

**Acevedo v 439 Realty Corp.**

2023 NY Slip Op 32599(U)

July 27, 2023

Supreme Court, Kings County

Docket Number: Index No. 522750/2016

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 73

Index No.: 522750/2016  
Motion Date: 3-20-23  
Mot Seq No. 10

-----X  
MARISOL ACEVEDO,

Plaintiff,

-against-

DECISION/ORDER

439 REALTY CORPORATION,  
KRAUPNER PHARMACY, INC. and  
KRAUPNER ACADEMY PHARMACY, INC.,

Defendants.  
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Upon the following e-filed documents, listed by NYSCEF as item numbers 178-198, 201-207, the motion is decided as follows:

In this premises liability action, defendant KRAUPNER ACADEMY PHARMACY, INC. (hereinafter “KAP”) moves, *inter alia.*, for an order vacating an order which granted plaintiff’s motion to amend the complaint to add it as a party defendant, said motion having been granted on default, vacating the default judgment that was entered against KAP due to its failure to timely appear in the action, and dismissing the action as untimely.

The plaintiff MARISOL ACEVEDO commenced this action claiming that she sustained serious injuries when she slipped and fell on March 6, 2015, at 5:00 p.m. on an accumulation of water on the steps of an interior staircase at her place of employment located at 1350 Green Avenue, Brooklyn, New York. The plaintiff initially sued 439 REALTY CORPORATION KRAUPNER PHARMACY, INC. (“KP”) as party defendants. Both defendants were let out of the case on summary judgment. Before both defendants were let out of the case, the plaintiff had moved to add KAP as a party defendant. Even though the motion was made after the expiration of the three -year statute of limitations governing the commencement of actions for personal injuries, the plaintiff argued in its motion that since KP and KAP were united in interest, the action against KAP was not untimely pursuant to the relation back doctrine. The motion to add KAP was not opposed and was granted on default. Notably, KAP was not put on notice of the motion.

The plaintiff served KAP with a copy of the amended summons and complaint and when KAP failed to interpose a timely answer, the plaintiff moved for and was granted a default judgment on the issue of damages. The matter proceeded to inquest and judgment in the amount of \$150,000 was entered against KAP.

In support of the motion, KAP submitted the affidavit of GARY GOFFNER, who is the president and sole shareholder of both KP and KAP. As and for his excuse for KAP's failure to timely answer the amended complaint, he stated that although he received the amended summons and complaint in the mail sometime in May of 2019, since the summons and complaint bore the same named plaintiff and what appeared to name the same defendants, he did not realize that KAP had been added as a defendant. He further stated that since KP had counsel taking care of the case, he assumed that KP's attorneys would take care of it. After receiving the amended summons complaint, he maintained that KAP never received any correspondence pertaining to the matter, including a notice of the service of the summons and complaint under BCL 306, the motion for a default judgment against KAP or the order granting a default judgment against KAP. He maintained that his first notice of the purported default was receipt of the instant Judgment entered against KAP on November 29, 2022.

As and for meritorious defense to the action, he stated that the action was time barred against KAP when it was commenced and that since KP and KAP are separate legal entities, who are not vicariously liable for the acts of the other, the relation back doctrine does not apply. He also stated that it was the duty of the third-floor tenant to maintain and clean the stairs where the plaintiff fell.

A party seeking to vacate an order entered upon its default in opposing a motion must demonstrate both a reasonable excuse for the default and a potentially meritorious opposition to the motion" (*Harrison v. Toyloy*, 174 A.D.3d 579, 580, 102 N.Y.S.3d 471; *see Deutsche Bank Natl. Trust Co. v. Segal*, 200 A.D.3d 852, 853, 155 N.Y.S.3d 338; *Nationstar Mtge., LLC v. Rodriguez*, 166 A.D.3d 990, 991, 89 N.Y.S.3d 205). "A motion to vacate a default is addressed to the sound discretion of the court" (*Vujanic v. Petrovic*, 103 A.D.3d 791, 792, 961 N.Y.S.2d 210; *see Harrison v. Toyloy*, 174 A.D.3d at 580, 102 N.Y.S.3d 471; *Nationstar Mtge., LLC v. Rodriguez*, 166 A.D.3d at 991, 89 N.Y.S.3d 205). Similarly, a party seeking to vacate a default judgment pursuant to CPLR 5015(a)(1) must demonstrate a reasonable excuse for the default and a

potentially meritorious defense to the action (*see Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co.*, 67 N.Y.2d 138, 141, 501 N.Y.S.2d 8, 492 N.E.2d 116; *HSBC Bank USA, N.A. v. Eliyahu*, 170 A.D.3d 1130, 1131, 97 N.Y.S.3d 259). Here, KAP establish both a reasonable excuse for its default in failing to oppose plaintiff's motion to amend the complaint (KAP was never served) as well as a meritorious defense to the motion (the relation-back doctrine did not apply). The plaintiff also established a reasonable excuse for its failure to timely appear in the action (he failed to realize KAP had been added as a party) and a meritorious defense to the action (the statute of limitation).

In light of the strong public policy in favor of resolving cases on the merits, the strong merit to KAP's defense to the action, as well as KAP's lack of willfulness, and the lack of prejudice to the plaintiff caused by the delay, those branches of KAP's motion to vacate the order which granted plaintiffs motion to add it as a defendant and to vacate the judgment that was entered against it due to its failure to timely appear in the action are granted.

That branch of KAP's motion to dismiss the action is also granted. KAP demonstrated as a matter of law that the action was commenced after the three-year statute of limitations pertaining to personal injury actions had expired and that the relation-back doctrine did not. "The relation-back doctrine allows a party to be added to an action after the expiration of the statute of limitations, and the claim is deemed timely interposed, if (1) the claim arises out of the same conduct, transaction, or occurrence, (2) the additional party is united in interest with the original party, and (3) the additional party knew or should have known that but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against the additional party as well" (*Roco G.C. Corp. v. Bridge View Tower, LLC*, 166 A.D.3d 1031, 1033–1034, 89 N.Y.S.3d 201 [internal quotations marks omitted]; *see Buran v. Coupal*, 87 N.Y.2d 173, 178, 638 N.Y.S.2d 405, 661 N.E.2d 978). "In a negligence action, 'the defenses available to two defendants will be identical, and thus their interests will be united, only where one is vicariously liable for the acts of the other' " (*Xavier v. RY Mgt. Co., Inc.*, 45 A.D.3d 677, 679, 846 N.Y.S.2d 227, quoting *Connell v. Hayden*, 83 A.D.2d 30, 45, 443 N.Y.S.2d 383; *see Mileski v MSC Indus. Direct Co., Inc.*, 138 A.D.3d 797, 800, 30 N.Y.S.3d 159; *LeBlanc v. Skinner*, 103 A.D.3d 202, 210, 955 N.Y.S.2d 391). There is no evidence in the record that would support the conclusion that

KAP and KP had a relationship with each other which would make them vicariously liable for the other's negligence (*see Kammerzell v. Clean Burn, Inc.*, 165 A.D.3d 768, 769, 85 N.Y.S.3d 518; *Berkeley v. 89th Jamaica Realty Co., L.P.*, 138 A.D.3d 656, 659, 29 N.Y.S.3d 470). Indeed, KAP demonstrated that the two are separate and distinct legal entities.

Accordingly, it is hereby

ORDERED that KAP's motion to vacate the order which granted plaintiff's motion to add KAP as a party defendant on default is hereby GRANTED; it is further

ORDERED that KAP's motion to vacate the default judgment that was entered against it is also GRANTED; and it is further

ORDERED that KAP's motion to dismiss the action on the grounds that it was untimely commenced is GRANTED.

This constitutes the amended decision and order of the Court and replaces the decision and order dated July 14, 2023, which is hereby vacated and recalled.

Dated: July 27, 2023



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**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020