

Bueno-Estevez v Hacker
2022 NY Slip Op 35042(U)
August 22, 2022
Supreme Court, Queens County
Docket Number: Index No. 716853/2020
Judge: Robert J. McDonald
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

HARLEN W. BUENO-ESTEVEZ, Index No.: 716853/2020

Plaintiff, Motion Date: 8/11/2022 **FILED**

- against - Motion No.: 2 **8/24/2022**
4:07 PM

AKEEM HACKER and DAVID WILLIAMS, Motion Seq.: 3

Defendants. **COUNTY CLERK**

QUEENS COUNTY

- - - - - x

The following electronically filed documents read on this motion by defendant DAVID WILLIAMS for an Order pursuant to CPLR 5015, vacating the Order granting plaintiff summary judgment based upon movant's failure to submit timely opposition, and upon such vacatur, and Order denying plaintiff's motion for premature/pre-discovery summary judgment:

Papers
Numbered:

Order to Show Cause-Affirmations-Exhibits.....EF 21-32

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on August 23, 2020.

On March 18, 2022, plaintiff e-filed a motion for summary judgment on the issue of liability. The motion was originally returnable on April 8, 2022. Movant's counsel states that he retained an outside investigator to locate defendant DAVID WILLIAMS so that he may execute an affidavit of meritorious defense to be submitted in opposition. As additional time was needed, an adjournment was granted to May 12, 2022. Movant's counsel further states that his client's affidavit was received on April 12, 2022, but due to a clerical error made by his paralegal, the new return date of the motion was not correctly entered into their diary system.

On May 31, 2022, this Court granted plaintiff's motion for summary judgment on liability based upon defendant's failure to oppose. Movant now seeks to vacate the Order.

CPLR Rule 5015(a)(1) states: "The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry".

A party seeking to vacate an order must demonstrate both a reasonable excuse and a potentially meritorious opposition to the motion (see Dokaj v Ruxton Tower Ltd. Partnership, 91 AD3d 812 [2d Dept. 2012]; Karamuco v Cohen, 90 AD3d 998 [2d Dept. 2011]; Donovan v Chiapetta, 72 AD3d 635 [2d Dept. 2010]). The determination of what constitutes a reasonable excuse lies within the trial court's sound discretion, and if no reasonable excuse is found, the court need not consider whether meritorious opposition was sufficiently shown (see Diaz v Ralph, 66 AD3d 819 [2d Dept. 2009]; Tribeca Lending Corp. v Correa, 92 AD3d 770, 771 [2d Dept. 2012]; Maida v Lessing's Rest. Servs., Inc., 80 AD3d 732, 733 [2d Dept. 2011]). A claim of law office failure must be supported by a detailed and credible explanation of the default at issue (see Neilson v 6D Farm Corp., 123 AD3d 676 [2d Dept. 2014]; Eastern Savings Bank, FSB v Charles, 103 AD3d 683 [2d Dept. 2013]; Henry v Kuveke, 9 AD3d 476 [2d Dept. 2004]).

Movant's counsel's paralegal, Eileen Kennedy-Jebrane submits an affidavit attesting to the law office clerical error. She states that she failed to diary the new date in the office calendar as usual, and in doing so, failed to e-file the affirmation in opposition and movant DAVID WILLIAMS's affidavit. She states that this failure to file was an isolated incident.

Movant states that they have demonstrated a reasonable excuse for the default. Further, this was a three-car accident, where movant states that he was propelled into the rear of plaintiff's car by co-defen vehicle 1 (AKEEM HACKER) was traveling east on Jamaica Avenue when vehicle 2 (DAVID WILLIAMS) stopped and vehicle 1 (AKEEM HACKER) impacted the rear of vehicle 2 (DAVID WILLIAMS) which propelled vehicle 2 (DAVID WILLIAMS) into oncoming traffic and collided with the rear of vehicle 3 (HARLEN W. BUENO ESTEVEZ. Clearly, thdant AKEEM

HACKER. No depositions have been conducted, and movant states that issues of fact, and questions as to liability still exist.

Movant also requests that in addition to vacating the prior Order granting plaintiff summary judgment that this Court also deny summary judgment on liability. Movant's counsel argues that the plaintiff has not met his burden of showing a prima facie entitlement to summary judgment.

Movant's counsel's affirmation in support points to defendant DAVID WILLIAMS affidavit, e-filed on June 7, 2022 where he states:

"On August 23rd of 2020, I was operating my vehicle in the eastbound lane on Jamaica Avenue at or near its intersection 193rd Street, Queens County, New York. Eastbound traffic had suddenly come to a stop in front of me so I brought my car to a stop safely behind the vehicle that was front of me. I was at a complete stop when I felt an impact to the rear of my car causing my car to be propelled it into the westbound lane of traffic where it came in contact with the plaintiff's vehicle. The sudden impact to the rear of my car left me without time to contemplate or weigh alternative courses of action, and therefore I cannot reasonably be held to the standard of care required of one who has had a full opportunity to reflect, and therefore should not be found negligent."

This statement contrasts with plaintiff's affidavit submitted in support of his summary judgment motion, where he states that he was traveling west on Jamaica Avenue when he observed a stopped vehicle (AKEEM HACKER) on the east bound lanes of Jamaica Avenue being struck in the rear by another vehicle (DAVID WILLIAMS). After being struck, the stopped vehicle (AKEEM HACKER) was propelled into the rear of Mr. BUENO ESTEVEZ's vehicle and therefore, both named Defendants' negligence was the sole and proximate cause of the accident.

Movant's counsel states that there are questions as to the existence of material and triable issues of fact relating to the happening of the subject accident that must be explored at depositions before any and all questions of liability can be determined. As such, movant requests that plaintiff's summary judgment motion be denied.

Accordingly and based on the foregoing, it is hereby

ORDERED, that the Order dated May 31, 2022 granting plaintiff summary judgment on the issue of liability is hereby vacated; and it is further

ORDERED, that plaintiff's motion for summary judgment on the issue of liability is hereby denied.

Dated: August 22, 2022
Long Island City, NY

Robert J. McDonald

HON. ROBERT J. MCDONALD
J.S.C.

FILED

8/24/2022

4:07 PM

COUNTY CLERK
QUEENS COUNTY