

Grenkus v Matiteeb

2023 NY Slip Op 32173(U)

June 26, 2023

Supreme Court, Kings County

Docket Number: Index No. 522075/2017

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 522075/2017
Seqs. 013 and 014

Part 91

DECISION/ORDER

FANNI GRENKUS,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Plaintiff,

Papers Numbered

against

Notice of Motion and Affidavits Annexed	<u>1-2</u>
Order to Show Cause and Affidavits Annexed.	<u> </u>
Answering Affidavits	<u>2-3</u>
Replying Affidavits	<u>5</u>
Exhibits	<u> </u>
Other	<u> </u>

ADAM MATITEEB, GERSHON MATITEEB, ALL IN ONE
AUTO PARTS, LLC, 610 CONEY ISLAND AVENUE
REALTY, LLC, GIDEON MATITIAEV,

Defendants.

Upon the foregoing papers, plaintiff's motion to vacate the default and for a judgment based on unpaid settlement funds (Seq. 013) and defendants Adam Matiteeb, Gershon Matiteeb, and Gideon Matitiaev's motion for an order directing plaintiff to reimburse excess payments (Seq. 014) are determined as follows:

Procedural History

This action was settled in the Jury Coordinating Part on May 5, 2022 for \$200,000. On that date, the parties entered into a so-ordered stipulation that gave the defendant sixty days to tender payment of \$150,000. The remaining \$50,000 was to be paid in accordance with the CPLR (within twenty-one days), and the parties agree that this first payment was timely made. On August 26, 2022, the plaintiff moved by order to show cause to enforce the settlement. That OSC was signed and the motion was made returnable in the Jury Coordinating Part on February 8, 2023. The February 8, 2023 date was kept when the motion was transferred to Part 91 for oral argument. On that date, the motion was denied as the movant did not appear. The electronic

court scheduling system carried over the prior designation of February 8, 2023 as a “control date,” despite the case being scheduled for oral argument.

Plaintiff now seeks to vacate the previous default, and upon vacatur, seeks entry of the judgment as requested in the prior motion. Defendants cross-move for remittance of a portion of their previous payment, claiming that they miscalculated interest and paid plaintiff more than she was entitled to.

Analysis

CPLR 5015 establishes the procedure for relief from an order when there is excusable default. “A party seeking to vacate a default must establish both a reasonable excuse for the default and a potentially meritorious cause of action or defense” (*Anonymous v. Nowicki*, 125 A.D.3d 701, 702–703 [2d Dep’t. 2015]). “A conclusory and unsubstantiated claim of law office failure will not rise to the level of reasonable excuse” (*Piton v Cribb*, 38 AD3d 741, 742 [2d Dept 2007]).

The court’s records indicate that the electronic filing system does refer to the February 8, 2023 appearance which bore the designation “CONTROL DATE—TBD.” Plaintiff also represented to the court at oral argument that the firm called the Jury Coordinating Part prior to the February 8, 2023 appearance and received confirmation that the return date was solely for control purposes. Vacatur of the default is appropriate. Plaintiff has demonstrated a reasonable excuse, and the stipulation of settlement is a legitimate predicate for a meritorious action to enter judgment on the unpaid settlement amount.

On the merits of the motion, defendant’s opposition and cross-motion are based on the contention that the plaintiff is not an unpaid person as defined in CPLR 5003-a, as she has now been paid in full (citing *Davila v Cornelia 1731 Corp.* 139 A.D.3d 999 [2d Dept 2016]).

However, in *Mann, Sr. v. All Waste Systems, Inc.*, 293 A.D.2d 656 (2d Dept 2002), a plaintiff who had been partially paid was permitted to enter judgment with interest on the full amount of the settlement. In *Mann*, the court tacitly endorsed entry of a judgment even when partial payment has been completed, noting that CPLR 5003-a “entitles the settling plaintiff, who has not been paid ‘all sums,’ to ‘costs and lawful disbursements’” (*id.* at 657). The court also held that interest for the purpose of the judgment was to be calculated on the total amount of the settlement, and not solely upon the unpaid amount (*id.* at 657).

Here, plaintiff has not been paid all sums. The plaintiff is therefore entitled to enter judgment pursuant to CPLR 5003-a, and defendants’ cross-motion to compel plaintiff to remit allegedly overpaid interest is denied. The plaintiff concedes that defendants have transmitted \$2,885.22 in interest payments. The action settled in JCP on May 5, 2022. The stipulation allowed defendants sixty days to tender payment of \$150,000 of the settlement. Sixty days after May 5, 2022 is July 4, 2022. Since this date was a holiday, the deadline for payment was extended to July 5, 2022 (Gen. Constr. Law § 25-a). Defendant made payment on September 16, 2022, 73 days after payment was due.

Therefore, the plaintiff is entitled to enter judgment in the amount of \$5,406.75. This is the amount of interest accrued at the statutory rate in the seventy-three days that defendants’ payment was late (\$8,291.97), less the amount of interest defendant has already paid (\$2,885.22), plus plaintiff’s counsel’s fees and disbursements (\$4,691.97).¹

¹ This formula can be rendered as $((.09 * 200,000) / 365) * 73 - 2885.22 + 4691.97 = 5406.75$.

Conclusion

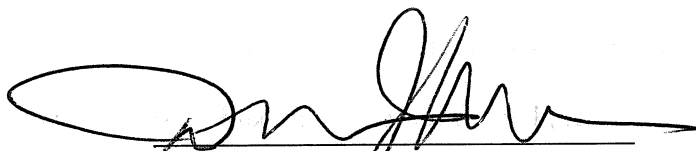
Plaintiff's motion (Seq. 013) is granted. Counsel is directed to settle judgment on notice in the amount of \$5,406.38.

Defendant's motion (Seq. 014) is denied.

This constitutes the decision of the court.

June 26, 2023

DATE



DEVIN P. COHEN
Justice of the Supreme Court