

**Sunblock Sys., Inc. v Marcum, LLP**

2023 NY Slip Op 31343(U)

April 21, 2023

Supreme Court, New York County

Docket Number: Index No. 653172/2017

Judge: John J. Kelley

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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. JOHN J. KELLEY PART 56M**

*Justice*

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SUNBLOCK SYSTEMS, INCORPORATED,

Plaintiff,

- v -

MARCUM, LLP, and SAMUEL A. FEINBERG,

Defendants.

-----X

INDEX NO. 653172/2017

MOTION DATE 03/02/2023

MOTION SEQ. NO. 005

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 85, 86, 87

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

In this action to recover damages for breach of contract, the plaintiff moves pursuant to CPLR 5015(a)(1) to vacate two orders of this court, both dated February 21, 2023, that respectively dismissed the complaint for the plaintiff's failure to appear at the call of the trial calendar on February 21, 2023, and marked the action as disposed. The defendant Marcum LLP (Marcum), opposes the motion. The motion is granted, the two orders dated February 21, 2023 are vacated, the complaint is reinstated insofar as asserted against Marcum, the matter is restored to the trial calendar, and the parties shall appear for a pretrial conference on June 7, 2023, at 9:00 a.m.

On October 31, 2019, the plaintiff served and filed a note of issue and certificate of readiness. In an order dated April 1, 2020, this court granted Marcum's motion for summary judgment only to the extent of awarding it summary judgment dismissing the cause of action alleging an account stated insofar as asserted against it (SEQ 004). Although the plaintiff did not oppose the motion, the court denied that branch of Marcum's motion seeking summary judgment dismissing the breach of contract cause of action insofar as asserted against it because Marcum did not establish its prima facie entitlement to judgment as a matter of law in

connection with that cause of action. In the same order, the court denied those branches of Marcum's motion seeking summary judgment on its cross claims to recover for breach of contract and contractual indemnification against the defendant Samuel A. Feinberg and, upon searching the record, awarded summary judgment to Feinberg dismissing Marcum's cross claim for common-law indemnification. In a second order dated April 1, 2020 (SEQ 003), this court granted Feinberg's unopposed motion for summary judgment dismissing the complaint insofar as asserted against him.

On February 7, 2023, and February 17, 2023, the court's eTrack system dispatched email messages to the attorneys for all of the parties, informing them that the matter would be called ready for trial on February 21, 2023, and directing them to appear in court at 9:00 a.m. on that date. Counsel for Marcum and Feinberg appeared at the call of the calendar on February 21, 2023. Counsel for Feinberg alleged that he had called the office of the plaintiff's counsel on February 15, 2023 and February 17, 2023 to confirm the conference date. On the morning of February 21, 2023, counsel for Marcum attempted to telephone the plaintiff's attorney to inform him of the required appearance, but was unable to reach him. Consequently, the court issued one order dated February 21, 2023 dismissing the complaint in its entirety, and a second order dated February 21, 2023 marking the action as disposed.

The plaintiff now seeks to vacate the February 21, 2023 orders on the ground of excusable default. To vacate the orders on that ground, the plaintiff must demonstrate both a reasonable excuse for its default and a potentially meritorious cause of action (*see 60 E. 9th St. Owners Corp. v Zihenni*; 111 AD3d 511, 512 [1st Dept 2013]; *Navarro v Plus Endopothetik*, 105 AD3d 586, 586 [1st Dept 2013]; *Kassiano v Palm Mgt. Corp.*, 95 AD3d 541, 541 [1st Dept 2012]; *Dokaj v Ruxton Tower Ltd. Partnership*, 91 AD3d 812, 813 [2d Dept 2012]; CPLR 5015[a][1]). Law office failure may, under appropriate circumstances, constitute a reasonable excuse (*see CPLR 2005, 5015 [a]*; *Kapoor v Interzan, LLC*, 172 AD3d 519, 520 [1st Dept 2019];

*Kassiano v Palm Mgt. Corp.*, 95 AD3d at 541; *Goodwin v New York City Hous. Auth.*, 78 AD3d 550, 551 [1st Dept 2010]).

With respect to the merits of the plaintiff's breach of contract cause of action, the plaintiff submits the complaint, which was personally verified by its principal, who has personal knowledge of the facts underlying the dispute. A certificate of conformity, as required by CPLR 2309(c), was attached to the verified complaint. This verified pleading may serve as an affidavit of merit, in accordance with CPLR 105(u), as long as it "sufficiently sets forth relevant evidentiary facts" (*60 E. 9th St. Owners Corp. v Zihenni*, 111 AD3d at 513). In its complaint, the plaintiff asserted unambiguously that it entered into an agreement with Marcum to provide it with digital forensic services, that it provided those digital forensic services to Marcum from July 30, 2013 through September 19, 2013, that the value of those services was \$34,254.22, and that Marcum never paid it for those services. The plaintiff annexed to the complaint two itemized bills, enumerating and identifying the services that it provided to Marcum. The plaintiff thus submitted proof of the "formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage" (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept. 2009]; see *Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1055 [3d Dept 2009]) and, hence, established the potential merit of its cause of action to recover for breach of contract against Marcum.

The determination of what constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court (see *Gecaj v Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600, 602 [1st Dept 2017]). In the instant motion, the plaintiff's attorney asserted that

"[p]laintiff did not appear at the February 21, 2023 pretrial conference because I was not aware of it. No notice of the appearance was filed on NYSCEF. A review of my inboxes and spam folders confirmed I did not receive any e-mail notification regarding the appearance on either e-mail I have used in connection with this case and NYSCEF filings, GeneRosen@Gmail.com and Gene@GeneRosen.com. As explained further below, my office did not receive any phone call informing me of the conference. Had I been aware of the conference, I certainly would have attended. If I had even been contacted the morning of the conference, I would have promptly made my way to Court."

Counsel averred that he first became aware of the scheduled appearance only after the court issued its orders of dismissal and disposition. He further stated that

“Feinberg’s attorney, Alexander Potruch, Esq., claims that he called my office last Wednesday (February 15, 2023) and last Friday (February 17, 2023) and left messages about the conference, but never called back. I checked my office’s phones and inquired with my staff. My office’s voicemail did not contain any message from Mr. Potruch on either aforementioned date. Neither myself nor anyone in my office received a phone call from Mr. Potruch on February 15, 2023. My office did receive a call from an ‘Alex’ at (516) 319-7157 on February 17, 2023, but the message did not indicate it was regarding any kind court appearance. When I called that number later that day, I was told by the person who answered that there was nobody named Alex at the number. By that time, my staff had left for the weekend and the Court date was the next business day. I inquired my staff again this morning [February 22, 2023], who confirmed that they were not told that the call was regarding this case or any court appearance – it was simply a message to call back ‘Alex.’”

Inasmuch as the plaintiff’s counsel asserted that he did not receive notice of the scheduled February 21, 2023 appearance, either via email or by telephone, “[w]hile counsel might be faulted for failing to keep track of the status of the case,” the court concludes that “such an oversight amounts to law office failure, which may be accepted as an excuse for delay” (*Muriel v St. Barnabas Hosp.*, 3 AD3d 419, 420 [1st Dept 2004]). The court agrees with the plaintiff that this instance of law office failure constitutes a reasonable excuse for failing to appear, especially given the absence of any evidence of willful or contumacious conduct on the plaintiff’s part (see *Alliance for Progress, Inc. v Blondell Realty Corp.*, 179 AD3d 629, 629 [1st Dept 2020]). The court rejects Marcum’s contention that the plaintiff’s decision not to oppose the summary judgment motions constituted an abandonment of the action.

Accordingly, it is

ORDERED that the plaintiff’s motion is granted, and the two orders dated February 21, 2023, respectively dismissing the complaint, and marking the action disposed, are vacated; and it is further,

ORDERED that the complaint is reinstated insofar as asserted against the defendant Marcum, LLP; and it is further,

ORDERED that the action is restored to the trial calendar at the same position as it had been as of February 21, 2023; and it is further,

ORDERED that the parties shall appear for a pretrial conference on June 7, 2023, at 9:00 a.m.

This constitutes the Decision and Order of the court.

4/21/2023  
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: