

**Diamonds Direct NY LLC v Huebner**

2024 NY Slip Op 32109(U)

June 14, 2024

Supreme Court, Kings County

Docket Number: Index No. 516165/2020

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

At a Centralized Compliance Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Stret, Brooklyn, New York, on the 14 day of June, 2024

**PRESENT:**

Honorable Leon Ruchelsman

Index No. 516165/20

Justice

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Diamonds Direct NY LLC

V

Levi Huebner

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Motion by plaintiff {motion sequence 7} seeking to be relieved of the 11/16/23 order striking the complaint and answers to counterclaims pursuant to CPLR 5015(a)(1) is denied upon review of the papers and oral argument.

Plaintiff's action was commenced by filling a summons & complaint on or about August 31, 2020, and an unverified amended complaint on 9/9/20 alleging breach of contract. On 6/24/22 a Case Scheduling Order required responses to demands served within 30 days. On 7/6/22 defendant moved to compel plaintiff (motion sequence 4) to comply with all discovery demands including to produce the original Memorandum Agreement and the Commissions Agreement and furnish those documents to Defendant's handwriting expert Andrew Sulner, MSFS, JD. After noting that plaintiff did not file opposition to the motion but did

serve late responses, the court ordered plaintiff to serve further responses by 8/19/22. The Compliance conference order dated 12/21/22 directed all responses to demands be served within 20 days. On 4/28/23 defendant moved {motion sequence 5} to dismiss/compel/preclude/strike and plaintiff failed to oppose. On 5/16/23, this court in part ordered plaintiff to provide *“all discovery set forth in the motion, including providing defendants the opportunity to take original documents for handwriting analysis as set forth in the motion within 30 days...”* Defendants were advised that failure to comply would result in appropriate sanctions pursuant to CPLR 3126, upon further motion.

On 8/6/23 defendants moved (motion sequence 6) pursuant to CPLR 3126 to dismiss plaintiff's complaint and strike the answer to Counterclaims of Isaac Dayan-third-party defendant. In his opposition dated 9/14/23, Scott Levenson, Esq (“Levenson”) of the Levenson Law Group-counsel for plaintiff stated in part that *“Prior to Defendant's April 28, 2023 filing of his motion to strike, Plaintiff's counsel (Gene Kazlow, Esq-of Kazlow and Kazlow) submitted resignation of his law license”* and Levenson was retained on or about 8/14/23. (The letter of resignation was not annexed as alleged by Levenson). Levenson further claimed *“Mr. Kazlow's disciplinary issues and subsequent resignation inhibited my clients' ability to timely and fully respond to Defendant/Third Party Plaintiff's discovery demands in this action”*. On 9/7/23 via correspondence, Levenson requested additional time to respond- {NYSCEF Document #178}. On 9/10/23 defendant opposed any extension claiming in part that Levenson never filed a notice of appearance on behalf of plaintiff. On 9/11/23 this court adjourned defendant's motion to dismiss to 10/5/23 and afforded plaintiff an opportunity to file opposition on or before 9/28/23- {NYSCEF Document #186}.

On 10/10/23 Levenson was ordered to appear “in-person” in the Central compliance part on 10/24/23. After conferencing the matter on 10/24/23 an “Interim Order” was issued affording plaintiff another opportunity to comply with the 5/16/23 order-no later than 11/7/23- {NYSCEF Document #194}. The order clearly stated that *“failure to comply will result in sanctions”* and further directed Levenson to file a Notice of Appearance as new counsel for plaintiff in place of Kazlow and Kazlow. Significantly, the order unequivocally stated that *“appearance in CCP on 11/16/23 is required”* and was signed by both defense counsel and the “Levenson Law Firm.” On 11/16/23 Levenson failed to appear in

court as ordered resulting in the striking of plaintiff's complaint and third-party defendant's counterclaims. In its decision, the court referenced plaintiff's failure to comply with the 5/16/23 and 10/24/23 orders which clearly warned that such conduct would result in sanctions- {NYSCEF Document #197}.

On 12/19/23 Levenson moved on behalf of plaintiff (motion sequence 7) to be relieved from the order striking the complaint and answers to counterclaims pursuant to CPLR 5015(a)-claiming in part that "*plaintiff has complied with all discovery demands*". On 2/13/23 defendant opposed the motion claiming plaintiff erroneously relied on CPLR 2221 and as such the motion was untimely. A Consent to Change Attorney was uploaded to NYSCEF on 2/14/24- {NYSCEF Document #204} indicating that the Law office of Christian Martinez was substituted as attorney for plaintiff, in place of Levenson. On 3/6/24 Christian N. Martinez, Esq ("*Martinez*") replied to defendant's opposition claiming prior counsel attached an affirmation stating that the discovery deadlines were missed due to counsel's own scheduling error caused by "*a switch in online case management systems*". Martinez claimed he corrected the error, complied with all outstanding discovery, and that in the interest of justice and fairness be relieved from the order dismissing the case. Martinez however failed to offer proof of any compliance with court orders.

A court may relieve a party from a judgment or order upon just terms, on motion of any interested person with such notice as the court may direct, upon the ground of . . . excusable default (CPLR 5015[a][1]). *Deep v City of New York*, 183 A.D.3d 586 (2d Dept. 2020). 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. *Harrison v Toyloy*, 174 A.D. 3d 579, 580 (2d Dept. 2019); see *Santos v Penske Truck Leasing Co.*, 105 A.D.3d 1029, 1029 (2d Dept. 2013). "A motion to vacate a default is addressed to the sound discretion of the court." *Vujanic v Petrovic*, 103 A.D. 3d 791, 792 (2d Dept. 2013); see *Harrison*, 174 A.D.3d at 580.

In *Deep*, supra, plaintiff's excuse of law office failure, specifically that the plaintiff's default in appearing in court, was due to law office failure occasioned by a "clerical error," which resulted in "the date being miscalendared," was rejected as it was not supported by a "detailed and credible explanation of the default". *Vujanic*, 103 A.D.3d at 792 [internal

quotation marks omitted]; see *Servilus v Walcott*, 148 A.D.3d 743, 744 (2d Dept. 2017); *Dobbyn-Blackmore v City of New York*, 123 A.D.3d 1083, 1084 (2d Dept. 2014).

In the subject case, the 10/24/23 order, signed by plaintiff's attorney Levenson Law, clearly stated that "appearance in CCP on 11/16/23 is required". In its motion to vacate the order dismissing the complaint pursuant to CPLR 5015(a)(1), plaintiff failed to offer a reasonable excuse for its failure to appear in court on 11/16/23. Instead, plaintiff stated that "plaintiff has corrected the error and has since complied with all outstanding discovery" and that "previous counsel attached an affirmation stating that the discovery deadlines were missed due to counsel's own scheduling error which was caused by a switch in online case management systems." Plaintiff's undetailed and conclusory statements neglect to explain its failure to appear in court on 11/16/23. Additionally, despite having an opportunity to upload exchanged discovery to NYSCEF or provide evidence to the court during oral argument, plaintiff failed to provide any proof that it complied with prior orders. See *Harrison*, 174 A.D.3d at 580 ; *Jin Chengri v. Su Yonh Choi*, 153 A.D.3d 911, 912 (2d Dept. 2017).

The above constitutes the order of the court.

Any relief not expressly granted herein has been considered and is denied.



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Hon. Leon Ruchelsman  
Hon. Leon Ruchelsman

J.S.C