Solan v Abdelqader
2020 NY Slip Op 34530(U)
May 12, 2020
Supreme Court, Bronx County
Docket Number: 22959/2019E
Judge: Alison Y. Tuitt

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA-5

YOSEF SOLAN,

Plaintiff,

-against-

MOHMED ABDELQADER, ALSO KNOWN AS MOHMED ABDEL QADAR, MOHMED ADBEL QADER, MAHMOUD ABDELQADER, MOHMAD ABDELQADER,

Defendant.

INDEX NUMBER: **22959/2019E**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1-2,

Read on this Defendant's Order to Show Cause to Vacate Default Judgment

On Calendar of **11/25/19**

Order to Show Cause-Exhibits, Affirmation, Affidavit 1

Affirmation/Affidavit in Opposition 2

Upon the foregoing papers, defendant's motion to vacate the default judgment and to extend his time to file an answer is denied for the reasons set forth herein.

By decision and Order dated June 11, 2019, plaintiff's motion for a default judgment against defendant was granted with no opposition. Defendant now moves to vacate the default judgment, pursuant to CPLR §5015, on the grounds that he has a reasonable excuse for the default and a meritorious defense. Defendant's counsel states that he presents a reasonable excuse for defaulting, in that he simply overlooked the time to respond to the Complaint and within the time to respond, although the defendant had timely presented him with the Complaint. Defense counsel states that he misplaced the file and inadvertently forgot to calendar the time to respond or contact plaintiff's counsel requesting additional time to respond to the lawsuit. Upon

being reminded by his client, he learned that a default judgment motion was filed, but never served. After learning of the default judgment, defendant's counsel filed the instant Order to Show Cause. Plaintiff opposes the motion arguing that defendant's purported excuse that he simply overlooked the time to respond falls short of reasonable as he fails to explain why he overlooked the summons and complaint with which he was personally served. Plaintiff further argues that defendant fails to set forth a meritorious defense to the action.

The Court has the inherent power, in the interest of justice, to vacate a prior order. Alvarez v. Fiat Realty Corp., 550 N.Y.S.2d 825 (1st Dept. 1990). Relief from a default judgment rests within the sound discretion of the motion court. Frenchy's Bar & Grill v. United Intern. Ins. Co., 675 N.Y.S.2d 31 (1st Dept. 1998); Horan v. New York Telephone Co.,765 N.Y.S.2d 788 (1st Dept. 2003). This State has a strong preference that disputes be resolved on their merits. Silverio v. City of New York, 698 N.Y.S.2d 669 (1st Dept. 1999); Richardson v. City of New York, 742 N.Y.S.2d 823 (1st Dept. 2002). It also has a liberal policy with respect to opening default judgments in furtherance of justice to the end that the parties may have their day in court to litigate the issues. Sanford v. 27-29 W. 181st Street Association, 753 N.Y.S.2d 49 (1st Dept. 2002).

To prevail on a motion to vacate a prior order pursuant to CPLR §5015, the movant must make a showing of excusable default and a meritorious action. While it is generally preferable to have cases determined on their merits, a party seeking to vacate a default must demonstrate a reasonable excuse for the default and a meritorious claim. Brown v. Suggs, 832 N.Y.S.2d 36 (1st Dept. 2007); Perez v. New York City Housing Authority, 850 N.Y.S.2d 75 (1st Dept. 2008). A determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the Court. 38 Holding Corp v. City of New York, 578 N.Y.S.2d 174 (1st Dept. 1992). CPLR 2005 specifically permits the Court to exercise its discretion in the interest of justice and excuse a default resulting from law office failure. Hunter v. Enquirer/Star Inc., 619 N.Y.S.2d 268 (1st Dept. 1994). Pursuant to CPLR 2005, law office failure does not preclude the Court from exercising its discretion to excuse, delay, or default. Grossberg Tudanger Advertising, Inc. v. Weinreb,576 N.Y.S.2d 235 (1st Dept. 1991).

Defendant has failed to make the requisite showing here to vacate the default judgment. While law office failure may constitute a reasonable excuse for the default, that alone is not sufficient to justify the vacating of a default judgment. In Eaton v. Equitable Life Assur. Soc. of U.S., 453 N.Y.2d 404 (1982), the Court of Appeals found that "[t]he excuses proffered by respondent amount to nothing more than law office failure... Just as it is an abuse of discretion to accept law office failure as an excuse for a plaintiff's failure to

prosecute, so is it an abuse of discretion to vacate a default on the application of a defendant whose only excuse is law office failure. Each party is entitled to expect the other to observe time requirements during the course of litigation, and both are equally subject to prejudice from failure to observe such requirements." Id. Moreover, vague and unsubstantiated allegations of law office failure do not constitute reasonable excuse for defaulting. See, Tandy Computer Leasing v. Video X Home Library, 508 N.Y.S.2d 190 (1st Dept. 1986)(An allegation without any supporting facts to explain and justify the law office failure would be insufficient to establish excusable default); Hamilton v. National Amusements, Inc., 86 N.Y.S.3d 888 (1st Dept. 2018)(Court providently exercised its discretion by accepting the law office failure of attorney as a reasonable excuse because that failure was isolated and unintentional and did not result in any prejudice to defendant).

In the instant matter, defendant's attorney's excuse of law office failure falls short of reasonable. First, counsel readily admits that the Complaint was timely provided to him by his client. Defendant Abdelqader himself states that he presented the Complaint to his attorney "either within the time to answer or very close to the time to Answer". Notably absent from either defendant or his attorney is a date when defendant presented the Complaint to his attorney. If defendant did not present the Complaint to his attorney until after the time to answer had expired, then he had defaulted even before the law office failure. Defense counsel claims that he "simply overlooked the time to respond" is conclusory, and an uncorroborated claim of law office does not amount to a reasonable excuse. White v. Daimler Chrysler Corp., 843 N.Y.S.2d 168 (2d Dept. 2007). Rather, courts will only accept law office failure as an excuse where there are detailed allegations as to the general operations of the law office and the source of the failure. See, In re Esposito, 870 N.Y.S.2d 109 (2d Dept. 2008). "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 of the default." Servilus v. Walcott, 48 N.Y.S.3d 494 (2d Dept. 2017). "Misplacement of a file is law office failure, which is rarely an acceptable excuse, and is not acceptable here, where the plaintiff's attorney affirmed only that the file was 'inadvertently misplaced' and gave no further information." Robinson v. New York City Transit Authority, 610 N.Y.S.2d 296 (2d Dept. 1994). Mere neglect will not be accepted as a reasonable excuse. Incorporated Village of Hempstead v. Jablonsky, 725 N.Y.S.2d 76 (2d Dept. 2007).

Here, there is no explanation as the law office's normal procedures or why they failed in this

instance. There are no specific dates given as to when the attorney received the file, when he misplaced it, when his client reminded him of his failure to answer, or when he learned of the default judgment. Furthermore, given defendant's affidavit that he overlooked the time to answer and only presented the file to his attorney either towards the end of that time or after, it is not clear why defense counsel did not attempt to seek and extension of time from plaintiff's counsel.

If it is shown that a party against whom default judgment is sought has failed to proffer an acceptable excuse for its failure to submit a timely answer, then it becomes unnecessary to determine whether a meritorious defense exists. Galaxy General Contracting Corp. v. 2201 7th Ave. Realty LLC, 945 N.Y.S.2d 298 (1st Dept. 2012); Wells Fargo Bank v. Cirvini, 921 N.Y.S.2d 643 (2d Dept. 2011); M.R. v. 2526 Valentine LLC, 871 N.Y.S.2d 131 (1st Dept. 2009).

Accordingly, defendant's motion to vacate the default judgment is denied.

This constitutes the decision and Order of this Court

Dated: 5/12/20

Hon. Alison Y. Tuitt