

Costakis v R.G. Ortiz Funeral Home, Inc.
2025 NY Slip Op 35588(U)
February 4, 2025
Supreme Court, Bronx County
Docket Number: Index No. 810679/2023E
Judge: Marissa Soto
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

C

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF BRONX, PART: IAS-22	
-----X COSTAKIS, CHRISTINE Petitioner(s), -against- R.G. ORTIZ FUNERAL HOME, INC. et. al. Respondent(s), -----X	Index No. <u>810679/2023E</u> DECISION AND ORDER Hon. <u>MARISSA SOTO</u> Justice Supreme Court

The following papers e-filed on this Petition (**Mot. Seq. 2**) and duly submitted

Papers	NYSCEF Doc. No.
Petition - Notice of Motion - Exhibits and Affidavits Annexed	22-33
Answering Affidavit or Affirmation in Opposition to Petition	36-40
Replying Affidavit and Exhibits	
Other: Framed Issue Hearing and exhibits	

Defendants, R.G. Ortiz Funeral Home, INC (herein after "ORTIZ") and 4423-29 Broadway LLC (hereinafter "BROADWAY" together with ORTIZ, the "Defendants"), moved to vacate the Court's default judgment entered against them on June 5, 2024, pursuant to C.P.L.R § 5015. Plaintiff, Christine Costakis (hereinafter "Plaintiff"), filed opposition.

Background

It is uncontroverted that on or about September 26, 2022, non-party, Andrew P. Low, passed away (hereinafter, the "Decedent"). Plaintiff, the surviving spouse, thereafter entered a contract with Defendants for the cremation and funeral services for the Decedent. It is uncontroverted that Defendants took possession and custody of the Decedent's body. Plaintiff alleges that Defendants failed to return the remains of Decedent despite alleged demands for the return of the remains. Plaintiff alleges that Defendants were negligent because they lost and

C

Plaintiff filed its motion for default against Defendants on January 24, 2024 and served the parties said notice on or about same day. Neither ORTIZ nor BROADWAY opposed the motion. This Court granted Plaintiff's motion and issued a default judgment against Defendants on June, 05, 2024. On September 18, 2024, Defendants' counsel filed its notice of appearance. On September 19, 2024, Defendants filed their motion to vacate a default pursuant to C.P.L.R. § 5015(a)(1). Upon the break down of settlement discussions, the Court set a briefing schedule for opposition and reply papers, by order dated November 18, 2024. NYSCEF Doc. No. 41. Plaintiff timely filed its opposition but Defendants did not file their reply by the time allotted. The Court will not consider Defendants' reply papers.

Analysis

C.P.L.R. § 5015(a)(1) allows for vacatur based on an excusable default. The courts have set the prima facie standard for this relief via a two-prong test. Movants must prove that there is both a reasonable excuse and meritorious defense. See 979 Second Avenue LLC v. Chao, 227 A.D.3d 436 (1st Dept. 2024); Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co., 67 N.Y.2d 138, 141 (1986);]. To establish a reasonable excuse, the movant must prove such facts with sufficient details beyond conclusory statements. Moreover, the Court's authority to grant vacatur is discretionary, upon such terms as may be just, allowing the motion court to consider the specific facts, equities, and "grounds for the requested relief (Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 5015.03 at 50-284)." See Nash v. Port Auth. of New York & New Jersey, 22 N.Y.3d 220, 225-26, 3 N.E.3d 1128, 1132 (2013). In accordance with the legal standard set forth above, the Court has considered the facts proffered by Defendants. Here, Ms. Ortiz, admits that service was effectuated at both addresses for Defendants, but claims that Defendants' employees did not make her aware of said service. She alleges that she was notified by her own counsel approximately 9

C

months later. However, there is no further evidence or explanation proffered as to what transpired between August 23, 2023 and May 23, 2024 (9 months) to show that the failure to appear was reasonable. The Defendant Funeral Home in this matter is not an individual but a commercial entity with numerous locations in New York City. The Court takes judicial notice of the fact that Defendant Funeral Home receives a high volume of clients from the Bronx. The facts proffered by Defendants fail to show that Defendant Funeral Home has a reasonable excuse for its default, in light of the admissions it made about service.

As to the second prong, meritorious defense, the case law is clear that this Court is not required to address this prong if the movant fails to establish a reasonable excuse. In Kucker Marino Winiarsky & Bittens, LLC v. Neiman, 226 A.D.3d 480, 481 (1st Dept. 2024), the First Department addressed this two-prong test to the extent necessary:

“Accordingly, notwithstanding the public policy favoring the hearing of disputes on their merits, absent a reasonable excuse for the default, it is ‘unnecessary to consider whether [appellant] has a potentially meritorious defense to the [proceeding]’ (Towncenter Partners LLC v A.A. Castro Complex Litig., 203 AD3d 528, 529 [1st Dept 2022]; *see also* Besler v Uzieri, 179 AD3d 628, 628-629 [1st Dept 2020]).” Id.

Pursuant to Bittens, the Court is not required to assess whether there is a meritorious defense since Defendants failed to demonstrate a reasonable excuse.

However, the Court reviewed movant’s papers and considered the sufficiency of its argument. The allegations set forth in Plaintiff’s complaint fall within the legal perimeters of breach of contract, tortious interference, as well as recklessness, and negligence of a duty of care. Defendants’ motion proffers conclusory and limited facts about a meritorious defense in response to Plaintiff’s claims. The Court agrees with Defendant Funeral Home that a movant is not required to prove a meritorious defense in its papers, and that a movant is only required to set forth sufficient facts to make a prima facie showing of a potentially meritorious defense. To support its position,

C

Defendant Funeral Home cites Martinez v. Urb. Renaissance Collaboration Ltd. P'ship, 227 A.D.3d 475, 476 (1st Dept 2024). However, the facts of Martinez are distinguishable from the facts in the instant matter in that defendants in that case were never actually served with summons and complaint, unlike Defendants in the instant matter. In Martinez, which is a slip-n-fall action, the defendant proffered affidavits and evidence that raised issues about the occurrence of the incident on the given date and plaintiff's history with filing complaints against defendant. Id. This evidence was enough for the First Department to reverse the Supreme Court's order.

In the instant matter, Defendants do not proffer sufficient facts that address the elements of Plaintiff's claims or allegations. In Ms. Ortiz's affidavit, she admits that Defendants did cause for the cremation of the Decedent's body. She further alleges that at some point thereafter one of the Defendant Funeral Home's employees, an unnamed and undescribed employee based on Ms. Ortiz's affidavit allegedly attempted to contact Plaintiff to allegedly no avail. NYSCEF Doc. No. 24 at ¶14. However, Ms. Ortiz does not specify the alleged number of attempts, if more than one, any dates, times, or the means by which such communication was allegedly effectuated. Id. Defendants did not proffer any affidavits or other evidence from said employees. In its motion papers, Defendants proffer general conclusory denials in response to Plaintiff's allegations about the handling of the Decedent's remains:

"Defendants deny any allegation that Plaintiff made persistent and constant inquiries to locate and obtain the cremated remains of the decedent, to which Defendants failed to respond and/or provide said remains, and/or has lost or misplaced said remains. See Exhibits "B" and "C" to Goldman Aff., each at ¶¶ 25-30. Rather, as stated in the accompanying sworn affidavit of Michelle Ortiz, after causing the remains of the decedent to be cremated, Defendants did attempt to contact Plaintiff to return said remains to Plaintiff, decedent's next of kin, upon information and belief, but was unable to do so. See Exhibit "A" to Goldman Aff. at ¶¶ 13-15, and Exhibits "B" and "C" to Goldman Aff., each at ¶ 16." (Defendant's Motion Seq 2. Memo. of Law, NSYCEF Doc No. 32, pg. 3-4.)

C

The Court finds such facts to be insufficient to meet Defendants' prima facie showing of a meritorious defense as the lack of details about the procedures employed or the responsibility determinations to add any indicia of reliability to the alleged defense. It is noteworthy to mention that unlike the Defendants, Plaintiff proffered a letter, dated December 09, 2022, demonstrating she demanded the remains and ashes of the Decedent in good faith prior to commencing this action in July 2023. See NYSECF Doc. No. 40. The letter requesting the remains of the Decedent be returned was sent to 3 (three) of Defendants' locations. Defendants did not proffer any proof that they responded in any way to said good faith attempt or any explanation as to why it wasn't responded to at all. Lastly, it is uncontroverted that the Decedent's remains are still in Defendants' possession, although respective counsel with the assistance of the Court conducted numerous settlement conferences in an attempt to return the remains to the Plaintiff.

Additionally, pursuant to the rules of Judicial Notice of Facts § 2.01(c), the Court may take judicial notice of facts contained in "undisputed records of a court, such as prior orders". Id. The Court takes judicial notice of its prior order, from a different action/index, where default judgment was entered against same Defendants for failing to appear with counsel, pursuant to directives previously given by this Court. See NYSECF Doc. No. 44, Order from Judge Marissa Soto, dated July 06, 2022, index no. 804349/2022E. This Court engaged in generous efforts to contact Defendants with Plaintiff, in the case cited above, for purposes of avoiding their default and expediting the resolution of the special proceeding which only sought discovery. However, Defendants are a corporate actor who have established a pattern of unresponsiveness and defaulting before this Court. Similarly in the instant matter, Defendants were unresponsive to the service and notice effectuated by Plaintiff.

Accordingly, it is hereby

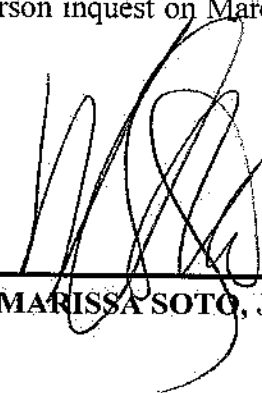
C

ORDERED that Defendants' motion to vacate a default (motion seq. 2) is denied; and it is further

ORDERED that matter is scheduled for an in person inquest on March 13, 2025 at 2:00 PM in courtroom 709.

This constitutes the order of the Court.

Dated: 2/4/2025

Hon. 

MARISSA SOTO, J.S.C.