entered directing discovery to be completed by February 14, 2018. Defendants did not comply with their discovery obligations, plaintiff filed a motion to strike, and by a January 19, 2018 order, the court directed defendant to provide the documents sought in plaintiff's April 10, 2017 demand within 30 days. Defendants again did not comply with discovery, plaintiff again filed a motion to strike, and by an April 5, 2018 order, the court ordered defendants to comply with all of plaintiff's discovery demands by May 5, 2018, or their answer would be stricken. Defendants once again failed to comply with discovery, and on June 25, 2018, plaintiff filed a third motion to strike defendants' answer for noncompliance. In its July 24, 2018 order, the court set forth another discovery schedule, and plaintiff's discovery motion was adjourned to October 31, 2018.

As of October 31, 2018, defendants had not complied with the court's order to provide the demanded discovery and failed to appear or otherwise respond to plaintiff's motion to strike. Consequently, the motion was granted on default without opposition, and defendant's answer was stricken. The October 31, 2018 order directed: "A copy of

---

Department, denied, on July 10, 2020, plaintiff's application to vacate the stay (*see* NYSCEF Doc. No. 102) as mentioned in a July 10, 2020 letter to this court (*see* NYSCEF Doc. No. 101).

this order shall be served upon the parties: Niranjan Mittal, Niranjan K. Mittal and Physician, PLLC within 7 days of this date." The docket sheet shows that the order with notice of entry was electronically filed, was electronically served as well as mailed to attorney Roman-Perez, but was not mailed to defendants (*see* NYSCEF Doc. No. 71).

Plaintiff then electronically filed an inquest note of issue and mailed it to attorney Roman-Perez (*see* NYSCEF Doc. No. 72). The inquest was scheduled for September 23, 2019. However, defendants did not appear, and the matter was adjourned to November 14, 2019, when the inquest was held without defendants' or Roman-Perez's appearance. On December 18, 2019, plaintiff filed a notice of settlement with a proposed judgment and served it on Roman-Perez.

On or about February 13, 2020, Roman-Perez's application to resign as an attorney and counselor-at-law was granted, and he was disbarred for misappropriation of client funds in unrelated matters (*see Matter of Roman-Perez*, 181 AD3d 138 [2d Dept 2020]).

On June 26, 2020, the court entered judgment against defendants in the sum of $562,336.00.[3] Plaintiff subsequently sought to execute the judgment and Mittal became aware of it on or after June 18, 2020 in connection with a federal action against him in the Eastern District of New York (*see* NYSCEF Doc. No. 81, Mittal aff at 2, ¶¶ 5-6). On July 8, 2020, new counsel for defendants appeared, and on July 9, 2020, defendants sought the instant order to show cause to stay enforcement of the judgment pending this motion to vacate.

---

[3] The judgment consisted of $200,000 for past pain and suffering, $150,000 for punitive damages, and $109,200 for lost earnings, thereby totaling $459,200, plus interest from October 31, 2018 in the sum of $68,306, and attorneys' fees in the sum of $34,830.

Discussion

Defendants argue that the default should be vacated: (1) pursuant to CPLR 5015 (a) (1) due to Roman-Perez's excusable neglect, (2) pursuant to CPLR 5015 (a) (3) due to the misconduct of plaintiff's attorney, and (3) in the interest of justice.

Vacatur Pursuant to CPLR 5015 (a) (1)

A court, in its discretion, may vacate a judgment on the ground of a party's "excusable default" (CPLR 5015 [a] [1]). To prevail on a motion to vacate a default judgment on this ground, a party must demonstrate a reasonable excuse for the default and a potentially meritorious defense (*see Chowdhury v Weldon*, 185 AD3d 649, 649 [2d Dept 2020]; *Jian Hua Tan v AB Capstone Dev., LLC*, 163 AD3d 937, 937-938 [2d Dept 2018]; *Ashley v Ashley*, 139 AD3d 650, 651 [2d Dept 2016]; *Lambert v Schreiber*, 69 AD3d 904, 905 [2d Dept 2010]). The motion must be made within one year after service of the judgment, with notice of entry, upon the moving party (*see* CPLR 5015 [a] [1]; *Ashley*, 139 AD3d at 651]). "The quantum of proof required to prevail [on a motion to vacate a default order or judgment] is not as great as is required to oppose summary judgment" (*Clark v MGM Textiles Indus.*, 307 AD2d 520, 521 [3d Dept 2003]).

As to the first prong, defendants argue that the default was a result of Roman-Perez's negligent failure to comply with discovery requests and to oppose plaintiff's motion to strike the answer or to oppose the entry of judgment. In support of this application, defendants claim that Roman-Perez failed to notify Mittal about the noncompliance with multiple discovery orders, despite Mittal previously having provided Roman-Perez with applicable documents and responses. Mittal asserts that he had not

heard from Roman-Perez in over a year and was unaware of the status of his case, as he was busy with his medical practice and the Covid-19 pandemic and had the impression that Roman-Perez had the case under control. Mittal also states that he never heard from Roman-Perez regarding the October 31, 2018 order striking defendants' answer nor about Roman-Perez's disbarment, as required by the Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.15 (b). Mittal alleges that he only learned that there was a judgment against him in this case while defending a separate case against him pending in the Eastern District of New York. Defendants contend that the fact that Roman-Perez was disbarred and the basis for that disciplinary action demonstrate that as of 2018 - about the time that the discovery orders in this case were entered – Roman-Perez failed to represent defendants, did not have their interests at heart, and instead stole his other clients' escrow funds without any intention to represent them.

In response, plaintiff contends that defendants fail to establish either a reasonable excuse of law office failure or a potentially meritorious defense. To that end, plaintiff argues there is a pattern of noncompliance here, starting with defendant's late filing of the answer and continuing through defendants' failure to comply with the discovery deadlines directed in the preliminary, compliance conference, and subsequent orders. Plaintiff notes that she has had to file multiple discovery motions, which defendants ignored, before the answer was stricken. Plaintiff submits that defendants also failed to move to vacate the order for an inquest or to stay the inquest, and failed to appear for the inquest on two scheduled dates. After defendants' nonappearance, the inquest took place, and the court awarded damages and directed that a judgment be settled on notice.

Plaintiff settled the inquest judgment on notice, but there was no response, and Roman-Perez was disbarred months after this happened. Plaintiff also contends that defendants have not submitted an affidavit from Roman-Perez or attempted to locate him or to explain what happened; defendants merely state that Roman-Perez was disbarred, which did not occur until *after* the court granted the motion to strike defendants' answer. According to plaintiff, this suggests that the default was willful. Plaintiff contends that courts have not excused defaults that were much less severe or willful. In addition, given the pattern of noncompliance with the court's order, plaintiff argues that Roman-Perez's negligence and law office failure should be imputed to defendants.

Plaintiff also asserts that defendants had a duty to follow up with their attorney regarding the status of this case. In that regard, plaintiff argues that Mittal's affidavit supports his lack of diligence in that Mittal does not state that he ever followed up with Roman-Perez, but merely states that he has not heard from Roman-Perez about deficient discovery and about the default.

"The determination of what constitutes a reasonable excuse generally lies within the sound discretion of the trial court" (*Jian Hua Tan*, 163 AD3d at 938; *Herrera v MTA Bus Co.*, 100 AD3d 962, 963 [2d Dept 2012]). "At the same time, mere neglect is not a reasonable excuse" (*Chowdhury*, 185 AD3d at 649 [internal quotation marks omitted]; *OneWest Bank, FSB v Singer*, 153 AD3d 714, 716 [2d Dept. 2017]). Conclusory and non-specific allegations do not suffice (*see OneWest Bank*, 153 AD3d at 716). Moreover, where there is a pattern of default and neglect, the negligence of a defendant's former attorney is imputed to the defendant (*see New York Vein Ctr., LLC v Dovlaryan*, 162

AD3d 1056, 1058 [2d Dept 2018]; *Carillon Nursing & Rehabilitation Ctr., LLP v Fox*, 118 AD3d 933, 934 [2d Dept 2014]; *MRI Enters. v Amanat*, 263 AD2d 530, 531 [2d Dept 1999]).

A court may exercise its discretion in the interest of justice to excuse delay or default resulting from law office failure upon an application that satisfies the requirements of CPLR 5015 (a) (*see* CPLR 2005). The Second Department has upheld a trial court's exercise of discretion in vacating a default resulting from law office failure of a party's prior counsel (*see Sarcona v J & J Air Container Sta., Inc.*, 111 AD3d 914, 915 [2d Dept 2013]; *Muir v Coleman*, 98 AD3d 569, 570 [2d Dept 2012]; *Gironda v Katzen*, 19 AD3d 644, 645 [2005]). Excusing defaults resulting from law office failure supports the "strong public policy of resolving controversies on the merits" *(Franco Belli Plumbing and Heating and Sons, Inc. v Imperial Development & Const. Corp.*, 45 AD3d 634, 637 [2d Dept 2007]; *see also Cornwall Warehousing, Inc. v Lerner*, 171 AD3d 540, [1st Dept 2019]).

However, the Second Department has also held that courts improvidently exercise their discretion to vacate a default judgment where the allegations of law office failure are vague and unsubstantiated or where the conduct of a party's attorney constitutes repeated neglect such that the party's continued belief that the attorney was handling the case was not reasonable (*see Roussodimou v Zafiriadis*, 238 AD2d 568, 568-569 [2d Dept 1997]; *Eretz Funding v Shalosh Assoc.*, 266 AD2d 184, 185 [2d Dept 1999]; *Rosado v Economy El. Co.*, 236 AD2d 598, 599 [2d Dept 1997]; *Chery v Anthony*, 156 AD2d 414, 417 [2d Dept 1989]).

Here, the court finds that defendants' explanation of law office failure on the part of their prior attorney constitutes a reasonable excuse for its default (*see Diamond v Leone*, 173 AD3d 686, 687 [2d Dept 2019]; *Sarcona*, 111 AD3d at 915; *Muir*, 98 AD3d at 570; *Gironda*, 19 AD3d at 645). While Roman-Perez failed to comply with the court's prior orders to provide discovery, Mittal avers that he provided Roman-Perez with discovery, and therefore, had reason to believe that it, in turn, was provided to plaintiff. In addition, Mittal has stated that he had not heard from Roman-Perez in over a year, which plaintiff utilizes to question Mittal's diligence, but which more objectively and fundamentally suggests that Roman-Perez did not notify Mittal of the court's discovery or default orders. Further, there is evidence that defendants were not placed on notice that Roman-Perez would not appear at the inquest or that he was no longer representing them, which also weighs in favor of excusing defendants' default (*see Sarcona*, 111 AD3d at 915). Indeed, Mittal avers, and plaintiff concedes, that the October 31, 2018 order was not served on defendants but on Roman-Perez, and, therefore, defendants would not have otherwise known of the default order. Mittal in fact claims, as previously mentioned, that he only learned about the judgment against defendants on or after June 18, 2020 in connection with a federal action against him in the Eastern District of New York (*see* NYSCEF Doc. No. 81, Mittal aff at 2, ¶¶ 5-6). Moreover, Mittal attests that he is ready, willing and able to provide discovery and to proceed with the case. Finally, upon learning of the judgment against them, defendants, by their new counsel, moved to vacate the subject default judgment very shortly after it was entered, which also weighs in favor of excusing the default (*see Sarcona*, 111 AD3d 915-916).

As to the second prong of the analysis, defendants contend that they have a potentially meritorious defense to this action. In that regard, Mittal claims that he and plaintiff had a verbal arrangement that after a three-month probationary period, as with other nurses on staff, plaintiff would move to a permanent position. However, after the probationary period, Mittal's relationship with plaintiff allegedly soured, as she purportedly did not perform her job duties as required, failed to respond to calls or text messages, could not be found when she was required, was tardy, or failed to report to work. When verbally disciplined, Mittal alleges, plaintiff became abusive or disrespectful to supervisors. Mittal claims that plaintiff wanted a schedule that fit her own preference, not one required by Mittal's medical practice.

Plaintiff counters that Mittal's affidavit is conclusory and fails to set forth a meritorious defense. Plaintiff notes that defendants effectively terminated her by reducing her work hours to zero after it was revealed that she was pregnant. Plaintiff also contends that defendants have not asserted that her pregnancy was not a motivating factor in her termination, while she has established that she was fired because she told defendant she was pregnant.

Courts have held that it is a defendant's burden to establish a "potentially" meritorious defense based upon nonhearsay evidence, such as sworn affidavits, or at least verified pleadings attached to the motion papers (*see Global Liberty Ins. Co. v Shahid Mian, M.D., P.C.*, 172 AD3d 1332, 1332-1333 [2d Dept 2019]; *King v King*, 99 AD3d 672, 673 [2d Dept 2012]). Defendants' burden of establishing a potentially meritorious defense is not to be examined under the standards applicable to summary judgment (*see*

Hon. Mark C. Dillon, Supplementary Practice Commentaries, McKinney's Cons Laws of NY, CPLR C5015:6) [Note: online version]). Here, defendants have met their burden of proffering a potentially meritorious defense by submitting Mittal's sworn affidavit in support of defendants' contention that plaintiff was terminated because she was a subpar employee and not because she was pregnant. Mittal's sworn affidavit thus creates an issue of fact regarding the basis for plaintiff's termination sufficient to establish a "potentially" meritorious defense.

In sum, defendants have presented both a reasonable excuse for default and a potentially meritorious defense that favors vacating the default judgment pursuant to CPLR 5015 (a) (1).

Vacatur Pursuant to CPLR 5015 (a) (3)

Turning to defendants' motion to vacate pursuant to CPLR 5015 (a) (3), a default judgment may also be vacated upon the ground of "fraud, misrepresentation, or other misconduct of an adverse party" (CPLR 5015 [a] [3]). "While there is no specific time limit within which to move under this provision, the motion must be made within a reasonable time" (*Empire State Conglomerates v Mahbur*, 105 AD3d 898, 899 [2d Dept 2013]). There are two types of fraud contemplated by the statute: (1) "intrinsic" fraud, where plaintiff's underlying allegations are allegedly fraudulent or false, and (2) "extrinsic" fraud, or fraud committed by plaintiff in obtaining the judgment by some device, trick or deceit that led defendant to believe that it need not defend the suit (*see Bank of New York Mellon Trust Company, N.A. v Ross*, 170 AD3d 931 [2d Dept 2019]; *LaSalle Bank National Association v Oberstein*, 146 AD3d 945,945 [2d Dept 2017]).

Where a defendant seeks vacatur on the ground of intrinsic fraud, "he or she must establish a reasonable excuse for the default and a potentially meritorious defense to the action" (*U.S. Bank, National Association v Gadson*, 181 AD3d 748, 748 [2d Dept 2020]).

Defendants contend that plaintiff engaged in fraud, misrepresentation or misconduct because she failed to serve defendants with the October 31, 2018 order on default as directed by the court. To that end, Mittal states that after checking the judgment, he realized that he had to be served with the October 31, 2018 judgment personally. Mittal denies being served with the judgment, contends that plaintiff's counsel only served Roman-Perez's office and commenced another action against him in the Eastern District of New York on November 19, 2018. Defendants contend that, as a result, they were unaware of the wrongs perpetrated by Roman-Perez in failing to respond to discovery demands and in not notifying them that there was a default in this case. Indeed, defendants argue that they should not be punished for plaintiff's error in failing to serve defendants or Roman-Perez's failure to defend.

In opposition, plaintiff contends that defendants have not established that plaintiff engaged in any misconduct pursuant to CPLR 5015 (a) (3) that would warrant vacating the judgment. Plaintiff asserts that there was no fraud or misconduct on the plaintiff's part in serving the order on Roman-Perez, rather than on defendants themselves, since CPLR 2103 (b) directs that in represented cases, papers are to be served on the party's attorney. Moreover, plaintiff notes that since this is an e-filed action, service of the papers would be effected by uploading documents to the NYSCEF portal pursuant to the Uniform Rules for Trial Courts (22 NYCRR) § 202.5-bb [c] [1]. In addition, plaintiff

contends that defendants did not move under CPLR 5015 (a) (3) within a reasonable time, as it has been over a year and a half since the October 31, 2018 order was entered (on November 8, 2018).

No evidence of plaintiff's misconduct appears herein. Defendants were represented by counsel, and plaintiff thus properly served the October 31, 2018 order on them pursuant to CPLR 2103 (b) by serving Roman-Perez by mail and uploading the order with notice of entry onto the court's electronic filing system pursuant to the Uniform Rules of Trial Courts (22 NYCRR) § 202.5-bb (c) (1). Defendants have also failed to establish that plaintiff's underlying allegations were fraudulent or false or that plaintiff obtained the judgment by some other deceit (*see Bank of New York Mellon Trust Company, N.A. v Ross*, 170 AD3d 931 [2d Dept 2019]).

Vacatur in the Interest of Justice

Finally, defendants argue that the default judgment should be vacated in the interest of justice, citing the longstanding New York public policy that matters be addressed on their merits. Mittal also avers he is ready, willing and able to comply with outstanding discovery demands. Plaintiff contends that there is no basis for the court to exercise its discretion to vacate under the interest of justice standard.

A court has inherent discretionary power to vacate a default judgment in the interest of substantial justice (*see Nash v Port Auth. of N.Y. & N.J.*, 22 NY3d 220 [2013]; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]), as there is a "strong policy of permitting the parties to determine matters on their merits" (*Kaufman v Board of Educ. of City School Dist. of City of New York*, 210 AD2d 226, 227 [2d Dept 1994]). In

exercising its discretion, a court should consider "the facts of the particular case, the equities affecting each party and others affected by the judgment or order, and the grounds for the requested relief" (*Nash*, 22 NY3d at 226, quoting Weinstein-Korn-Miller, NY Civ Prac ¶ 5015.03 at 50-284).

In the instant matter, the court finds that exercising its discretion to vacate the judgment is warranted. As noted above, defendants have demonstrated excusable default. Defendants, by new counsel, moved swiftly to vacate the default upon learning about it and should not be penalized for the inaction of their prior counsel, who is now disbarred. Additionally, the amount of the judgment here is not insubstantial, and defendants have demonstrated a potentially meritorious defense, which weigh in favor of vacatur under the particular circumstances of this case.

The court has reviewed the parties' remaining contentions and finds them without merit. Accordingly, it is

ORDERED that defendants' motion, mot. seq. five, to vacate the default judgment herein and reinstate their answer, is granted. The case is hereby restored to the calendar.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

Justice Lawrence Knipel