

Rodriguez v Alba Servs. Inc.

2025 NY Slip Op 31104(U)

March 24, 2025

Supreme Court, Kings County

Docket Number: Index No. 504703/2022

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 504703/2022
Seqs. 005-007

Part LL1

DECISION/ORDER

GENESIS RODRIGUEZ,

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>1-3</u>
Order to Show Cause and Affidavits Annexed	<u>2-4</u>
Answering Affidavits	<u>5</u>
Replying Affidavits	<u>5</u>
Exhibits	<u> </u>
Other	<u> </u>

ALBA SERVICES INC., 312 CONEY ISLAND AVENUE
LLC, AND INTERNATIONAL BAPTIST CHURCH, INC.,

Defendants.

Upon the foregoing papers, plaintiff’s motion to restore the action (Seq. 005), defendant International Baptist Church, Inc. (International)’s cross-motion to amend (Seq. 006), and Alba Services Inc. (Alba)’s cross-motion to amend (Seq. 007) are decided as follows:

Procedural Posture

Plaintiff commenced this action to recover for damages she claims to have sustained on February 10, 2022 at 312 Coney Island Avenue, Brooklyn, NY, when she fell while performing demolition work. The action was scheduled for a compliance conference on February 20, 2024. The defendants did not appear, and Justice Leon Ruchelsman issued a compliance conference order on February 24, 2024 upon the default of defendants. Plaintiff was directed to upload that order. However, plaintiff did not upload the order and the action was dismissed on May 4, 2024. Plaintiff now moves to vacate the default, and defendants cross-move to amend their answers.

Analysis

Vacatur

In order to vacate a default pursuant to CPLR 5015, a party “is required to demonstrate a reasonable excuse for [its] default and a potentially meritorious” cause of action (*Horio Realty*

Corp. v Hunts Point Flower Mkt., Inc., 181 AD3d 571, 572 [2d Dept 2020]). Claims of law office failure must “set forth a detailed and credible explanation for” the default (*id.*).

Here, plaintiff’s counsel admits that the failure to upload the order was the result of law office failure. Specifically, counsel explains that a per diem attorney appeared for the compliance conference on February 20, 2024. Counsel further clarifies that when the per diem emailed the compliance conference order to plaintiff’s counsel’s firm, the email went to the paralegal’s spam folder and was not discovered until after the action was dismissed. Counsel promptly moved for vacatur.

As to the merits, plaintiff provided two affidavits. The first, dated June 24, 2024, claims that the plaintiff tripped and fell on construction debris on a staircase (June 24 aff. at ¶ 3). Plaintiff’s counsel contends that this affidavit is inaccurate and was filed in error. To explain the error, plaintiff provides the affidavit of Matthew Negron, a paralegal at Hamel Law Firm (plaintiff’s counsel). Mr. Negron admits that he was using a template from a prior client when preparing the translated affidavit for plaintiff, and that he failed to edit paragraph three (Negron aff. at ¶ 3). Mr. Negron further claims, based on recollection and on contemporaneous notes, that plaintiff said she fell on a roof when her protective suit caught on an exposed nail while she was carrying a box of garbage bags (*id.* at ¶¶ 3–4). Plaintiff then filed an amended affidavit of merit dated October 9, 2024, in which plaintiff avers that she fell when her protective suit caught on a loose nail (October 9, 2024 aff. at ¶ 5). Plaintiff also contends in the October affidavit that the prior affidavit was not read to her before she signed it (*id.* at ¶ 7).

Plaintiff’s motion must be denied. The amended affidavit of merit that plaintiff offers is not accompanied by a certification of translation, and the October 9, 2024 affidavit is not mentioned in Mr. Negron’s own affidavit (CPLR 2101 [b]; *see Raza v Gunik*, 129 AD3d 700 [2d

Dept 2015]). Without that affidavit, plaintiff has failed to produce prima facie evidence of a potentially meritorious cause of action (*see King v King*, 99 AD3d 672 [2d Dept 2012]).

Amendment

Permission to amend is “committed to the broad discretion of the trial court” (*Vorobichik v Greenpoint Goldman SM, LLC*, 164 AD3d 866, 866 [2d Dept 2018]). Where a party seeks to plead fraud, the claim must be plead “in detail,” or “with particularity,” whether as a cause of action or as a defense (CPLR 3016 [b]; (*Matter of Clarke v Wallace Oil Co., Inc.*, 284 AD2d 492, 492–93 [2d Dept 2001]). “The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation . . . and damages” (*Eva Chen Fine Jewelry, Inc. v Recovery Racing IX, LLC*, 222 AD3d 840, 842 [2d Dept 2023]).

Here, defendants have failed to plead the elements of fraud with particularity. Although defendants identify statements from the plaintiff individually that they claim are false or misleading, defendants do not claim to have justifiably relied on any such misstatements. Indeed, the fact that defendants are actively litigating this matter indicates that they are *not* relying on any statements plaintiff has made about his alleged accident. Although the alleged inconsistencies in plaintiff’s account may one day weigh on the issue of liability, they do not constitute a basis for fraud. The Appellate Division, First Department has recently held that precisely this type of amendment is “patently devoid of merit” (*Breton v Dishy*, 2025 NY Slip Op 00039 [1st Dept Jan. 7, 2025]; *see also Linares v City of New York*, 223 NYS 3d 62 [1st Dept 2024]).¹

¹ Absent contrary guidance from the Second Department, and without an indication that the Second Department would hold differently, it is appropriate here for the court to follow

This decision is made based on the motions, papers, and arguments before the court, and does not reflect the court's assessment of any matters not currently at bar, including the merits of any pending action or any duly commenced claim for fraud.

Conclusion

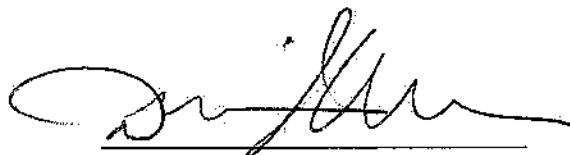
Plaintiff's motion to vacate and restore (Seq. 005) is denied without prejudice to a new motion made upon properly filed papers.

Defendants cross-motions (Seq. 006 and 007) are denied.

This constitutes the decision and order of the court.

March 24, 2025

DATE



DEVIN P. COHEN
Justice of the Supreme Court

precedent from the First Department (*see Mountain View Coach Lines*, 102 AD2d 663 [2d Dept 1984]).