

Savitt v Falcinelli

2009 NY Slip Op 33339(U)

January 7, 2009

Supreme Court, New York County

Docket Number: 603755/05

Judge: Shirley Werner Kornreich

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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: Kornreich, Shirley Werner, J.
Justice

PART 54

RICHARD P. SAVITT and GARY E. LUCIANI

INDEX NO. 603755/05

MOTION DATE 10/23/08

- v -

MOTION SEQ. NO. 3

FRANK FALCINELLI, et al.

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to VACATE

FILED PAPERS NUMBERED

Notice of Petition/ Order to Show Cause — Affidavits — Exhibits ... 1-4

Answering Affidavits — Exhibits _____

Replying Affidavits _____

JAN 09 2009

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, plaintiff's motion to vacate a default, is denied. On or about January 10, 2008, this action was discontinued pursuant to a settlement agreement. On or about May 29, 2008, plaintiff Richard P. Savitt filed a motion for contempt, sanctions, costs, expenses and attorneys fees. This motion was received in the submissions part on or about June 17, 2008. On July 7, 2008, the clerk for Part 54 received the motion from the submissions part with a marked date for oral argument set for July 10, 2008. Plaintiff failed to appear for oral argument on July 10, 2008. Therefore, the court denied the motion and marked it disposed. Plaintiff now moves to vacate this default decision.

Pursuant to NYCRR § 202.27, if, at any scheduled call of the calender, if the defendant appears but the plaintiff does not, the court may note the default on the record and enter an order dismissing the action." *Campos v. New York City Health and Hospitals Corp.*, 307 A.D.2d 785 (1st Dept 2003). When an action is dismissed in accordance with NYCRR § 202.27, the party not in attendance receives no warning other than the notice to appear at the calendar call. *Id.* Such a dismissal may be vacated only where the plaintiff demonstrates both a reasonable excuse for the default and a meritorious cause of action. *Poltr Construction, Inc. v Maks Etingin*, 297 A.D.2d 509, 511 (1st Dept 2002) *Fink v. Antell*, 19 A.D.3d 215 (1st Dept 2005). The court has "sound discretion" in determining whether the plaintiff's proffered excuse and statement of merits is sufficient. *Navarro v. Trenkman Estate, Inc.*, 279 A.D.2d 257, 258 (1st Dept 2001).

Here, Mr. Savitt has failed to proffer a reasonable excuse for his default. Plaintiff claims that he did not know that his motion was set for oral argument on July 10, 2008 because defendant's counsel failed to notify him. In support of this position, plaintiff argues that since defendant's counsel never served him with a response to his motion, he never bothered to call the court to see when his motion was set down for oral argument. Plaintiff's argument fails for several reasons. A review of the county clerk file shows that defendant attempted to serve plaintiff with its opposition to his motion on or about June 13, 2008. These papers were sent to plaintiff at 405 East 72nd Street, Suite 4E, New York N.Y., the same address listed by plaintiff in support of this motion. However, the county clerk file also shows that on or about January 25, 2007, Mr. Savitt filed a change of address form with the trial support office stating his address to be 146 Duane Street, Suite 2C, New York, N.Y. To date, Mr. Savitt has failed to file a change of

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

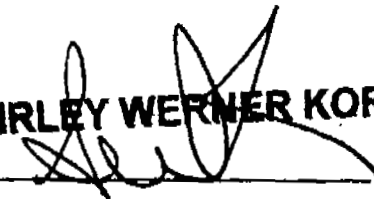
[* 2]
address form to update the court as to his apparent new address 405 East 72nd Street, Suite 4E, New York N.Y., the address on his present papers. Court records still list 146 Duane Street as plaintiff's address. Second, the court always sends postcards to counsel for both sides to notify them of the date a motion is set down for oral argument. Mr. Savitt's failure to update the court as to his new address caused him not to receive the postcard.

In addition, the major dispute here centers on the purported execution and compliance with the terms of a settlement agreement. If Mr. Savitt seeks to challenge the settlement agreement or its execution, he should make a motion to enforce or vacate the settlement. Accordingly, it is

ORDERED that the motion is denied.

HON. SHIRLEY WERNER KORNREICH

Dated: January 7, 2009



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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