

DG Physical Therapy P.C. v Abdo Fitness Corp.

2022 NY Slip Op 30243(U)

January 26, 2022

Supreme Court, New York County

Docket Number: Index No. 161382/2017

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

DG PHYSICAL THERAPY P.C.,

Plaintiff,

- v -

ABDO FITNESS CORP., MICHALIS SOLOMOU, SALIH
PEKIC

Defendants.

-----X

INDEX NO. 161382/2017

MOTION DATE N/A

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98

were read on this motion to/for VACATE - JUDGMENT.

The motion by defendants Solomu and Pekic to vacate the judgment and prior orders against them is denied.

Background

This case concerns a five-year sublease from 2015 between plaintiff (the subtenant) and defendant Abdo (the sublandlord). Plaintiff alleges that the Abdo operated a gym at the site and was supposed to build out a specific portion of the premises for plaintiff's exclusive use (plaintiff offers physical therapy services) at the gym. Plaintiff contends it gave Abdo a check for \$45,000, which consisted of one month's rent, the final month's rent and a security deposit. It alleges that it occupied a small room in the gym while it paid \$4,000 a month and awaited the expected build out. After more negotiations between the parties, which included plaintiff advancing more money to Abdo, plaintiff contends that Abdo told plaintiff that the over-landlord was threatening eviction in 2017.

Plaintiff alleges that Abdo demanded a monthly rent of \$25,000 despite the agreement specifying that \$15,000 was due. Plaintiff then eventually left the premises and brought this action based on alleged misrepresentations by defendants during its occupancy which purportedly caused plaintiff to advance rental payments in order to stay in the premises. After counsel for defendants withdrew from this case in early 2020, defendants failed to appear at conferences for more than a year so the answer was stricken and an inquest was held. Plaintiff then entered a judgment against all defendants (NYSCEF Doc. No. 95).

Now defendants Solomou and Pekic move to vacate their default. Solomou insists that there was no fraud in this action and that it was plaintiff who breached the subject sublease by abandoning the premises before the end of the sublease term. Solomou claims that he did not receive any mailings or notices but admits that he lives at the address where the notices about his attorney's withdrawal and this case were sent. He insists that he did not live at this residence for certain periods during the pandemic, although he does not specify exactly when those periods were.

In opposition, plaintiff contends that a bare denial of receipt of service is not sufficient to vacate the defendants' default. It argues that defendant Solomou only offers hearsay with respect to whether Mr. Pekic received certain notices.

Discussion

“To vacate a default, a party must demonstrate both a reasonable excuse and the existence of a meritorious defense” (*Terrapin Indus., LLC v Bank of New York*, 137 AD3d 569, 570, 27 NYS3d 153 [1st Dept 2016]).

The Court begins its analysis with a review of the procedural posture of this case. The decision, written by the judge previously assigned to the case, that let defendants' former counsel

off the case is dated January 29, 2020 (NYSCEF Doc. No. 49). This decision required defendants' former attorney to serve defendants, including a directive that they be personally served with the decision. The former attorney then uploaded affidavits of service that show that all defendants were served personally, including defendant Solomou via his wife (NYSCEF Doc. Nos. 50-53).

This Court then scheduled multiple conferences and defendants failed to appear at each one. Counsel for plaintiff purportedly served defendants with notices about these conferences but defendants did not appear for these telephonic and virtual conferences. The Court then issued an order attempting to restart discovery despite defendants' nonappearances (plaintiff was directed to serve this notice on defendants) and warned that continued nonappearances would result in defendants' answer being stricken (NYSCEF Doc. No. 63). Defendants still ignored the notices and the answer was stricken (NYSCEF Doc. No. 72).

As an initial matter, the Court denies the branch of the motion to vacate the judgment against defendant Pekic as he did not submit anything in connection with this motion. Solomou cannot deny Pekic's receipt of the various notices in this case on Pekic's behalf.

And the Court finds that Solomou failed to state a reasonable excuse for his default. The decision letting defendants' former counsel withdraw from the case was dated January 29, 2020 and there is an affidavit of service claiming that this decision was served on Solomou's wife. His bare and vague denial of receipt of any notices does not defeat this clear proof of service.

Moreover, recognizing the impact of the ongoing pandemic, this Court adjourned numerous court conferences to allow defendants many, many chances to appear. It directed that defendants, including Solomou, be served with all manner of notices at the addresses where they lived. Solomou admits he lived at that address and merely insists that he, at some unspecified

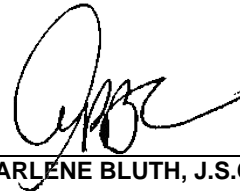
times, was not there during the pandemic. Simply put, plaintiff has pursued this case for years and now, only after a judgment was entered, did Solomou decide to mount a defense. The Court cannot overlook the fact that Solomou failed to raise a reasonable excuse for ignoring this case for nearly two years despite proof that notices were continually sent to his house. This is not a situation where Solomou never appeared or knew about the case. Rather, he had attorneys who then withdrew and he decided to ignore the case after that. That he now regrets that decision is not a reason to vacate a judgment.

Accordingly, it is hereby

ORDERED that the motion by defendants Solomou and Pekic to vacate the judgment is denied.

1/26/2022

DATE



ARLENE BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: