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| <b>Botsvadze v Shewmake</b>                                                                                                                                                                                                    |
| 2025 NY Slip Op 35550(U)                                                                                                                                                                                                       |
| February 6, 2025                                                                                                                                                                                                               |
| Supreme Court, Westchester County                                                                                                                                                                                              |
| Docket Number: Index No. 58640/2024                                                                                                                                                                                            |
| Judge: Joan B. Lefkowitz                                                                                                                                                                                                       |
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SUPREME COURT: STATE OF NEW YORK  
 IAS PART WESTCHESTER COUNTY  
 PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

-----X  
 GURAM BOTSVADZE,

Plaintiff,

DECISION & ORDER

Index No: 58640/2024

-against-

Motion Sequence No. 1

PAUL L SHEWMAKE,

Defendant.  
 -----X

The following electronically filed papers (NYSCEF Doc Nos. 18-37) were read on the opposed motion by the plaintiff for an order: (a) vacating a prior order of this Court dated October 28, 2024, which dismissed the complaint in accordance with 22 NYCRR 202.27; (b) restoring the case to the Court's active calendar; (c) compelling incoming counsel for the plaintiff to pay outstanding disbursements to the movant herein, Gambone Law Group, PLLC, or barring incoming counsel from recovering attorney's fees; (d) imposing sanctions upon incoming counsel for the plaintiff; (e) relieving Gambone Law Group, PLLC as counsel for the plaintiff; and (f) granting such other and further relief as the Court deems just and proper.

Motion Sequence No. 1

Notice of Motion-Affirmations (2)-Exhibits (A-C)-Affirmation of Service  
 Affirmation in Opposition (by defendant)-Exhibits (A-G)-Affidavit of Service  
 Affirmation in Opposition (by Law Offices of Alexander Bespechny)-Exhibit (A)  
 Reply Affirmations (2)

Upon reading the foregoing papers, the motion is determined as follows:

Plaintiff, via his counsel, Gambone Law Group, PLLC (Gambone Law), commenced this action on March 14, 2024, seeking to recover monetary damages for personal injuries allegedly sustained in a motor vehicle pedestrian knockdown accident that purportedly occurred on or around November 23, 2023, on Saw Mill River Road at its intersection with Park Avenue, in the County of Westchester, State of New York (*see* "Summons and Complaint", NYSCEF Doc No. 1). On June 19, 2024, the defendant interposed an answer to the complaint wherein, *inter alia*, he denied the material allegations of the complaint and raised various affirmative defenses (*see* "Answer", NYSCEF Doc No. 4). On June 25, 2024, plaintiff, via Gambone Law, filed a request for a preliminary conference (*see* "Request for Preliminary Conference", NYSCEF Doc No. 5). On June 26, 2024, the Court scheduled a preliminary conference for August 13, 2024 (*see* "Court Notice", NYSCEF Doc No. 10).

On August 13, 2024, defendant's counsel appeared for the preliminary conference but plaintiff's counsel did not (*see* "Referee Report & Order" dated August 14, 2024, NYSCEF Doc No. 12). The Court, *inter alia*, then scheduled another preliminary conference for September 12, 2024 (*see id.*). On September 12, 2024, defendant's counsel appeared for the scheduled conference but plaintiff's counsel again failed to appear (*see* "Compliance Conference Referee Report & Order" dated September 17, 2024, NYSCEF Doc No. 15). The Court, *inter alia*, directed plaintiff's counsel to appear at the next scheduled conference on October 3, 2024 (*see id.*). Plaintiff's counsel again failed to appear on October 3, 2024. The Court subsequently adjourned this conference to October 21, 2024, but plaintiff's counsel yet again failed to appear.

In an order dated October 28, 2024, and entered on October 29, 2024, the Court dismissed the complaint in accordance with 22 NYCRR 202.27 (b) for plaintiff's failure to appear for four scheduled conferences (*see* "Dismissal Order", NYSCEF Doc No. 16) (Dismissal Order). Plaintiff, via Gambone Law, now moves for, among other things, an order vacating the Dismissal Order and restoring the matter to the Court's active calendar. The defendant, Paul L Shewmake (Defendant), as well as the Law Offices of Alexander Bespechny, Esq., incoming counsel for the plaintiff (Incoming Counsel), oppose the motion.

Briefly, in support of the motion, plaintiff contends, among other things, that the default in appearing at the scheduled conferences before the Court was entirely attributable to Incoming Counsel. Plaintiff notes that on March 29, 2024, plaintiff signed a consent to change attorney form substituting moving counsel herein, Gambone Law, with Incoming Counsel, and that despite this stipulation, Incoming Counsel failed to file a notice of appearance in this action or pay outstanding disbursements to Gambone Law. Accordingly, Gambone Law submits that because the default is due to Incoming Counsel's inaction, vacatur of the Dismissal Order and restoration of the case to the Court's active calendar is warranted.

In opposition, Defendant contends, among other things, that plaintiff failed to meet his burden entitling him to vacatur of the Dismissal Order. Defendant notes, that in accordance with the Court's prior directives, it reached out to plaintiff's counsel of record, Gambone Law, on multiple occasions following plaintiff's missed appearances but to no avail. Defendant asserts that plaintiff's conduct was willful and contumacious and should not be excused. Defendant further notes that the consent to change attorney form was never filed with the Court and was never provided to Defendant's counsel until the instant motion was filed. Based thereon, Defendant submits that those portions of the motion seeking vacatur of the Dismissal Order and restoration of the case to the Court's active calendar should be denied. In further opposition, Incoming Counsel asserts, among other things, that while a consent to change attorneys was forwarded to Gambone Law on March 29, 2024, together with a "stop work letter", Gambone Law continued representing the plaintiff for an additional three months following its discharge and never informed Incoming Counsel of same.

In reply, plaintiff submits, among other things, that any delay in filing the consent to change attorney form was due to Incoming Counsel's refusal to communicate and settle

outstanding disbursements which prevented an effective transition of the file. Based thereon, plaintiff submits that the motion should be granted in its entirety.

A plaintiff moving to vacate a dismissal pursuant to 22 NYCRR 202.27 must demonstrate both a reasonable excuse for the default and a potentially meritorious cause of action (*see* CPLR 5015 [a][1]; 22 NYCRR 202.27 [a]; *U.S. Bank N.A. v Roberts*, 216 AD3d 1038, 1040 [2d Dept 2023]; *Hanscom v Goldman*, 109 AD3d 964, 965 [2d Dept 2013]). The determination of whether an excuse is reasonable is entrusted to the court's sound discretion (*see Crevecoeur v Mattam*, 172 AD3d 813, 814 [2d Dept 2019]). "The court has discretion to accept law office failure as a reasonable excuse where the claim is supported by a detailed and credible explanation of the default, but conclusory and unsubstantiated allegations of law office failure are not sufficient" (*Hudson City Sav. Bank v Augustin*, 191 AD3d 774, 775 [2d Dept 2021] [internal quotation marks, citations and brackets omitted]; *see LaSalle Bank, N.A. v LoRusso*, 155 AD3d 706, 707 [2d Dept 2017]).

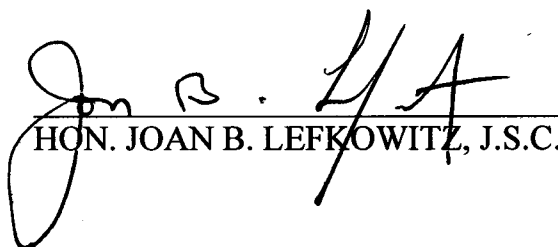
"Although a client may, as a matter of public policy, discharge an attorney at any time, with or without cause, an attorney of record in an action may only withdraw or be changed or discharged in the manner prescribed by statute" (*Moustakas v Bouloukos*, 112 AD2d 981, 983 [2d Dept 1985] [internal citation omitted]). CPLR 321 (b)(1) provides, in pertinent part, that "an attorney of record may be changed by filing with the clerk a consent to the change signed by the retiring attorney and signed and acknowledged by the party[] [and further that] [n]otice of such change of attorney shall be given to the attorneys for all parties in the action[.]" "Until an attorney of record withdraws or is changed or discharged in the manner prescribed by CPLR 321, his or her authority as attorney of record for his or her client continues, as to adverse parties, unabated" (*Garafalo v Mayoka*, 151 AD3d 1018, 1019 [2d Dept 2017] [internal quotation marks and brackets omitted]).

Here, the court finds that plaintiff has failed to present a reasonable excuse for failing to appear at the four scheduled conferences held before the Court. Movant's proffered excuse—that Incoming Counsel is to blame for the plaintiff's missed appearances—is insufficient as a matter of law since the consent to change attorney form was deficient. The plaintiff's signature on the consent to change attorney form was not acknowledged, the notification of the plaintiff's change of attorney was not provided to the Defendant and lastly, the form was never filed with the appropriate court clerk (*see* CPLR 321 [b][1]). In view of these failures, and in the absence of a court order discharging Gambone Law as plaintiff's counsel (*see* CPLR 321 [b][2]), Gambone Law continued to represent plaintiff in this action and thus had a duty to appear at the scheduled conferences on plaintiff's behalf (*see GMAC Mtge., LLC v Galvin*, 184 AD3d 750, 751 [2d Dept 2020]). Plaintiff offers no other reasonable excuse for defaulting at the scheduled court conferences. Inasmuch as plaintiff failed to demonstrate a reasonable excuse for his default, the Court need not consider whether plaintiff established a potentially meritorious cause of action (*see Deutsche Bank Natl. Trust Co. v Fishbein*, 179 AD3d 768, 770 [2d Dept 2020]). Accordingly, the motion is denied.

All other arguments raised on the motion and evidence submitted by the parties in connection therewith have been considered by the Court, notwithstanding the specific absence of reference thereto. Based on the foregoing, it is hereby:

ORDERED that the motion is denied in its entirety.

Dated: White Plains, New York  
February 6, 2025

  
HON. JOAN B. LEFKOWITZ, J.S.C.