

Madatova v City of New York
2020 NY Slip Op 34236(U)
December 18, 2020
Supreme Court, Kings County
Docket Number: 506236/2016
Judge: Lawrence S. Knipel
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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 18th day of December, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

----- X
ELYA MADATOVA,

Index No. 506236/2016

Plaintiffs,

- against -

Mot. Seq. 4

THE CITY OF NEW YORK AND THE NEW YORK CITY
TRANSIT AUTHORITY AND DYNASERV INDUSTRIES, INC.,

Defendant.
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The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion, Affidavit/Affirmation/Annexed Exhibits
Opposing Affidavits (Affirmations)/Annexed Exhibits
Reply Affidavits (Affirmations)

84-96
97-107
109-110

Upon the foregoing papers, defendant Dynaserv Industries, Inc. (Dynaserv) moves, in motion sequence (mot. seq.) four, for an order, pursuant to CPLR 5015, setting aside the court's August 5, 2020 order.

Background

Plaintiff brings this action against the City of New York (City), the New York City Transit Authority (Transit) and Dynaserv claiming that she sustained personal injuries on February 28, 2015 as a result of allegedly slipping and falling on snow and ice while attempting to board a city bus at a bus shelter in Brooklyn. By order dated March 8,

2019, all claims and cross claims against Transit were dismissed with prejudice.

On September 10, 2019, plaintiff served Dynaserv with a supplemental notice for discovery and inspection (the Supplemental Notice). The Supplemental Notice requested digital copies of two photographs, including metadata information, of the bus shelter where plaintiff allegedly fell, that previously were turned over by Dynaserv in its July 23, 2019 supplemental response to the preliminary conference order (the PC Response). In the PC Response, Dynaserv produced color images of the two photographs, allegedly taken during service visits on February 26, 2015 and February 27, 2015, with those dates purportedly reflected by the metadata information on the images. A July 23, 2019 email from Dynaserv's counsel attaching a digital copy of the response stated that the dates that the photographs were taken was noted on the metadata images. The email shows the names of attached image files as "BRO2360 – out_20150226_110320_3_82 – 022615 service visit – 07219 – GM.jpg" and "BRO2360 – out_20150227_103801_3_14 – 022715 service visit – 07219 – GM.jpg."

At the final pre-note conference on October 30, 2019, the court issued an order directing Dynaserv to respond to the Supplemental Notice by November 30, 2019. On February 7, 2020, plaintiff served Dynaserv with a second supplemental notice for discovery and inspection (the Second Supplemental Notice) requesting a copy of the post installation inspection report that corresponds with the two previously requested photographs.

On July 21, 2020, plaintiff moved to strike Dynaserv's answer for their alleged failure to comply with the court's October 30, 2019 order. Plaintiff noticed the motion

for August 5, 2020, but Dynaserv did not oppose the motion and did not appear in court that day. As a result, on August 5, 2020, the court issued an order, without opposition, directing Dynaserv to respond to both the Supplemental Notice and the Second Supplemental Notice, and to provide all outstanding discovery ordered by the court in its October 30, 2019¹ order no later than September 7, 2020. The court further directed that Dynaserv would be precluded from testifying or offering evidence at trial unless it timely complies with the order.

Parties' Contentions: Defendant Dynaserv

Dynaserv contends that its counsel's failure to oppose the plaintiff's motion was not intentional but was unforeseeable and beyond his control, and thus excusable under CPLR 5015. In that regard, Dynaserv's counsel, Todd McCauley of the McCauley Law Firm, PLLC (McCauley), asserts that as part of the widespread damage caused by Tropical Storm Isais, McCauley lost all power, internet, land line and cell phone coverage from August 4, 2020 through August 11, 2020. McCauley states that the damage, which included downed trees and power lines, resulted in Governor Cuomo declared a state of emergency for downstate New York. McCauley avers that Westchester County, where he resides and maintains an office, was among the hardest areas hit by the storm. As a result of the storm, McCauley contends that he was unable to submit opposition papers to the motion, as indicated on the return date, which was the first time that the motion was on the court's calendar. On August 5, 2020, the court granted the plaintiff's motion without opposition. McCauley states that once power was restored, he telephoned plaintiff's

The August 5, 2020 reference to the court's prior "October 20, 2019" order is a typographical error.

attorney, Andrew Weitz, who refused to resolve the motion by stipulation, necessitating the filing of this motion. McCauley also states that he telephoned the court's motion support part to advise of the circumstances, but was told to await the receipt of the decision, which was not available at the time of his call.

In addition, Dynaserv contends that it previously provided all discovery responsive to plaintiff's Supplemental Notice and references its PC Response. Dynaserv notes that its July 23, 2019 email shows the City's identification numbers for its bus shelter and the dates of Dynaserv's service visits. Dynaserv states that despite previously providing the requested discovery, it again provides digital copies of the subject images in CD format annexed to the instant motion. With regard to the Second Supplemental Notice, which demands a copy of a post-installation inspection report that purportedly corresponding to the two subject photographs, Bradley J. Gruber (Gruber), Dynaserv's owner, attests that no such report exists. Gruber attests that such reports would only be generated if requested by the New York City Department of Transportation (DOT), which has not made such a request in this case.

Finally, Dynaserv contends that it has thus established a meritorious defense to plaintiff's motion to strike for failure to produce discovery, and is therefore entitled to relief from the court's August 5, 2020 order.

Parties' Contentions: Plaintiff Madatova

In its opposition, plaintiff contends that Dynaserv failed to provide a detailed and credible explanation for its default on August 5, 2020 and its noncompliance with the court's August 5, 2020 order. In that regard, plaintiff argues that Dynaserv had sufficient

time to comply with the order, noting that it had 26 days from the time that the purported power outage ended on August 11, 2020 until the September 7, 2020 compliance deadline, to produce discovery. Plaintiff also notes that the affidavit provided by Dynaserv's owner regarding post-installation reports was served on September 16, 2020, nine days after the discovery deadline. Plaintiff further argues that Dynaserv has engaged in a pattern of clear neglect, (1) by failing to appear at the October 30, 2019 pre-note conference, (2) by failing to oppose plaintiff's motion to strike Dynaserv's answer for their failure to comply with the Court's October 30, 2019 order, which was ultimately decided on default, and (3) by failing to comply with the August 5, 2020 order in question.

In addition, plaintiff contends that contrary to Dynaserv's assertions, it has not yet provided the metadata information for the two bus shelter photographs. Plaintiff alleges that there was no metadata in the CD served with the PC Response and no additional report, memo, affidavit, or any other type of record indicating the date the photos were taken. Plaintiff states that after accessing the file information for the subject photographs, it showed that the images were "taken" on July 23, 2019, which plaintiff contends was not the date that the photos were actually taken but when the email was sent. Plaintiff also asserts that Dynaserv never followed up with a hard copy of the photographs as stated in the email. Further, plaintiff states that the CD provided by Dynaserv on September 17, 2020 in support of this motion did not contain metadata for the subject images.

Finally, plaintiff contends that Dynaserv has failed to demonstrate a potentially

meritorious defense to the action. To that end, plaintiff argues that at the deposition, DOT director of operations John Schneider testified that defendant was subcontracted to remove snow from NYC bus shelters. Plaintiff argues that defendant did not address the issue of a potentially meritorious defense in their moving papers, and did not attach even a single affidavit of merit, deposition transcript or other document alleging that defendant removed snow and ice from the subject bus stop. According to plaintiff, the Gruber affidavit is insufficient to establish a meritorious defense.

Discussion

A court, in its discretion, may relieve a party from its order on the ground of a party's "excusable default" (CPLR 5015 [a] [1]). To prevail on a motion to vacate an order 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" (*Bilodeau-Redeye v Preferred Mut. Ins. Co.*, 38 AD3d 1277, 1277 [4d Dept 2007]; *Clark v MGM Textiles Indus.*, 307 AD2d 520, 521 [3d Dept 2003]).

As to the first prong, "[t]he 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]; *see also Cox v Marshall*, 161 AD3d 1140, 1141 [2d Dept 2018]). “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 Dowlaryan*, 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*). Excusing defaults resulting from law office failure where the claim is supported by a detailed and credible explanation of the default 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 Kondrotas-Williams v Westbridge Enterprises, Inc.*, 170 AD3d 983, 985 [2d Dept 2019]; *U.S. Bank, N.A. v Esaghof*, 178 AD3d 876, 877 [2d Dept 2019]; *Cornwall Warehousing, Inc. v Lerner*, 171 AD3d 540, [1st Dept 2019]). However, a court improvidently exercises its discretion to vacate a default 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, Dynaserv has provided a detailed and credible explanation for its failure to submit an opposition to plaintiff's motion by August 5, 2020. Specifically, Dynaserv's counsel affirms that his office and residence, located in Westchester County, lost all power, internet, land line and cell phone coverage from August 4, 2020 to August 11, 2020 due to Tropical Storm Isais. McCauley further submits, and the court takes judicial notice of the fact that the storm was severe enough that Governor Cuomo declared a state of emergency for downstate New York. As such, Dynaserv has provided a reasonable excuse for its default in opposing the motion (*see Home Ins. Co. v Meyers Parking System, Inc.*, 186 AD2d 497, 497 [1st Dept 1992] [affirming lower court's opening of default due to defense counsel's delay in appearing in court on a motion due to weather related failure of public transportation]).

Additionally, the evidence proffered by Dynaserv demonstrates that it has previously provided plaintiff with images of the two photographs on July 23, 2019. The images were sent in electronic form as attachments to Dynaserv's email. Although the court has not had occasion to review the documents in the email attachment, it notes that the email shows the documents' file names, purportedly created by Dynaserv as part of a labeling system. The file names contain dates that the photographs appear to be taken – February 26, 2015 and February 27, 2015 – the two days prior to plaintiff's accident.

While Dynaserv states that it provided a CD an exhibit to the moving papers here purportedly containing the two photographs along with their metadata, the court is not in receipt of the CD and therefore was unable to review the CD to determine whether it indeed contains the metadata. Therefore, the court hereby directs the plaintiff to provide another CD containing metadata of the two photographs in question to plaintiff and to the court within fourteen days of service of this decision with notice of entry. In any event, plaintiff has not demonstrated that she has suffered any prejudice with respect to any late receipt of this discovery.

As to the second prong, 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, too, Dynaserv has met its burden of establishing a potentially meritorious defense by attaching a copy of its verified answer to the amended complaint, dated August 3, 2017. Contrary to plaintiff's contention, Dynaserv need not submit deposition transcripts or any affidavit of merit 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).

Conclusion

Accordingly, it is

ORDERED that plaintiff's motion (mot. seq. four), for an order pursuant to CPLR 5015 (a) (1), setting aside the court's August 5, 2020 order is granted to the extent that the court sets aside its August 5, 2020 order. Plaintiff's motion to strike Dynaserv's answer (mot. seq. three) is denied in its entirety. The time to file a note of issue is extended to January 29, 2021; and it is further

ORDERED that Dynaserv is to serve plaintiff and the court with digital copies of the two photographs of the subject bus shelter taken during service visits on February 26, 2015 and February 27, 2015, along with the photographs' metadata, within fourteen days of service of this order with notice of entry.

The court has reviewed the parties remaining contentions and find them to be without merit.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

Justice Lawrence Knipel