

Rodriguez v Department of Pub. Works of the City of Yonkers
2020 NY Slip Op 33682(U)
February 6, 2020
Supreme Court, Westchester County
Docket Number: 66971/2016
Judge: Lawrence H. Ecker
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Commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
BLANCA RODRIGUEZ,

Plaintiff,

-against-

DEPARTMENT OF PUBLIC WORKS OF THE CITY
OF YONKERS and THOMAS DELPRETE,

Defendants.
-----X

ECKER, J.

INDEX NO. 66971/2016

DECISION/ORDER

**Motion Date: 12/18/19
Motion Seq. 4**

The following papers were read on the motion of plaintiff BLANCA RODRIGUEZ (plaintiff) [Mot. Seq. 4], made pursuant to CPLR 5015(a), for an order vacating the order of this court dated November 26, 2018 (the 2018 Decision), and upon vacatur denying the motion of defendants DEPARTMENT OF PUBLIC WORKS, THE CITY OF YONKERS and THOMAS DELPRETE (defendants) for summary judgment dismissing the complaint, and for such other relief, as against defendants:

PAPERS

Notice of Motion, Affirmation, Exhibits 1-9
Affirmation in Opposition, Exhibits A-G

Upon the foregoing papers, the court determines as follows:

By decision/order dated November 26, 2018 (the November 2018 Decision), this court, upon plaintiff's failure to interpose opposition, granted defendants' motion for summary judgment dismissal of the complaint. The November 2018 Decision detailed the numerous opportunities and judicial warnings that plaintiff received with regards to plaintiff's continual failure to produce discovery and to timely respond to motions. [NYSCEF No. 86]. Of import, as the result of the long history of plaintiff's delay, on October 16, 2018, Justice Lefkowitz declined to sign plaintiff's proposed order seeking an adjournment of the time to file opposition to the relevant motion for summary

judgment dismissing the complaint, which resulted in defendants' motion being granted on default. The facts as detailed in the November 2018 Decision are incorporated herein.

Now, one year later, by notice of motion dated November 25, 2019, plaintiff moves for an order vacating defendants' default that resulted in the November 2018 Decision upon the grounds of law office failure (CPLR 2005). The explanation offered for the law office failure is stated in counsel's affirmation as follows:

"The motion (for summary judgment) was returnable on October 5, 2018. Plaintiff attempted to get an adjournment by contacting defense counsel, ¹Michael Levinson, a week prior to the return date and left several messages with his secretary. Defense counsel did not return any of the calls. Plaintiff was unaware that in the event a stipulation for adjournment could not be obtained and filed prior to the return date that Plaintiff was to file a proposed order. On October 5, 2018 Plaintiff's office appeared in court to try to get an adjournment and was informed of the Court's rules. Plaintiff e-filed a letter explaining this to the Court along with a proposed order (Annexed hereto as Exhibit "3"). Defendant's motion was granted on default without opposition on November 2, 2018 (Copy of the Court's order is annexed as an Exhibit "4"). Plaintiff by law office error did not file a proposed order to adjourn the first time on summary judgment motion. Our office was trying to get a stipulation signed by Defense counsel to adjourn the motion. We ask that the Court vacate the **November 26, 2018** (emphasis added) order and allow Plaintiff to submit opposition to Defendant's summary judgment motion."

In opposition to this motion, defendants outline the chronology of events that resulted in two court orders prior to the filing of the note of issue. These prior decisions concerned plaintiff's delays in complying with disclosure deadlines, and include a finding by Justice Lefkowitz, as presiding justice of the Compliance Part of the Court, that plaintiff had engaged in "a pattern of willful default and neglect". Hon. Alan Scheinkman, now presiding justice of the Appellate Division, Second Department and then administrative judge of the Ninth Judicial District, in a second order, dismissed plaintiff's claim for special damages pursuant to CPLR 3126 based on inexcusable delay. As noted, plaintiff's request to adjourn the time in which to submit her opposition to the motion for summary judgment at issue here was denied by Justice Lefkowitz.

Hence, in essence, plaintiff seeks to reargue Justice Lefkowitz's refusal to grant plaintiff additional time in which to file opposition papers to the motion for summary judgment dismissing the complaint. A motion for leave to reargue pursuant to CPLR

¹ The affirmation does not state who on behalf of plaintiff made the phone calls or the name of the secretary at defense counsel's office with whom the several messages were left.

2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision. It is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 27[1st Dept. 1992]; *Blair v Allstate Indem. Co.*, 124 AD3d 1224 [4th Dept 2015]); CPLR 2221[d]). The motion is denied as the motion to reargue Justice Lefkowitz's² decision must be made before Justice Lefkowitz and, in any event, the motion to reargue that decision, made over a year ago, is untimely (CPLR 2221[2][d]).

To the extent that plaintiff maintains that this motion is a motion to vacate the November 2018 Decision, the motion is denied. In order to vacate a default in opposing a motion pursuant to CPLR 5015 (a) (1), the moving party is required to demonstrate a reasonable excuse for his or her default and a potentially meritorious opposition to the motion (*Capital One, NA v Amid*, 174 AD3d 494 [2d Dept 2019]; *Hudson City Sav. Bank v Bomba*, 149 AD3d 704, 705 [2d Dept 2017]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court (*Capital One, NA v Amid, supra*). A court has the discretion to accept law office failure as a reasonable excuse where that claim is supported by a detailed and credible explanation, although mere neglect is not a reasonable excuse (*Id.*).

Hence, to the extent that plaintiff argues that the default in opposing defendants' motion for summary judgment is excusable based on law office failure, the contention lacks merit. The court finds that in light of the history of plaintiff's delay, the failure of plaintiff to obtain an adjournment to submit opposition, the previous court rulings, the plaintiff's violation of the rules of the court, the inability of the court under court rules to grant an adjournment³, and the one year delay in filing this motion, the claim of law

²Hence, the present motion to vacate, if it is to be considered at all, is properly to be made before her, or before Hon. Kathie Davidson, Administrative Judge, 9th Judicial District.

³Of note, the Westchester County rules, identified as the Differentiated Case Management Protocol Part Rules, effective February 23, 2018, state at Part II.D.:

"In no event shall an adjournment be granted after the time to move or submit opposition or reply papers has expired. It is incumbent upon counsel to ensure that any request for an adjournment of the return date of a motion has been received and approved within the requisite time period. **Requests for adjournments to IAS parts will not be approved.** (emphasis added).

In addition, this court's rules, *inter alia*, incorporates the rules of the Differentiated Case Management Protocols. Part III.K. of this court's rules state: "Once a post-note of issue summary judgment or dispositive motion is filed, this Court cannot grant an adjournment."

office failure is insufficient to warrant the exercise of judicial discretion to relieve plaintiff of her default (*See Capital One, NA v Amid, supra*). As plaintiff has failed to establish a reasonable excuse for her default, there is no need for the court to consider the merits of her claim (*Id.*).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of plaintiff BLANCA RODRIGUEZ [Mot. Seq. 4], made pursuant to CPLR 5015(a), for an order vacating the order of this court dated November 26, 2018 (the 2018 Decision), and upon vacatur denying the motion of defendants DEPARTMENT OF PUBLIC WORKS, THE CITY OF YONKERS and THOMAS DELPRETE (defendants) for summary judgment dismissing the complaint, and for such other relief, as against defendants is denied in its entirety, and the complaint remains dismissed.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
February 6, 2020

ENTER,



HON. LAWRENCE H. ECKER, J.S.C.

Appearances

All parties appearing via NYSCEF
