

Justicebacker Inc. v Abeles

2023 NY Slip Op 32089(U)

June 23, 2023

Supreme Court, New York County

Docket Number: Index No. 650374/2017

Judge: David B. Cohen

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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. DAVID B. COHEN PART 58

Justice

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INDEX NO. 650374/2017

JUSTICEBACKER INC. D/B/A JUSTICEBACKER.COM, JS
BARKATS PLLC, and LAW OFFICES OF MICHAEL B.
WOLK, P.C.,

MOTION SEQ. NO. 007

Plaintiffs,

- v -

**DECISION + ORDER ON
MOTION**

ALEJANDRO ABELES,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178

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

In this breach of contract action, defendant moves, pursuant to CPLR 317 and 5105(a), to vacate this Court's prior order denying his contempt motion on default.

Factual and Procedural Background

This case arises out of legal services rendered by plaintiffs JS Barkats PLLC and Law Offices of Michael B. Wolk, P.C. (Wolk, P.C.) on behalf of defendant in various actions beginning in 2011 (NYSCEF Doc No. 1). In 2015, with defendant unable to pay for such services, he entered into a financing agreement with plaintiff Justicebacker Inc. to cover the costs of his legal representation. Shortly thereafter, he entered into a settlement agreement to settle all of his pending actions. The settlement agreement provided that proceeds from the settlement would be placed in an escrow fund and Wolk, P.C. was designated as the escrow agent.

Plaintiffs commenced this action to January 2017, asserting claims for breach of contract and quantum meruit after defendant allegedly violated the financing agreement by failing to pay

them with monies in the escrow fund (Doc No. 1).¹ Defendant joined issue by his answer dated February 16, 2017, denying all substantive allegations of wrongdoing and asserting various affirmative defenses (Doc No. 2). Three years later, Justicebacker moved for summary judgment on its breach of contract claims and defendant cross-moved for summary judgment against Justicebacker and JS Barkats (Doc No. 53). By decision and order of December 22, 2020, Justicebacker's motion was denied and defendant's cross-motion was granted; with this Court directing that "all monies held in any escrow pending the outcome of th[e] action shall be tendered . . . to defendant" (Doc No. 90).

After Wolk, P.C., failed to turn over the monies in the escrow fund to defendant, defendant moved to compel it to do so (Doc No. 91). By decision and order of December 2021, his motion was granted and Wolk, P.C. was directed to turn over all the monies in the escrow fund to defendant within 30 days (Doc No. 107).²

After Wolk, P.C. again failed to dispense the monies in the escrow fund to defendant, defendant moved for an order holding it in contempt of the December 2021 order (Doc No. 111). Oral argument of the contempt motion was initially scheduled for June 13, 2022, and all parties appeared virtually on that date, but it was ultimately rescheduled for January 24, 2023 (Doc No. 175). After defendant failed to appear for oral argument, by decision and order of January 24, 2023, his contempt motion was denied on default (Doc No. 167). He moves to vacate the January 2023 order (Doc No. 168), which Justicebacker and JS Barkats do not oppose.

¹ Wolk, P.C. is no longer a plaintiff in this action, as it discontinued its quantum meruit claim shortly after the complaint was filed (Doc No. 6). However, it remains the escrow agent.

² The order identified Michael B. Wolk, individually, as the escrow agent (Doc No. 107).

Legal Analysis and Conclusions

Defendant contends that the January 2023 order must be vacated because he has a reasonable excuse for failing to appear at oral argument and his contempt motion was meritorious. According to defendant, his attorney was never notified of the rescheduled oral argument date and his attorney's audio disconnected when the parties were discussing new dates at the virtual appearance on June 13, 2022.

“A party seeking to vacate a judgment entered upon default under CPLR 5015(a)(1) must show a reasonable excuse for the default as well as a potentially meritorious defense” (*Perez v Table Run Estates, Inc.*, 191 AD3d 416, 416 [1st Dept 2021] [citations omitted]; *accord Soffer v Montanez*, 198 AD3d 606, 606 [1st Dept 2021] [citations omitted]). However, “[a] determination of the sufficiency of the proffered excuse and the statement of merits rests within the sound discretion of the court” (*Marquez v 171 Tenants Corp.*, 161 AD3d 646, 647 [1st Dept 2018]; *see Rivera v Shypri Realty Corp.*, 198 AD3d 448, 448 [1st Dept 2021]). Although “law office failure may constitute a reasonable excuse, . . . claims of law office failure which are conclusory and unsubstantiated cannot excuse default” (*Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790 [1st Dept 2012] [internal quotation marks and citations omitted]; *see Matter of Tri-State Consumer Ins. Co. v Hereford Ins. Co.*, 167 AD3d 416, 417 [1st Dept 2018]).

Here, the failure of defendant's counsel to appear for the rescheduled oral argument of defendant's contempt motion “due to an inadvertent calendar error by counsel's firm, amounted to excusable law office failure” (*Blanco v Quality Gas Corp.*, 214 AD3d 432, 432-433 [1st Dept 2023] [affirming vacatur of prior order on default because scheduling error causing counsel to miss oral argument was reasonable excuse of law office failure]; *Perez v New York City Hous. Auth.*,

290 AD2d 265, 265 [1st Dept 2002] [finding scheduling issue causing attorney to miss pretrial conference appearance constituted reasonable excuse of law office failure]).

Defendant has also demonstrated that his contempt motion had merit. To support a finding of civil contempt, it is well established that: (1) “it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect;” (2) “[i]t must appear, with reasonable certainty, that the order has been disobeyed;” (3) “the party to be held in contempt must have had knowledge of the court’s order;” and (4) “prejudice to the right of a party to the litigation must be demonstrated” (*Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]).

Based on the documents submitted by defendant in support of the contempt motion, it appears that the elements for civil contempt are met here. First, the December 2021 order appears to contain an unequivocal mandate that was in effect, as it clearly stated that the escrow agent, Wolk, P.C., was required to turn over the remaining monies in the escrow fund to defendant by December 31, 2021 — 30 days from the order’s date of entry of December 1, 2021 (Doc No. 90). Second, it appears that the order had been disobeyed by Wolk, P.C., as evidenced by an email it sent to defendant’s counsel indicating that it would not turn over the monies to defendant because Wolk, P.C. was owed money by JS Barkats (Doc No. 113). Third, defendant’s properly executed affidavit of service (Doc No. 117) created a presumption that a proper mailing occurred, and thus, that Wolk, P.C. had knowledge of the December 2021 order (*see Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]; *60 E. 9th St. Owners Corp. v Zihenni*, 111 AD3d 511, 512 [1st Dept 2013] [finding attorney had notice of court conference based on presumption created by affidavit of service]). Fourth, and finally, defendant has demonstrated that he was prejudiced by Wolk, P.C.’s conduct because he was denied the monies in the escrow fund (*see Pacific Alliance Asia Opportunity Fund L.P. v Kwok Ho Wan*, 199 AD3d 423, 423 [1st Dept 2021] [finding plaintiff demonstrated prejudice to

its rights because multimillion dollar yacht remained outside court's jurisdiction]; *Burn v Burn*, 101 AD3d 488, 490 [1st Dept 2012] [finding defendant's failure to make maintenance payments prejudiced plaintiff's rights]). Defendant has thereby demonstrated that his contempt motion has merit.

Therefore, by demonstrating that he had a reasonable excuse for his default and had a meritorious contempt motion, plaintiff has shown that his default should be vacated (*see e.g. Coretto v Extell W. 57th St., LLC*, 137 AD3d 677, 677-678 [1st Dept 2016] [granting plaintiffs' motion to vacate order granting cross-motion for summary judgment on default because they demonstrated reasonable excuse and meritorious opposition to motion]).

Defendant's remaining contention that the January 2023 order should be vacated pursuant to CPLR 317 does not need to be addressed given the findings above.

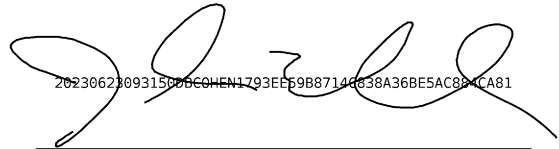
Accordingly, it is hereby:

ORDERED that the motion by defendant Alejandro Abeles to vacate the January 24, 2023 order denying his contempt motion on default is granted; and it is further

ORDERED that defendant's contempt motion is restored to the motion calendar, and the parties shall appear for oral argument of such motion on August 15, 2023, at 11:00 a.m., in person at 71 Thomas Street, Room 305; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office; and it is further

ORDERED that such service upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website).



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6/23/2023

DATE

DAVID B. COHEN, 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: