

Jakuboski v 3235 Emmons Ave. Corp.

2025 NY Slip Op 33868(U)

October 9, 2025

Supreme Court, New York County

Docket Number: Index No. 158439/2016

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDY H. KIM PART 04

Justice

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JOHN A. JAKUBOSKI, AS EXECUTOR OF THE ESTATE
OF JOHN JAKUBOSKI,

Plaintiff,

- v -

3235 EMMONS AVENUE CORP., ESQUIRE
MANAGEMENT CORP., AZHDAR RAGIMOV, JANE DOE,

Defendant.

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INDEX NO. 158439/2016

MOTION DATE 08/22/2024

MOTION SEQ. NO. 008

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 008) 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214

were read on this motion to VACATE - DECISION/ORDER.

Upon the foregoing documents, defendant 3235 Emmons Avenue Corp. and Esquire Management Corp.’s motion to vacate the October 5, 2018 order of Justice Lucy Billings and direct the continued deposition of their witness, Ontario Barthly, is denied.

In this nearly ten-year-old action, plaintiff alleges that a dog owned by Azhdar Ragimov jumped onto the now-deceased plaintiff while he was outside 3235 Emmons Avenue, Brooklyn, New York, on June 2, 2016, injuring him (NYSCEF Doc No. 1, complaint). On October 9, 2018, the Court (Hon. Lucy Billings) granted plaintiff’s motion, pursuant to CPLR 3126, to strike the Moving Defendants Answer, to the extent that defendant 3235 Emmons Avenue Corp. was ordered to produce its witness Ontario Barthly for his continued deposition within thirty days after entry of the order, unless plaintiff agreed to a later date (NYSCEF Doc No. 211, order). Justice Billings added that “[s]ince this order is the sixth one setting an extended deadline to complete the

deposition, if Barthly fails to appear for his deposition within the time now ordered, 3235 Emmons Avenue Corp. shall be precluded from offering any witnesses on its liability in support of or in opposition to summary judgment or at trial” (*id.*). That order was filed, with notice of entry, on October 9, 2018 (NYSCEF Doc No. 137, notice of entry). The continued deposition of Barthly was never held.

Defendants 3235 Emmons Avenue Corp. and Esquire Management Corp. (collectively, the “Moving Defendants”) now move for an order vacating Justice Billings’ conditional preclusion order dated October 9, 2018, and, upon vacatur, directing the parties to schedule Barthly’s deposition. Movants assert that they have a reasonable excuse for their failure to comply with the conditional preclusion order, insofar as plaintiff’s counsel agreed to a date for Barthly’s deposition beyond the court’s 30-day deadline but then cancelled the deposition at the last moment, on the grounds that it was untimely. The Moving Defendants concede that, thereafter, they made no efforts to arrange for or otherwise seek to compel Barthly’s deposition. They attribute their inaction to the prolonged stay of this matter following plaintiff’s death, repeated withdrawal of plaintiff’s attorneys, and the COVID-19 pandemic.

In opposition, plaintiff disputes the Moving Defendants’ claim that a continued deposition was calendared and presents an affidavit from plaintiff’s firm at that time attesting that the firm’s calendar sheet for that date does not include any events related to this case. More fundamentally, plaintiff argues that this motion must be denied because the Moving Defendants offer no reasonable excuse as to their delay in moving to vacate Justice Billings’ order five years and eleven months after it went into effect.

DISCUSSION

The motion is denied. As an initial matter, while denominated as a motion pursuant to CPLR 2221, this is in fact a motion pursuant to CPLR 5015, as demonstrated by the fact that the Moving Defendants argue that they have a reasonable excuse for their failure to comply with Justice Billings' order and a meritorious defense to this action, rather than that Justice Billings misapprehended any facts or law or that there are new facts that would change her determination of the motion (*compare* CPLR 5015[a] and CPLR 3211[d], [e]). Accordingly, the Court addresses it as such (*see Goldstein v CIBC World Markets Corp.*, 30 AD3d 217 [1st Dept 2006]; *see also Kanat v Ochsner*, 301 AD2d 456 [1st Dept 2003]).

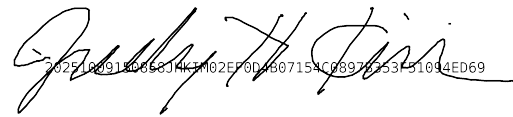
Since the underlying order arose from a motion made on notice that was opposed on its merits, that order was appealable and this motion is procedurally improper and is denied on that basis (*see Hinds v 33rd St. Astoria, Inc.*, 197 AD3d 697, 698 [2d Dept 2021]; *see also Youni Gems Corp. v Bassco Creations Inc.*, 70 AD3d 454, 454 [1st Dept 2010]). The motion is also denied as extremely untimely, given that it was filed well beyond the one-year window contemplated by CPLR 5015, even after accounting for delays caused by the death of plaintiff and multiple withdrawals of plaintiff's attorneys (*see Cap Rents Supply, LLC v Durante*, 167 AD3d 700, 703 [2d Dept 2018]; *Gilmore v Gilmore*, 279 AD2d 506, 506-07 [2d Dept 2001]). Notably, the most recent stay of this action—caused by the withdrawal of plaintiff's counsel—ended on or about the date that replacement counsel filed his notice of appearance, i.e., November 18, 2021 (NYSCEF Doc No. 198) yet the Moving Defendants waited nearly three years beyond that date to make the instant motion.

Accordingly, it is

ORDERED that 3235 Emmons Avenue Corp. and Esquire Management Corp.’s motion to vacate the October 9, 2018 order of this court is denied; and it is further

ORDERED that defendants are to serve a copy of this decision and order, with notice of entry, on plaintiff and the Clerk of the Court within ten days of the date of this decision and order.

This constitutes the decision and order of the Court.



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10/9/2025

DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE