

170 Marcy Ave LLC v Brisa Bldrs. Corp.

2023 NY Slip Op 33012(U)

August 21, 2023

Supreme Court, Kings County

Docket Number: Index No. 530297/2022

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

BACKGROUND

On October 19, 2022, plaintiff 170 Marcy Ave LLC (hereinafter plaintiff) commenced the instant action to recover damages for, among other things, breach of contract by electronically filing a summons with notice and complaint with the Kings County Clerk's office.

On December 8, 2022, the plaintiff filed an amended summons with notice and verified complaint. The verified complaint alleges 185 allegations of fact in support of 14 causes of action for: (1) Breach of Contract; (2) Business Fraud; (3) Piercing the Corporate Veil (4) Business Tort; (5) Negligent Hiring and Supervision; (6) Trespass; (7) Theft; (8) Breach of Contract asserted against defendant City-Wide Testing Inc.; (9) Business Fraud asserted against defendant City-Wide Testing Inc.; (10) Piercing the Corporate Veil asserted against defendant City-Wide Testing Inc.; (11) Business Tort asserted against defendant Best Plumbing & HVAC, Inc.; (12) Business Fraud Tort asserted against defendant Best Plumbing & HVAC, Inc.; (13) Piercing the Corporate Veil asserted against defendant Best Plumbing & HVAC, Inc.; and (14) Business Tort asserted against defendant Best Plumbing & HVAC, Inc.

On January 27, 2023, defendants Brisa Builders Corp. and Erika Keller Wala (hereinafter the movants) electronically filed a pre-answer notice of motion seeking an order to dismiss the plaintiff's amended complaint pursuant to CPLR §§ 3211(a) (1) and (7), among other things. The motion was returnable on June 8, 2023.

By order of this Court dated July 7, 2023, the amended complaint as asserted against defendants Brisa Builders Corp. and Erika Keller Wala was dismissed as abandoned by the plaintiff's failure to submit opposition the motion.

LAW AND APPLICATION

In the instant order to show cause, plaintiff seeks an order denying the entry of the defendant Brisa Builders Corp's June 12, 2023 proposed order of dismissal, with prejudice, granted on default; or in the alternative, if the defendant's proposed order has not been entered, to accept plaintiff's motion papers in opposition and/or denying Brisa Builders Corp's motion to dismiss.

The order to show cause signed on June 23, 2023, did not request a temporary stay of the action and the July 7, 2023 order regarding the motion to dismiss was entered on July 10, 2023. Therefore, the request to deny entry of the order is moot.

Inasmuch as the plaintiff's request sounds in vacatur, the Court will address it as a motion seeking to vacate the Court's order of July 7, 2023:

Pursuant to CPLR 5015 (a)(1), upon a motion, the court which renders a judgment or order may relieve a party from it upon the ground of excusable default. "A party seeking to vacate an order entered upon his or her default in opposing a motion must demonstrate both a reasonable excuse for the default and a potentially meritorious opposition to the motion" (*Sauteanu v BJ's Wholesale Club, Inc.*, 210 AD3d 922, 923 [2d Dept.2022], quoting *Maruf v E.B. Mgt. Props., LLC*, 181 AD3d 670, 671 [2020]; CPLR 5015 [a] [1]). "Law office failure may qualify as a reasonable excuse for a party's default if the claim of such failure is supported by a credible" and detailed explanation of the default" (*Columbus v Kourtei*, 192 NYS3d 552 [2d Dept.2023], quoting *Sauteanu*, 210 AD3d at 923, citing *Maruf*, 181 AD3d at 671). The Court has discretion to determine what constitutes a reasonable excuse (*Sauteanu*, 210 AD3d at 923, citing CPLR 2005). However, conclusory, and unsubstantiated allegations of law office failure are insufficient to constitute a reasonable excuse (*Columbus v Kourtei*, 192 NYS3d at 552, citing

Kamil El-Deiry & Assoc. CPA, PLLC v Excellent Home Care Services, LLC, 208 AD3d 1170, 1171). Furthermore, general allegations of mere neglect will not suffice (*Sauteanu*, 210 AD3d at 923, citing CPLR 2005).

Here, it is undisputed that the movants appeared to orally argue the motion on June 8, 2023 and the plaintiff did not appear nor submit opposition to the motion. Plaintiff's counsel affirmation in support of the motion proffers the following reasons: (1) the matter was not calendared by Counsel's office, and (2) that a hard copy of the movants' motion was not received. Nevertheless, Counsel acknowledges that the motion was filed in the New York Courts Electronic Filing System (NYSCEF). Counsel further avers that plaintiff did not become aware of the appearance date until the movants submitted a proposed order to the Court on June 12, 2023.

Based upon the plaintiff's submission, it is clear that the failure to oppose the motion was the equivalent of mere neglect and therefore cannot constitute a reasonable excuse to warrant vacatur (*see Sauteanu*, 210 AD3d at 923, citing CPLR 2005). Consequently, the Court need not reach the issue of whether the plaintiff has demonstrated a potentially meritorious opposition as the plaintiff failed to demonstrate a reasonable excuse for its default in opposing the movants' motion. (*see Citibank, N.A. v Vela*, 209 AD3d 827, 828 [2d Dept 2022]).

CONCLUSION

Accordingly, plaintiff's motion to vacate the order of this Court dated July 7, 2023 is denied.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.