

Giordano v Giordano
2022 NY Slip Op 30415(U)
February 4, 2022
Supreme Court, New York County
Docket Number: Index No. 657722/2019
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH PART 14

Justice

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INDEX NO. 657722/2019

ANTHONY GIORDANO, Individually and as a shareholder
of Cheers Hotel Apts., Inc.,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 005

- v -

JOSEPH GIORDANO, CHEERS HOTEL APTS., INC.

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 158, 159, 160, 161, 162, 163

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

The motion by plaintiff to vacate this Court’s decision granting defendants’ motion for summary judgment without opposition is denied.

Background

On October 21, 2021, defendants moved for summary judgment. According to the Supreme Court Records On-Line Library (“SCROLL”), the motion was adjourned from November 4, 2021 at 9:30 a.m. (the original return date) to November 19, 2021 and then to November 26, 2021. When plaintiff asked for yet another adjournment, the Court (on November 23, 2021) adjourned the motion to December 15, 2021 and stated that this was the final adjournment (NYSCEF Doc. No. 97). Defendants submitted a letter the next day (November 24, 2021) noting their objection to this adjournment and demanding that they have time to respond to the opposition (NYSCEF Doc. No. 99).

Defendants' original notice of motion stated that "pursuant to CPLR 2214(b) answering affidavits, if any, are required to be served upon the undersigned at least 5 days before the return date of this motion" (NYSCEF Doc. No. 47). Clearly, that meant that plaintiff had until December 10, 2021 to file his opposition. Instead of doing that, plaintiff waited until the return date itself, December 15, 2021, at 10:58 p.m. to file a cross-motion. Of course, by that time the motion had already been marked fully submitted without opposition.

The Court then granted defendants' motion without opposition and ignored plaintiff's untimely papers (NYSCEF Doc. No. 130). Plaintiff now moves to vacate the Court's decision. He claims he did not willfully default and that defendants have not suffered any prejudice. He insists he did not violate the Court's adjournment order and the cross-motion was timely.

Plaintiff's counsel focuses on the fact that defendants refused to enter into a briefing schedule. Counsel for plaintiff argues that he had no idea that the Court's intervention to adjourn the motion took it out of Room 130 (Motion Support). Plaintiff's counsel asserts he is a solo practitioner with only one secretary working for him. He explains that the motion he now seeks to vacate was issued only a few days before he had to fly to Florida to accompany his elderly mother for a surgery and her subsequent recovery. Counsel for plaintiff claims that last week his only employee (his secretary) told him she had Covid and that delayed the filing of the instant motion to vacate.

The client (Anthony Giordano) also submits an affidavit in which he explains he was in Rochester during Thanksgiving and is his mother's caretaker.

In opposition, defendants emphasize that they filed the motion back in October, it was adjourned three times and plaintiff still didn't make the deadline. Defendants insist that plaintiff does not offer a reasonable excuse for the untimely opposition.

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 denies the motion on the ground that plaintiff failed to raise a reasonable excuse for his default. In fact, in this Court’s view, plaintiff did not bother to offer an excuse at all. Rather, plaintiff insists that his cross-motion was timely filed. He argues that the original notice of motion did not provide enough time for an opposition (the motion was dated October 21, 2021 and the return date was November 4, 2021). But that claim misses the point; CPLR 2214 requires that answering papers be filed at least two days before the return date where the return date is less than sixteen days after the filing of the motion. Moreover, plaintiff did not file the cross-motion on the original return date (November 4, 2021). Instead, plaintiff asked for, and received, three adjournments over defendants’ objections. Plaintiff had more than enough time to file the cross-motion by December 10, 2021 or even by December 13, 2021.

Setting aside the procedural issues, a practical evaluation of the circumstances could never yield the conclusion that the cross-motion was timely filed. When would defendants have had a chance to oppose a cross-motion filed at 10:58 p.m. on the return date? And this Court declines to just view the papers as opposition; plaintiff made a conscious decision to file a cross-motion. The Court cannot simply pick and choose how to consider papers in whatever way is most convenient for plaintiff.

It is axiomatic that a motion is submitted on the return date which, of course, means that a Court must then issue a prompt decision. Plaintiff’s scheme deprived defendants of their right to oppose the cross-motion or even submit a reply. To remedy this, the Court would have had to

sua sponte set up a new briefing schedule, further delaying a motion that had already been adjourned many times over defendants' objections. It is not this Court's role to clean up messes intentionally created by one of the parties.

The Court also observes that the cross-motion was not accompanied by a letter explaining why it was filed so late or even acknowledging that defendants should have a chance to oppose it. That may be because plaintiff does not think the papers were filed late but these are the type of gotcha litigation tactics this Court cannot condone. Counsel for plaintiff's confusion about whether this motion was in 130 or with this Court is irrelevant. The notice of motion states the motion is returnable at 9:30 a.m. Even if, in some bizarro world, a party could file a cross-motion on the return date, that does not mean they can file it after the time provided in the notice of motion.

Plaintiff's complaints that defendants refused to enter into a briefing schedule or that he was blindsided by the motion are also both irrelevant. While this Court encourages parties to work together to enter into briefing schedules for motions, parties are not required to do so. That is why there is the CPLR. And plaintiff's objections and unhappiness with defendants' motion has nothing to do with filing a timely opposition.

That the client was away during Thanksgiving or helping care for his mother does not compel the Court to grant the motion. These excuses do not explain or justify counsel for plaintiff's decision to wait until December 15, 2021 to file a cross-motion.

And to be clear, the Court is not denying the instant motion because there was a delay in seeking to vacate the Court's previous decision. That renders counsel for plaintiff's excuses about having to travel to Florida (after the previous motion was decided) and his secretary's

illness as irrelevant. This Court is only focused on whether plaintiff identified a reasonable excuse for failing to timely file opposition papers to the previous motion.

The Court also observes that although counsel for plaintiff claims to be a solo practitioner, a different attorney (Ally Hack, Esq.) filed an affirmation for an adjournment on plaintiff's behalf (NYSCEF Doc. No. 88), a request which this Court granted. Emails attached in support of that adjournment also show this attorney working on plaintiff's behalf.

Summary

This Court recognizes that cases should, in most instances, be decided on the merits. But as *counsel for plaintiff* points out, the Court must consider "justice and fair play." Fair play involves filing timely opposition, especially after requesting and receiving three adjournments. Fair play does not involve filing a cross-motion after the motion was already submitted and then hoping this Court would simply overlook that fact. And, critically, fair play does not involve insisting that such a filing was timely in spite of the circumstances established on this record.

The fact is that plaintiff failed to identify a reasonable excuse for failing to timely file his cross-motion. Rather, he spent the vast majority of the moving papers making *ad hominem* attacks against defendants. This Court is unconcerned with whether defendants may or may not have complied with various discovery orders on this motion. The Court does not know whether the decision to file the cross-motion in the middle of the night on the return date was gamesmanship or simply an oversight. But, in any event, plaintiff ignored a court deadline and did not identify a compelling argument for why this Court should overlook that failure.

Accordingly, it is hereby

ORDERED that the motion by plaintiff to vacate this Court's decision is denied.

2/4/2022

DATE



ARLENE BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE