

Kwiatkowski v Horne

2023 NY Slip Op 33208(U)

September 14, 2023

Supreme Court, Erie County

Docket Number: Index No. 009986/2007

Judge: Raymond W. Walter

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

GREGORY M. KWIATKOWSKI

Plaintiff,

v.

Decision & Order

Index No. 009986/2007

CARIOL J. HORNE

Defendant.

*Frank J. Jacobson, Esq.
Law Office of Ralph C. Lorigo
Attorney for Plaintiff*

*W. Neil Eggleston, Esq.
Kirkland & Ellis LLP
Attorney for Defendants*

Walter, J.:

The following papers were read on the Defendant’s Motion to Vacate along with the transcript from oral arguments held before Justice Nowak on May 25, 2023.

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This action was originally commenced by Mr. Gregory M. Kwiatkowski (“Kwiatkowski” or the “Plaintiff”) on October 15, 2007, by the filing of a Summons and Verified Complaint asserting a cause of action for defamation. On or about

November 2, 2007, Ms. Cariol J. Horne (“Horne” or the “Defendant”) served her Certified Answer asserting affirmative defenses and counterclaims. The litigation proceeded with discovery and depositions taking place over the next couple of years.

On May 8, 2009, the Hon. James Dillon determined that Kwiatkowski was likely to be successful in the action and ordered an attachment of \$20,000 owed to Horne by the City of Buffalo. On August 17, 2010, the Hon. Frederick Marshall issued an Order granting Kwiatkowski summary judgment as to liability on the merits. According to the Order, the Defendant, by her attorney, Barbara M. Sims, Esq., failed to submit opposition papers but appeared and was heard on the motion.

On February 18, 2011, Justice Marshall issued a judgment awarding Kwiatkowski money damages of \$65,000 and directing the City of Buffalo to pay over the \$20,000 that had been attached in 2009. On February 24, 2011, the judgement was formally entered by the Erie County Clerk. The \$20,000 was paid by the City of Buffalo and applied to the judgment. On November 19, 2021, the Hon. Paul Wojtaszek granted an Order renewing the judgment pursuant to CPLR § 5014. Horne had opposed the renewal judgment and moved to vacate the underlying judgment. Justice Wojtaszek denied the motion to vacate, without prejudice, on procedural grounds.

On February 16, 2023, the renewal judgment was formally entered by the Erie County Clerk and on March 8, 2023, Plaintiff placed an Execution with Notice to garnishee with the Erie County Sheriff, seeking to execute funds owed to the Defendant by the City of Buffalo.

On March 27, 2023, the Defendant filed the present motion seeking an Order annulling and reversing the original judgment granted on February 8, 2011, and entered on February 18, 2011, and directing the Plaintiff to return the \$20,000 plus statutory interest awarded to him in 2011. The motion is made pursuant to the Court's inherent authority to vacate its prior judgment, when necessary, in the interest of substantial justice.

CPLR § 5015 empowers a court to vacate a judgment or order for several reasons, including, excusable default, newly discovered evidence, fraud, misrepresentation or misconduct, lack of jurisdiction, or upon the reversal, modification or vacatur of a prior judgment. Further, the Court of Appeals in *Woodson v Mendon Leasing Corp.*, (100 NY2d 62, 68 [2003] citing *Ladd v Stevenson*, 112 NY 325, 332 [1889]) recognized that “[i]n addition to the grounds set forth in section 5015(a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice” (see also *In re Foreclosure of Tax Liens*, 59 AD3d 1065, [4th Dept. 2009]; *KLCR Land Corp. v New York State Elec. & Gas Corp.*, 15 AD3d 719, 720 [3rd Dept. 2005]).

The Courts, however, have held that this “inherent power to exercise control over its judgments is not plenary, and should be resorted to only to relieve a party ‘from judgments taken through [fraud,] mistake, inadvertence, surprise or excusable neglect’ ” (*McKenna v Nassau County*, 61 NY2d 739 [1984] quoting *Ladd v Stevenson* 112 NY at 332; see also *Matter of Arbitration Between City of Syracuse and Lee* 163 AD3d 1394, 1398 [4th Dept. 2018]; *Quinn v. Guerra*, 26 AD3d 872,873

[4th Dept. 2006]). In addition, the Courts have warned that “a motion to vacate should not be utilized as a means by which to raise an issue of law that could have been pursued in the course of a timely perfected appeal” (*KLCR Land Corp.*, 15 AD3d at 720-721 citing *Mckenna v Nassau County*, 61 NY2d at 741-742).

The Defendant urges the Court to exercise its discretionary authority to vacate its own judgment based on four intertwined arguments. First, that Horne was unable to present any evidence prior to summary judgment and such judgment constituted a “de facto default”. Second, that Horne had a valid excuse for her failure to respond. Three, that Horne would have been able to mount a meritorious defense. And fourth, that through Cariol’s Law, passed by the city of Buffalo and signed into law on or about October 28, 2020, and Justice Dennis Ward’s decision of June 17, 2021, vacating the City of Buffalo’s termination of Horne, the facts now support the truthfulness and lack of actual malice of Horne’s alleged statements.

As stated above, this Court, in addition to the authority granted to it under CPLR § 5015, has the inherent authority to vacate its own judgments for sufficient reason and in the interest of substantial justice (*see Woodson* at 68). Such authority is not, however, unlimited (*see Matter of Arbitration Between City of Syracuse and Lee*, at 1398). This Court may only relieve a party from a judgment “taken through [fraud,] mistake, inadvertence, surprise or excusable neglect” (*Id.* at 1398 quoting *Mckenna*, at 742). None of those factors are present in this matter.

The Defendant’s arguments that her attorney’s failure to file opposition papers to the motion for summary judgment should be treated as a de facto default

judgment is without merit. It is settled law that “an order entered on a motion for summary judgment constitutes a disposition on the merits” (*Emmons v Broome County*, 180 AD3d 1213, 1216 [3rd Dept. 2020]). In addition, the Defendant was represented by counsel through every stage of the litigation and Horne’s attorney appeared and was heard on the motion for summary judgment (see Plaintiff Ex. F, Doc. No. 35, Order granting summary judgment dated August 17, 2010). Regardless, the Defendant fails to offer any facts supporting law office failure. Her affidavit, (Defendant’s Ex. D, Doc. No.12), only provides conclusory statements without evidence of a reasonable excuse for her attorney’s failures.

The Defendant also argues that she could have mounted a meritorious defense but for her attorney’s failures. The Defendant states that she would have affirmed the truthfulness and lack of actual malice of her alleged defamatory statements. Throughout numerous adversarial judicial and quasi-judicial proceedings, however, Horne’s version of events were rejected (see Plaintiff’s Ex. A-F, Doc Nos. 30-35). In addition, the Plaintiff pleaded actual malice in his complaint and Justice Marshall was in the best position to decide the merits of the motion. This Court, after thirteen years and given the record before it, is not in a better position to substitute its judgment in place of Justice Marshall’s.

The Defendant also had an opportunity to appeal the decision and failed to do so. “[A] motion to vacate should not be utilized as a means by which to raise an issue of law that could have been pursued in the course of a timely perfected appeal” (*KLCR Land Corp*, at 720). Granting this motion to vacate on such grounds would

be an abuse of discretion.

Finally, the Defendant asks this court to reconsider its decision solely in the interest of substantial justice considering subsequent determinations by the City of Buffalo and Justice Ward's Order (Defendant's Ex. I, Doc. No. 17). Even if this Court had such unlimited authority, which, as discussed above, it does not, this case does not warrant the vacatur of Justice Marshall's decision.

Horne's reliance on the passage of "Cariol's Law: Duty to Intervene" on October 28, 2020, is misplaced. Defendant cites the following sentence from the law: "Whereas, in 2006, Police Officer Cariol Horne intervened to save a civilian from being harmed by a fellow police officer and had her employment terminated" (see Plaintiff Ex. H, Cariol's Law: Duty to Intervene, Doc. No. 16). There is nothing in the substance of "Cariol's Law" that addresses the defamatory statements made by Horne against Kwiatkowski.

The Court will not and should not give weight to legislative pronouncements found in "whereas" clauses masquerading as factual determinations. Such determinations are not subject to the adversarial process of a judicial proceeding. Neither are they subject to any type of due process protections or rules of evidence. It would be unjust to take one sentence from this law and use it as the basis to declare any statement made by Horne against Kwiatkowski as the truth and a complete defense against defamation.

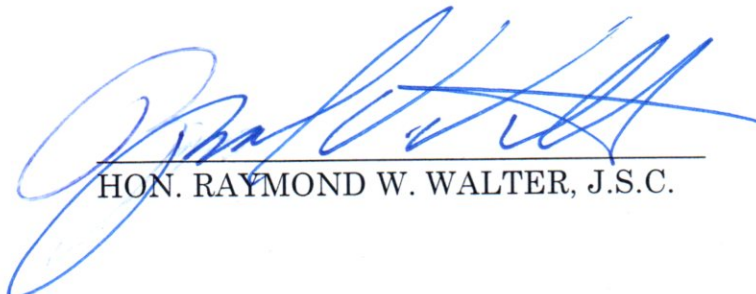
Additionally, Justice Ward's Order has no bearing on the judgment in favor Kwiatkowski against Horne in the instant matter (Defendant's Ex. I, Doc. No. 17).

Kwiatkowski was not a party in that proceeding. It was solely between Horne, the plaintiff, and the City of Buffalo, the defendant. Justice Ward was not asked to review any of the facts and law of the instant case. Justice Ward made his decision on the facts and law as it pertained to the wrongful termination of Horne by the City of Buffalo. It is also apparent from Justice Ward's decision that the defendant, City of Buffalo, barely opposed Horne's motion and apparently acquiesced to the relief she was seeking. Finally, Cariol's Law § 13-21.5 specifically provided for "Retroactive Protection for Officers" which Justice Ward cited as a basis for his holding. No such provisions are applicable in this case.

Accordingly, it is

ORDERED that Defendant's motion for an order and judgment annulling and reversing the Order, Verdict, and Judgement of this Court issued August 17, 2010, February 8, 2011, and February 18, 2011, is **DENIED** in its entirety.

Dated: 9/14/23



HON. RAYMOND W. WALTER, J.S.C.

ENTERED: