

Jimenez v Morales

2023 NY Slip Op 30782(U)

February 8, 2023

Supreme Court, New York County

Docket Number: Index No. 151847/2012

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART 38M

Justice

-----X

NELSON JIMENEZ,

Plaintiff,

- v -

RUD MORALES, NEGRO CLARO CORP., D/B/A NEGRO
CLARO LOUNGE, and NEGRO CLARO LOUNGE,

Defendants.

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INDEX NO. 151847/2012

MOTION DATE 05/19/2022

MOTION SEQ. NO. 018

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 018) 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, and 355

were read on this motion for DEFAULT JUDGMENT.

LOUIS L. NOCK, J.

Plaintiff moves for a default judgment against defendant Rud Morales “for failing to obtain new counsel or otherwise advis[ing] the Court that she will proceed *pro se* in the . . . trial of this matter” (NYSCEF Doc. No. 339).

Brief Factual Background of the Case:

This is a commercial case seeking monetary damages for alleged breach of contract, fraudulent misrepresentation, unjust enrichment, and breach of the implied covenant of good faith and fair dealing brought by plaintiff Nelson Jimenez against answering defendant Rud Morales and the defaulting corporate defendant(s), Negro Claro Corp., d/b/a Negro Claro Lounge, and, as separately named, “Negro Claro Lounge.” Plaintiff claims that defendant Morales took his business equity investment money for purposes of enabling the lounge enterprise and then excluded him from operating Negro Claro Lounge or receiving any shares or profits from the business.

Specifically, Plaintiff claims that defendant Morales and he had a verbal agreement that he would receive 35% of the business in return for his investment of \$105,000. Plaintiff claims that defendant Morales, despite not signing a formal contract, acted in accordance with the deal and acknowledged plaintiff's investment until 2011, when she denied any business contact with plaintiff, banned him from coming to the lounge, would not provide him any statements of profits, and would not let him have any say in how the business operated. Plaintiff also claims that defendant Morales engaged in fraudulent misrepresentation by inducing him to invest in the business when she planned all along to take his investment money and exclude him from the business, which she accomplished through a series of fraudulent and deceptive acts.

Procedural History of the Case:

The within action was commenced by the filing of the Summons and Verified Complaint on April 16, 2012. Issue was joined by the service of the Answer on behalf of all defendants, on or about August 27, 2012 (NYSCEF DOC NO. 31). On May 16, 2013, after former counsel for all defendants, Argilio Rodriguez, Esq., moved to withdraw as counsel for Negro Claro and Negro Claro Lounge, the court directed the corporate defendants to obtain substitute counsel (NYSCEF DOC NO. 49). On December 6, 2013, Plaintiff moved for a default judgment against the corporate defendants Negro Claro and Negro Claro Lounge for failing to obtain substitute counsel (NYSCEF DOC NOS. 56 – 71). On March 10, 2014, Plaintiff's motion for default judgment was granted as against the corporate defendants Negro Claro and Negro Claro Lounge, leaving Morales the sole defendant subject to trial in this case (NYSCEF DOC NO. 80).

During a March 28, 2022, conference, Morales' counsel, Michael Wiseberg, Esq., advised that he could not continue as trial counsel on account of his health, and that he would withdraw from the case and allow Morales to obtain new counsel. The court granted Mr.

Wiseberg's application to withdraw and permitted Morales until April 29, 2022, to retain new trial counsel. By order dated May 3, 2022 (NYSCEF DOC NO. 343), the court issued a Trial Rescheduling Order whereby on or before May 13, 2022, any notice of appearance of substitute trial counsel for defendant Morales shall be filed, or any letter shall be filed by Mr. Wiseberg on or before said date informing of said defendant's commitment to proceed to trial *pro se*. It was further ordered that the failure of satisfaction of any of the aforesaid contingencies shall enable plaintiff's counsel to apply to this court for a default judgment without trial. However, neither a notice of appearance of substitute trial counsel, nor any letter from Mr. Wiseberg confirming that Morales would proceed *pro se*, was filed. Given those circumstances, Plaintiff made the instant motion for a default judgment against Morales.

Defendant Morales' Opposition to the Motion:

By belated opposing affidavit filed June 29, 2022 (NYSCEF DOC NO. 349), Morales – then, and now, *pro se* – explained to this court that her prior counsel, Mr. Wiseberg, had never kept her apprised of the court's May 3rd order requiring her (or any substitute counsel on her behalf) to inform the court of her representational status by May 13th. Her affidavit also goes on to discuss the merits of her defense, including a reiteration of her denial of Plaintiff's seminal allegation that he invested any money with her with regard to the Negro Claro Lounge. Morales' opposition, therefore, asks the court to forgive her innocent failure to timely notify the court of her commitment to proceed to trial *pro se*, and asks for the opportunity to have her day in court, and to present her defenses at trial.

Discussion:

CPLR § 2001 enables the court to excuse “a mistake, omission, defect or irregularity . . . upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake,

omission, defect or irregularity shall be disregarded[.]” Relatedly, CPLR § 3215 affords the court discretion to determine whether there is a reasonable excuse for a party’s default in participation (*e.g.*, *New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463 [1st Dept 2012]).

Here, Morales has explained the circumstances of her missing the deadline for informing the court of her trial-representational status, as being the result of her former counsel’s neglect to inform her of same. In addition, she has reiterated her defense, contradicting the seminal allegations of the complaint (*see*, NYSCEF DOC NOS. 342 [Verified Amended Answer], 349 [Affidavit in Opposition Motion for a Default Judgment]) (*e.g.*, *Soffer v Montanez*, 198 AD3d 606 [1st Dept 2021] [“a potentially meritorious defense”]). Accordingly, this court denies Plaintiff’s motion for a default judgment against Morales (*see*, *Ayala v Delgado*, 278 AD2d 59, 59 [1st Dept 2000] [“the strong public policy favoring resolution of disputes on the merits”]).

As for any undue prejudice to Plaintiff arising from this denial – there is none. This action was commenced by Plaintiff as far back as 2012 – a staggering 11 years ago – yet, after such prolonged period, and with 18 motions having been filed, this case has not yet undergone trial. Plaintiff did not file his note of issue until 2018 (*see*, Decision & Order, NYSCEF DOC NO. 337). At one point, jury selection commenced in September 2021; but the trial was adjourned at Plaintiff’s request, and on consent of prior defense counsel (*id.*). To hear Plaintiff now complain of any prejudice in allowing Morales to finally have her day in court, at trial, would be distortion of the just processes of this court.

Accordingly, it is hereby

ORDERED that Plaintiff’s motion for default judgment against defendant Rud Morales is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference on Tuesday, April 20, 2023, at 2:00 PM, in Room 1166, 111 Centre Street, New York, New York.

This constitutes the decision and order of the court.

ENTER:



<u>2/8/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE