

Minuto v Bravo

2022 NY Slip Op 31542(U)

May 9, 2022

Supreme Court, Kings County

Docket Number: Index No. 501861/2019

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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ANTHONY MINUTO, M&F SMITH STREET HOLDINGS
CORP., S&A FOOD MANAGEMENT CORP.,
174 SMITH FOOD CORP.,

Plaintiffs, Decision and order

Index No. 501861/2019

VICTORIANO BRAVO,

Defendant, May 9, 2022

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to reargue a decision and order dismissing the action on default. The defendants have opposed the motion. Papers were submitted by the parties and upon review of all the arguments this court now makes the following determination.

On August 2, 2019 the defendant filed a motion to dismiss the complaint. The motion contained a return date of August 15, 2019 which the court adjourned to September 4, 2019. On August 6, 2019 the plaintiff filed an order to show cause seeking to adjourn the above motion to September 16, 2019. The order to show cause was signed on August 8, 2019 with a return date of September 11, 2019 and service of the order to show cause by August 12, 2019. On September 3, 2019 the plaintiff filed opposition papers to the motion to dismiss which the defendants rejected. On September 4, 2019 the plaintiff failed to appear and the defendant's motion was granted. Indeed, a proposed order was uploaded to NYSCEF on September 6, 2019. On October 2, 2019

the court signed the order granting the defendant's motion to dismiss on the basis of the plaintiff's failure to appear for a hearing of the motion on September 4, 2019.

The plaintiff has now filed a motion to reargue asserting that while it is true there was a failure to appear on September 4, 2019, the court had granted the plaintiff's motion seeking an extension which was to be heard on September 11, 2019. Therefore, there was no real default and the dismissal order should be vacated. As noted, the defendants oppose this motion.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]). Further, it is well settled that to succeed upon a motion to vacate a default the party must demonstrate a reasonable excuse for the default and a meritorious claim (Golden Mountain Income v. Spencer Gifts, LLC, 167 AD3d 850, 88 NYS3d 889 [2d Dept., 2018]).

The confusion this case yielded was based on the fact that a motion had been filed seeking a dismissal with a return date of September 4, 2019 and a motion was filed seeking to extend such return date and that motion was returnable on September 11, 2019.

This, while the return date of September 4, 2019 was never changed within the motions filed for that relief, it was changed in the motion filed by the plaintiff seeking an extension. Therefore, it can hardly be said the plaintiff wilfully defaulted upon the motion. Moreover, while the plaintiff's opposition papers were rejected, they were indeed filed before the actual motion was scheduled for September 4, 2019. Therefore, as a matter of law the plaintiff has presented a reasonable excuse for the failure to appear.

Turning to the meritorious claim, the plaintiff seeks \$30,000 he claims is owed by the defendants pursuant to an agreement reached in Civil Court on July 10, 2018. The plaintiff asserts he has not been paid and is seeking those funds. This claim is surely meritorious. First, this claim only arose because it is alleged there has not been any payment. Thus, there can be no collateral or res judicata effect because this claim never accrued. Consequently, res judicata cannot bar claims or potential claims that survive the conclusion of a case (see, Rudovic v. Rudovic, 131 AD3d 1225, 16 NYS3d 856 [2d Dept., 2015]).

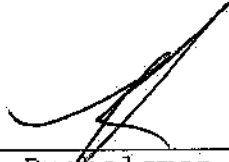
Moreover, although that agreement stated that "both Minuto & Bravo Release and Discharge the other from all claims to date" (see, Agreement) future claims were not contemplated. Thus, a general release only covers matters that were the subject of the

dispute and do not involve future claims (Cahill v. Regan, 5 NY2d 292, 184 NYS2d 348 [1959]). Therefore, if a release contains no reference to future claims then it does not bar such claims (see, Troy News Co., Inc., v. City of Troy, 167 AD2d 730, 563 NYS2d 301 [3rd Dept., 1990]). Therefore, the plaintiff has alleged meritorious claims. Consequently, the motion seeking reargument is granted and upon such reargument the motion seeking to vacate the default is granted as well.

So ordered.

ENTER:

DATED: May 9, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC