

Brice v Adult Resources Ctr., Inc.

2020 NY Slip Op 34090(U)

December 10, 2020

Supreme Court, Kings County

Docket Number: 509796/18

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

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 10th day of December, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

YVES BRICE,

Plaintiff,

- against -

Index No. 509796/18

ADULT RESOURCES CENTER, INC. and
CHUKWUEMEKA NKUME,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

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

28-37

Affidavits (Affirmations) Opposition _____

39-42

Upon the foregoing papers in this action for personal injuries allegedly sustained in an automobile accident, plaintiff Yves Brice (Brice) moves (in motion sequence [mot. seq.] three) for an order: (1) vacating this court's July 31, 2020 order issued on default, which precluded Brice's testimony absent good cause (Preclusion Order), or, alternatively (2) determining that good cause has been demonstrated by Brice in his attempts to satisfy all prior court orders.

According to a December 4, 2019 Central Compliance Part (CCP) conference order, Brice was required to serve a bill of particulars and responses to defendants'

combined demands for discovery by January 6, 2020. The record reflects that Brice, on January 3, 2020, served a verified bill of particulars and responses to defendants' demand for discovery and inspection.

On or about June 18, 2020, defendants moved to strike Brice's complaint based on his alleged failure to respond to their discovery demands. By the July 31, 2020 Preclusion Order, this court granted defendants' unopposed discovery motion "to the extent that plaintiff is precluded from testifying at trial or submitting [an] affidavit in any dispositive motion unless good cause [is] shown by motion of plaintiff." In addition, the Preclusion Order further states that:

"Plaintiff did not provide bill of particulars nor any authorizations or discovery responses, notwithstanding demands for same and prior preliminary conference order; compliance conference order of 12/4/19 and good faith demands; nor did plaintiff submit any opposition to the motion or seek additional time to comply."

Brice now moves to vacate the Preclusion Order on the ground that there is a "reasonable excuse" for Brice's default based on law office failure. Brice's counsel affirms that:

"Plaintiff's counsel maintains a calendaring system whereby court appearances are retrieved from the Court e-track system and subsequently inputted in our daily calendar one week in advance. As a result of an oversight in our office, the Court appearance for the instant matter was never placed in our daily calendar, and as a result, our office was not aware of the return date of defendants' motion. As a result, our office failed to oppose or otherwise appear for defendants' motion.

* * *

“Your Affirmant’s failure to oppose defendants’ motion was not willful or intentional. It was solely due to law office failure, in that our office failed to properly calendar the matter which resulted in the motion return date not being displayed in our office appearance calendar.”

Brice’s counsel asserts that “[s]ince there is no evidence of any willful or contumacious behavior on the part of the plaintiff or plaintiff’s counsel, he should be permitted to pursue his claim for personal injuries as against the defendants.” In addition, Brice submits an affidavit of facts regarding the automobile accident to establish that he has a meritorious claim for negligence against defendants.

Brice’s counsel submits a copy of Brice’s verified bill of particulars and responses to defendants’ discovery demands that were served upon defendants on January 3, 2020, to demonstrate that Brice had complied with the December 4, 2019 CCP order. Brice’s counsel also affirms that Brice served an updated bill of particulars and further responses to defendants’ discovery demands with updated medical records and authorizations on or about August 18, 2020, subsequent to the July 31, 2020 Preclusion Order.

Finally, Brice’s counsel contends that defendants’ discovery motion should have been denied because defense counsel failed to make a good faith effort to resolve the underlying discovery issue before resorting to motion practice, as required by 22 NYCRR § 202.7 (a) (2).

Defendants, in opposition, assert that Brice’s motion should be denied because he

has not shown good cause why he failed to provide discovery responses or submit opposition to defendants' prior motion. Defense counsel contends that it did not receive Brice's verified bill of particulars and responses to defendants' discovery demands that Brice's counsel claims to have served on January 3, 2020. However, defense counsel admits that she received a bill of particulars from Brice on or about August 20, 2020. Defense counsel contends that Brice's motion to vacate should also be denied because Brice failed to establish a meritorious cause of action.

It is well-settled that "[a] trial court has the discretion to grant a motion to vacate its own order in the interest of justice" (*Armstrong Trading, Ltd. V MBM Enterprises*, 29 AD3d 835, 836 [2006]). Furthermore, 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, Brice's motion to vacate the Preclusion Order is granted since Brice's default was based on law office failure, his default was not willful and he has demonstrated his compliance with discovery. Accordingly, it is hereby

ORDERED that Brice's motion (in mot. seq. three) is granted, and this court's July 31, 2020 Preclusion Order, entered on August 6, 2020, is hereby vacated.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

Justice Lawrence Knipel