2022-09-27

Dunn Beulah XV, L.P. v. Rodriguez

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Dunn Beulah XV, L.P. v Rodriguez
2022 NY Slip Op 50941(U)
Decided on September 27, 2022
Civil Court Of The City Of New York, Bronx County
Ibrahim, J.
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Decided on September 27, 2022

Civil Court of the City of New York, Bronx County

Dunn Beulah XV, L.P., Petitioner,

against

Carmen Rodriguez, Respondent,
and "JOHN DOE" and "JANE DOE" Respondents-Occupants

L&T Index No. 314378-2021

Shorab Ibrahim, J.

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION BY PETITIONER TO VACATE THE DEFAULT ENTERED ON MAY 16, 2022:

Notice of Motion, Affirmation & Exhibits Annexed No. 15-20 (NYSCEF)
Affirmation in Opposition & Exhibits Annexed # 23-27
Reply Affidavit & Exhibits Annexed # 30

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

PROCEDURAL POSTURE & RELEVANT FACTS

On March 17, 2022, petitioner's counsel, Hertz, Cherson & Rosenthal, P.C. (HCR),

respondent's Guardian Ad Litem, and respondent's newly retained counsel, Mobilization for Justice, Inc. (MFJ) all appeared. The matter was adjourned to April 11, 2022, with an answer due by March 31, 2022.

The answer was timely filed. (*see* NYSCEF Doc. 12). On April 11, 2022, no settlement was reached, and the matter was adjourned to May 16, 2022 at 2:30 P.M. for a pre-trial conference. All relevant parties, including petitioner's counsel, were present and agreed to the date and time. On May 13, 2022, the court sent an email to petitioner's counsel and respondent's counsel reminding them that the pre-trial conference was "in-person." The email contains both the date and the time for the conference. (*see* NYSCEF Doc. 24).

On May 16, 2022, petitioner did not appear for the pre-trial conference and the case was dismissed. (*see* NYSCEF Doc. 14).

Petitioner now moves to vacate its default.[FN1] The motion is supported with an attorney affirmation wherein counsel states that "we were unaware that the matter was placed on the court's calendar for that day" and "before we were made aware of the court date, the matter had already been dismissed." (*see* NYSCEF Doc. 15 at par. 9). Petitioner argues that law office failure does not preclude a court from excusing a default, that courts have vacated defaults where an attorney attested to mistakenly calendaring, that cases should be decided on their merits, and that petitioner should not be prejudiced by its attorneys' "careless" error. (*id* at 10, 11 and 13).

Respondent opposes the motion on several grounds. Respondent argues that 22 NYCRR [*2]§ 208.14 (3) mandates this motion be brought by order to show cause, rather than notice of motion. As to the merits of the motion, respondent argues that petitioner fails to demonstrate a reasonable excuse for its non-appearance and fails to demonstrate it has a meritorious claim.

As to excusable default respondent's counsel argues that general allegations of law office error are insufficient. She notes that she sent (2) emails from court to petitioner's counsel on May 16, 2022, in addition to the court's email on May 13, 2022. (*see* NYSCEF Doc. 23 at par. 16). The opposition points out that the motion completely fails to allege a meritorious claim.

In its reply, petitioner's counsel again argues that "petitioner should not be prejudiced by their attorneys' careless error." (NYSCEF Doc. 13 at par. 4). The reply further notes that the pleadings state a meritorious cause of action.

DISCUSSION

A default may be vacated in the court's discretion upon a showing of a reasonable excuse for default *and* a meritorious defense to the proceeding. (*see* CPLR §5015(a)(1); *Kapoor v Interzan LLC*, 172 AD3d 519, 520, 2019 NY Slip Op 03745 [1st Dept 2019], *citing Eugene Di Lorenzo, Inc. v A. C. Dutton Lumber Co.*, 67 NY2d 138, 141, 501 NYS2d 8 [1986]). Assessment of whether the proffered excuse is reasonable and whether the party has sufficiently demonstrated a meritorious claim is within the sound discretion of the court. (*see Bengal House Ltd. v 989 3rd Ave., Inc.*, 118 AD3d 575, 575-576, 988 NYS2d 586 [1st Dept 2014] *citing Di Simone v Good Samaritan Hosp.*, 100 NY2d 632, 768 NYS2d 735 [2003]).

Excusable Default

Law office failure, under certain circumstances, may constitute a reasonable excuse for a default. (*see* CPLR § 2005; *Mutual Marine Office, Inc. v Joy Const. Corp.*, 39 AD3d 417, 419, 835 NYS2d 88 [1st Dept 2007]). However, the mere mention of "law office error" is not enough. (*see Onishenko v Ntansah*, 145 AD3d 910, 911, 43 NYS3d 504 [2nd Dept 2016]; *Ortega v Gisogno & Meyerson*, 38 AD3d 510, 511, 831 NYS2d 259 [2nd Dept 2007] ("While CPLR 2005 allows courts to excuse a default due to law office error, it was not the legislature's intent to routinely excuse such defaults.")). Thus, claims of law office failure must be supported by a detailed and credible explanation of the default, rendering conclusory allegations of law office failure insufficient. (*see Tri-State Consumer Insurance Company v Hereford Insurance Company*, 167 AD3d 416, 417, 88 NYS3d 188 [1st Dept 2018]; *Le Monda v City of New York*, 159 AD3d 470, 2018 NY Slip Op 01546 [1st Dept 2018]; *Galaxy General Contracting Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790, 945 NYS2d 298 [1st Dept 2012]; *Rudd Mechanical Associates, Inc. v ZDG, LLC*, 192 AD3d 440, 441, 139 NYS3d 802 [App Div, 1st Dept 2021]).

The affirmation in support here does not set forth a single fact explaining the law office error. Both the affirmation in support and the reply affirmation fail to account for the court's email or for respondent's counsel's emails.[FN2] There is no discussion of office practices and what led to the non-appearance. Such conclusory allegations of law office error do not constitute a reasonable excuse. (*see Onewest Bank, FSB v Singer*, 153 AD3d 714, 716, 59 NYS3d 480 [2nd Dept 2017]

Petitioner's reliance on *Rosenberg v Maggio* is inapposite. (*see* 281 AD3d 183, 2001 NY [*3]Slip Op 01964 [1st Dept 2001]). In *Maggio*, the defaulting counsel at least offered he had calendared the proceeding under the wrong date in his diary.

Under these circumstances, the court cannot simply reference the preference for deciding cases on the merits. (*see Leader v Parkside Group*, 174 AD3d 420, 421 [1st Dept 2019] (The preference for deciding cases on the merits does not justify vacating a default judgment where the moving party fails to satisfy the two-prong test of showing a reasonable excuse and a meritorious defense)).

Meritorious Claim

Assuming arguendo that petitioner had offered a reasonable excuse for its default, it has not submitted proof of a potentially meritorious claim. (*see Gonzalez v Praise the Lord Dental*, 79 AD3d 550, 912 NYS2d 402 [1st Dept 2010] (no need to address meritorious claim when party fails to demonstrate reasonable excuse for the default).

The affirmation in support does not utter a single word about the merit of the underlying claim. Even if this court were to consider counsel's *reply* affirmation, (*see Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381, 822 NYS2d 264 [1st Dept 2006] (a movant is not permitted, in reply, to supply new evidence in support of the application)), counsel's affirmation is without probative value. (*see Thelen LLP v Omni Contracting Co.*, 79 AD3d 605, 606, 914 NYS2d 119 [1st Dept 2010]; *Onewest Bank, FSB v Michel*, 143 AD3d 869, 871, 39 NYS3d 485 [2d Dept 2016][FN3] ; *see also Northern Source, LLC v Kousouros*, 106 AD3d 571, 572, 966 NYS2d 377 [1st Dept 2013] (affirmation from counsel insufficient to demonstrate meritorious claim because counsel had no first-hand knowledge)).

Petitioner may not, as a matter of course, simply refer to the pleadings to "demonstrate" its meritorious claim. (*see Carroll v Nostra Realty Corp.*, 54 AD3d 623, 625, 864 NYS2d 210 [1st Dept 2008] (pleadings were self-serving and conclusory);[FN4] *compare Mediavilla v Gurman*, 272 AD2d 146, 148, 717 NYS2d 432 [1st Dept 2000] (*affidavit* of merit accompanies by medical records sufficient); *Rosenberg v Maggio*, 282 AD2d at 184 (affidavit of physician specifying defendant's departure from accepted practice and opining that such departures contributed to plaintiff's injuries); *Caso v Manmall, Inc.*, 68 AD3d 470, 471, 894 NYS2d 374 [1st Dept 2009] (plaintiff's *affidavit* in support of motion sufficiently detailed to show merit); *see also Incorporated Village of Hempstead v Jablonsky*, 283 AD2d 553, 554, 725 NYS2d 6 [2nd Dept 2001] (movant must submit supporting facts in

evidentiary form sufficient to justify vacating the default)).

Consequently, petitioner has failed to show either an excusable reason for its default or that it has a meritorious claim against the respondent.

CONCLUSION

Based on the foregoing, petitioner's motion is denied on the merits. As such, the court need not reach respondent's procedural argument.

This constitutes the Decision of the court. It will be posted on NYSCEF.

Dated: September 27, 2022
SO ORDERED,
Bronx, NY
/S/
SHORAB IBRAHIM, JHC

Footnotes

Footnote 1: For unexplained reasons, petitioner waited two and a half months to make the instant motion.

Footnote 2: Neither of petitioner's counsel's affirmations mention the April 11, 2022 court date.

Footnote 3: The court notes that the petition is attorney verified.

Footnote 4: In *Carroll v Nostra Realty Corp.*, the plaintiff also submitted an affidavit.