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Zito v. Camacho

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART G

Mot. Seq. 2

----- X
JOHN TERENCE ZITO,

L&T Index No. 319556-22/KI

Petitioner,

-against-

Decision/Order

THEODORE CAMACHO, SALVADOR ACOSTA,
Respondents.

----- X
HON. AGATA RUMPRECHT-BEHRENS

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Order to show Cause/ Notice of Motion and Affidavits /Affirmations annexed	NYSCEF Doc. 15-18
Answering Affidavits annexed	NYSCEF Doc. 19-20

This is a holdover case wherein petitioner seeks possession of the premises known as 1235 Madison Street, Entire First Floor, Brooklyn, New York 11221. The case first appeared on the calendar on October 11, 2022 and was adjourned to November 30, 2022. On November 30, 2020, the case was dismissed because petitioner did not appear. Petitioner’s counsel filed the instant motion seeking to vacate the calendar default and restore the case. Respondent’s counsel opposed the motion because petitioner failed to provide a reasonable excuse for his failure to appear on November 30, 2022, and because petitioner failed to demonstrate that there is a potentially meritorious claim.

After oral argument and after review of the NYSCEF documents, the motion is denied.

Petitioner’s counsel states that he seeks to vacate the calendar default “occasioned by my firm’s failure to appear at an initial appearance of October 11, 2022¹.” *Gerard Affirmation Para 2*. Petitioner states that “[t]he firms (sic) default appears to be an example of law office failure” because a law firm hired for the appearance “did not properly calendar the appearance in its office” and that is why the default occurred. *Gerard Affirmation para 3-4*. Petitioner relies on 22 *NYCRR § 208.14*, et. seq. which says “[a] motion must be supported by affidavit by a person having firsthand knowledge, satisfactorily explaining the reasons for the action having been stricken...” Petitioner’s motion is also supported by an affidavit of petitioner, John Terence Zito, which states that “My counsel informs me that the attorney was supposed to appear on the court date failed to do so...the underlying facts and circumstances upon which this matter was initiated continue to exist.” *Zito Affidavit §4*.

¹ The Notice of Motion seeks to vacate the calendar default from August 25, 2022. The Affirmation and the Affidavit in support of the motion both seek to vacate a calendar default from October 11, 2022.

Respondent's counsel correctly points out that the moving papers attempt to show an excuse for a default on the wrong date. Assuming, arguendo, that the moving papers contain a scrivener's error, and the motion is meant to vacate a default on November 30, 2022, the motion must still be denied.

Pursuant to *CPLR 5015(a)(1)*, the moving party must demonstrate a reasonable excuse and a meritorious cause of action when seeking to vacate a default. This is a two prong test.

22 NYCRR § 208.14 requires that the motion be supported by a person having firsthand knowledge, satisfactorily explaining the reason for the default. Here, the landlord and the attorney of record are not persons with firsthand knowledge. The affirmation even says "upon information and belief, the law firm ...who I hired for the appearance did not properly calendar the appearance..." The affirmation submitted here cannot be said to be that of a person having firsthand knowledge since it is "upon information and belief." Such conclusory allegations are insufficient to constitute a showing of law office failure sufficient to demonstrate a reasonable excuse for the default. *See Juarbe v. City of New York*, 303 AD2d 462 [2003]; *V.S. Med Servs. P.C. v Travelers Ins. Co.*, 24 Misc 3d 32 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2009].

22 NYCRR § 208.14 requires a showing that the moving party is ready for trial. However, "Petitioner may not, as a matter of course, simply refer to the pleadings to 'demonstrate' its meritorious claim." *Dunn Beulah XV, L.P., v. Rodriguez*, 2022 N.Y. Misc. Lexis 5019. Petitioner's affidavit states that the "underlying facts and circumstances upon which this matter was initiated continue to exist. Petitioner is anxious to proceed on its case and is ready to move forward." The *Gerard Affirmation* states that petitioners "are ready for trial as the claims of Petitioners in the Holdover Petition set forth the entirety of Petitioners' case, and further satisfy all elements necessary for a Judgement of Possession and Warrant of Eviction." *Gerrard Affirmation 12* The statements by the attorney and by the petitioner are simply referring to the pleadings which is not sufficient to demonstrate a meritorious claim.

Based on the above it is ORDERED that petitioner's motion is denied.

This constitutes Decision/Order of the Court.

Dated: May 4, 2023
Brooklyn, New York



AGATA RUMPRECHT-BEHRENS
JUDGE, HOUSING COURT