

Concepcion v Midtown Tracking Ventures LLC

2021 NY Slip Op 32368(U)

November 19, 2021

Supreme Court, New York County

Docket Number: 452219/2018

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARLENE BLUTH PART 14

Justice

-----X

SHERRY CONCEPCION,

Plaintiff,

- v -

MIDTOWN TRACKING VENTURES LLC, LEESEL
TRANSPORTATION CORP., AND SELBY
TRANSPORTATION CORP.,

Defendants.

-----X

INDEX NO. 452219/2018

MOTION DATE 11/18/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 94-116
were read on this motion to/for VACATE.

The motion by plaintiff to vacate this Court's order dismissing this case is denied.

In this personal injury action, plaintiff moves to vacate this Court's order (NYSCEF Doc. No. 103) dismissing this case due to plaintiff's complete failure to pay attention to this case. On March 23, 2021, this Court uploaded a court notice to the parties that directed the parties to do one of three things prior to the next conference (NYSCEF Doc. No. 87). They could submit a stipulation signed by all parties, a stipulation with partial agreement or a communication explaining why no agreement could be reached.

Plaintiff ignored this first order (which required the parties to submit something a week before the conference) and so the Court adjourned the conference to July (NYSCEF Doc. No. 90). Again, the Court directed the parties to inform the Court about the status of discovery prior to the next conference and warned (as it did in the first notice) that the failure to submit anything would result in dismissal if this happened three consecutive times. For some reason, plaintiff

again ignored this notice, so the conference was adjourned to October (NYSCEF Doc. No. 91). In addition to the usual language concerning the parties' obligation to upload something (really, anything), the third court notice specifically warned that if nothing was submitted by September 28, 2021, the case would be dismissed.

Plaintiff ignored this warning and the Court dismissed the case, as it said it would. Now plaintiff moves to vacate this dismissal and she claims that this case was never abandoned. Counsel for plaintiff insists that once the Court dismissed the case, he immediately emailed the Court to demand that the Court reinstate this case and that the failure to upload anything was due to "a clerical error" (NYSCEF Doc. No. 104).

Of course, missing from that email and the moving papers is any explanation for why plaintiff ignored the first two court notices. As stated above, this is not a situation in which the Court dismissed the case after a single missed conference. Instead, the record shows that plaintiff ignored this case for nearly seven months, despite repeated prodding. And counsel for plaintiff's email to the Court requesting that the Court vacate the dismissal order is dated October 4, 2021, the next business day after the dismissal (the dismissal order is dated Friday, October 1, 2021). This shows that counsel for plaintiff was clearly receiving the Court's correspondence and only did something once the Court dismissed the case. Apparently, plaintiff thought it was acceptable to ignore the case for months and months in defiance of this Court's multiple directives. It was not.

Counsel for plaintiff's purported reasonable excuse for this pattern of ignoring court directives is that there was a scheduling error. He submits the affidavit of Davida Aceto (the calendar clerk for plaintiff's counsel) who claims that she went on maternity leave for three months starting in April 2021 (NYSCEF Doc. No. 102). The Court observes that the first court

notice was sent in March 2021, before Ms. Aceto went on maternity leave and she returned in August 2021, well before the deadline for plaintiff to submit something pursuant to the third notice. (Are plaintiff's attorneys really suggesting that the entire law firm breaks down when the calendar clerk takes scheduled leave?) While the Court recognizes that dates can be missed, the entire point of the discovery requirements in this part is to give parties every opportunity to move their case. All they have to do is submit something, but plaintiff did not do that here.

In any event, this affidavit, just like the affirmation in support, misses the point. The issue is not that plaintiff ignored a single court notice or conference. It is that plaintiff ignored *three consecutive* notices and there is no explanation for why that happened. Each time plaintiff ignored the notice, the Court adjourned the conference and sent another notice, but still plaintiff did nothing. Critically, plaintiff does not deny receiving any of these notices. Without a reasonable excuse for this pattern of delay and abandonment, the dismissal is justified (*Langomas v City of New York*, 152 NYS3d 802, 2021 NY SlipOp 05776 [1st Dept 2021] [affirming the denial of a motion to vacate where plaintiff failed to appear for multiple conferences]).

To the extent that plaintiff contends that she was engaging in settlement discussions, that does not compel a different outcome. Plaintiff could have sent a letter at any time from March 2021 to the end of September 2021 stating just that. The submission of that letter would have satisfied the Court's directive. Instead, plaintiff's long radio silence suggested to this Court that she no longer had any interest in moving this case. Nothing on this record compels the Court to restore this case.


This Court's practice of sending out court notices is designed to give the parties the freedom to do discovery at their convenience. Instead of having to show up on a specific date

and time and work out as much as they could in the hallway outside the courtroom (as happened before the pandemic), the Court has set up a system to create a “virtual hallway” giving the parties until a week before the conference date (which is really a control date) to work out their issues. This usually means they have months to reach an agreement. If they agree and submit a stipulation (and the Court approves), there is no need for the conference and the parties can continue to move the case.

In the event that there are disputes, the Court holds a conference. The goal is, especially in light of the ongoing pandemic, to respect the parties’ time and hold conferences only when there are genuine disputes. The notice makes perfectly clear that the only thing the parties have to do is upload *something* (even a letter saying no agreement can be reached) so the Court can assess whether a conference is necessary. The plaintiff here chose not to do that and ignored the case until it was dismissed. Then, and only then, did plaintiff realize that she should take the Court’s notices seriously. Unfortunately, that miscalculation is not a reason for this Court to turn a blind eye to plaintiff’s brazen conduct.

Accordingly, it is hereby

ORDERED that the motion by plaintiff to vacate this Court’s order dismissing this case is denied.

<u>11/19/2021</u> DATE			 ARLENE BLUTH, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE