

Rabos v R&R Bagels & Bakery Inc.

2012 NY Slip Op 33178(U)

April 12, 2012

Sup Ct, Queens County

Docket Number: 3754/2011

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

VASILIA RABOS, Index No.: 3754/2011
Plaintiff, Motion Date: 03/22/12
- against - Motion No.: 38

R&R BAGELS & BAKERY INC., DAVID Motion Seq.: 5
RAKHMINOV, LARISSA RAKHMINOV,
BRIARWOOD CONSULTING SERVICE INC.,
SION AKILOV, ZALATA AKILOV, SHIRLEY
J.W. KOTCHER, individually and as
Trustee and LAWRENCE T. CHOY, as
Trustee of the HARRY A. KOTCHER
Testamentary Trust, "SAMMY COHEN," a
fictitious name intended to be the
Landlord's Manager and Rental Agent
and S&V RESTAURANT EQUIPMENT MFG.
CORP., d/b/a CUSTOM COOL,
Defendants.

- - - - - x

The following papers numbered 1 to 13 were read on this motion by
defendants BRIARWOOD CONSULTING SERVICE INC., SION AKILOV and
ZALATA AKILOV for an order pursuant to CPLR 3012(d) vacating the
defendants' default and granting an extension of time to serve an
answer:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....7 - 11
Reply Affirmation.....12 -13

This is an action in which plaintiff has brought a cause of
action against said defendants for negligence and practicing law

without a license based upon their assistance with forming a partnership and with a corporate filing. The action was commenced by the plaintiff by the filing of a summons and complaint on February 15, 2011. As set forth in this Court's prior decision dated November 23, 2011, plaintiff served defendants Briarwood Consulting Service Inc., Sion Akilov and Zalata Akilov on February 17, 2011 pursuant to CPLR 311, 308(1) and 308(2), respectively. Counsel for plaintiff served the defendants with a "CPLR 3215 NOTICE" stating that service of the enclosed summons and complaint had been made pursuant to CPLR 3215(g).

Counsel for defendants, Altamonte Law Firm, P.C., served a notice of appearance dated May 24, 2011. On June 1, 2011, plaintiff's counsel rejected the notice of appearance as untimely. This court found that counsel for plaintiff timely rejected the May 24, 2011 notice of appearance on the grounds that the notice was untimely and non-responsive to the complaint. On June 30, 2011, the defendants served a notice to dismiss which this court denied by decision dated November 23, 2011 on the ground that the motion was premature because the defendants were in default at the time the motion was served.

The defendants now move for an order pursuant to CPLR 3012(d) vacating their default and compelling the plaintiff to accept their answer.

In support of the motion, defendants' counsel submits an affirmation in which he states that the three defendants hired the law firm of Almonte & Bratkovsky PLLC with respect to this action. He states that, "shortly thereafter the partners of A&B split up and the law firm ceased to do business. Due to law office error, both attorneys believed that the other one would be handling this case." Counsel states further that "upon their realization of the error and being unable to locate the complaint, this law firm, the Altmonte Law Firm, P.C. attempted to call the plaintiff's law firm and immediately thereafter served a Notice of Appearance." As stated above, the notice of appearance was served on May 24, 2011, approximately 60 days after the answer was due. Defendants Sion Akilov and Zlata Akilov submit affidavits in support of the motion in which they each state that after they received the summons and complaint they attempted to hire an attorney but did not have the means until late March 2011. Defendants state that the law firm they hired Altamonte and Bratkovsky ceased to exist in April 2011.

Counsel also submits a copy of a motion to dismiss filed prematurely in which they raise certain defenses to the action such as the lack of legal capacity to bring a cause of action for practicing law without a license and the failure to state a cause of action with respect to the claim of negligence in the

formation of a partnership agreement and formation of a corporation and that the allegations in the complaint are vague and conclusory.

In opposition to the motion, plaintiff's counsel asserts that the motion should be denied as the defendants have failed to provide a reasonable excuse for their default and a meritorious defense.

CPLR 3012 (d) permits the court to "extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." "It is within the court's power to grant such an extension where it is established . . . that the delay in service was not willful or lengthy and that it did not cause any prejudice to the parties." A & J Concrete Corp. v Arker, 54 NY2d 870 [1981]; also see Maurice v Maurice, 78 AD3d 792 [2d Dept. 2010]; MMG Design, Inc. v Melnick, 35 AD3d 823 [2d Dept. 2006]; Twersky v Kasaks, 24 AD3d 657 [2d Dept. 2005]). Further, CPLR 2005, expressly permits a court to excuse a delay or default, based upon a claim of "law office failure".

This Court finds that as the plaintiff's delay in appearing was of relatively short duration, as there was no prejudice to the defendant, and as the plaintiff has demonstrated a reasonable excuse of law office failure for the delay and a potentially meritorious defense, the motion is granted (see CPLR 3012[d]; Beizer v Funk, 5 AD3d 619 [2d Dept. 2004] [where there is no evidence of willfulness, deliberate default, or prejudice to the defendant, the interest of justice is best served by permitting the case to be decided on its merits]).

Accordingly, for the above stated reasons, it is hereby

ORDERED, pursuant to CPLR §3012(d), that the defendants' default is vacated on condition that the defendants serve their answer on or before May 25, 2012.

Dated: April 12, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.