Torres v Metro N. R.R.
2016 NY Slip Op 33115(U)
December 23, 2016
Supreme Court, New York County
Docket Number: 115850/2009
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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GRACIE TORRES and MERARY PIZZARO, Index No. 115850/2009

Plaintiffs

- against - DECISION AND ORDER

METRO NORTH RAILROAD, THYSSENKRUPP ELEVATOR CORPORATION, "JOHN DOE," and "RICHARD ROE,"

Defendants

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FILED
JAN 06 2017
COUNTY CLERK'S OFFICE
NEW YORK

I. BACKGROUND

Plaintiffs commenced this action for personal injuries November 19, 2009, alleging that they slipped and fell on a wet spot on escalator #6 at Grand Central Station in New York County. Plaintiffs served their summons and unverified complaint only on defendant Thyssenkrupp Elevator Corporation. After multiple conferences before the court regarding disclosure failed to produce plaintiffs' compliance with defendant's disclosure requests, defendant twice moved to dismiss the complaint, in March 2011 and November 2013, based on plaintiffs' failure to prosecute the action. Both motions were resolved by stipulations in which plaintiffs agreed to provide defendant its requested disclosure and to conduct depositions, but plaintiffs failed to provide most of the disclosure they agreed to provide, and no depositions were conducted.

When plaintiffs' attorney failed to appear for a status conference scheduled July 28, 2014, the court (Tingling, J.)

dismissed the action. 22 N.Y.C.R.R. § 202.27(b). Plaintiffs' attorney attests that he failed to enter the conference date on his calendar, was on vacation with his son on that date, contacted defendant, and belatedly provided medical records in an unsuccessful attempt to reach a stipulation restoring the action to the status conference calendar.

Plaintiffs now move to restore the action to the calendar, supported by their affidavits that they have not intended to abandon the action, the allegations in the previously unverified complaint are true, and thus the action is meritorious. Aff. of Gary S. Fish Ex. 2 ¶ 2, Ex. 3 ¶ 2. Since Justice Tingling dismissed the action due to plaintiffs' nonappearance at a scheduled conference, 22 N.Y.C.R.R. § 202.27(b); Biton v. Turco, 88 A.D.3d 519, 519 (1st Dep't 2011); Chiaramonte v. Coppola, 81 A.D.3d 426, 426 (1st Dep't 2011); Aaron v. Greenberg & Reicher, LLP, 68 A.D.3d 533, 534 (1st Dep't 2009); Espinoza v. Concordia Intl. Forwarding Corp., 32 A.D.3d 326, 327 (1st Dep't 2006), however, plaintiffs must meet the standards for vacatur of the dismissal under C.P.L.R. § 5015(a), rather than for restoration of the action to the calendar under C.P.L.R. § 3404. Cato v. City of New York, 70 A.D.3d 471, 471 (1st Dep't 2010); Donnelly v. Treeline Companies, 66 A.D.3d 563, 564 (1st Dep't 2009).

II. VACATUR OF THE DISMISSAL

Defendant urges that plaintiffs' motion be denied because plaintiffs failed to satisfy C.P.L.R. § 2103(b)(5) when they faxed their motion to defendant's attorney, but mailed it to an

incorrect address for the attorney. Although plaintiffs did mail the motion to the incorrect address and provide no evidence that they in fact mailed the motion to the correct address, the court disregards this technical defect, as defendant admits it received plaintiffs' faxed copy and thus received notice of the motion, enabling it to oppose the motion. C.P.L.R. § 2001; Ruffin v. Lion Corp., 15 N.Y.3d 578, 582 (2010). Given this determination that the service by facsimile July 23, 2015, was effective, plaintiffs served their motion within the required one year period after the dismissal July 28, 2014, that they seek to vacate. C.P.L.R. § 5015(a)(1).

The court therefore turns to the merits of plaintiffs' motion. Plaintiffs may vacate the dismissal by presenting a reasonable excuse for their default and evidence of a meritorious claim. Id.; Johnson-Roberts v. Ira Judelson Bail Bonds, 140 A.D.3d 509, 509 (1st Dep't 2016); Kassiano v. Palm Mgt. Corp., 95 A.D.3d 541, 541 (1st Dep't 2012); Parker v. Alacantara, 79 A.D.3d 429, 429 (1st Dep't 2010); Chelli v. Kelly Group, P.C., 63 A.D.3d 632, 633 (1st Dep't 2009).

A. Lack of a Reasonable Excuse

Law office failure, C.P.L.R. § 2005, may constitute a reasonable excuse, as long as the conduct is not part of a pattern of persistent and willful inaction, dilatory behavior, or willful default and neglect. Imovegreen, LLC v. Frantic, LLC, 139 A.D.3d 539, 539-40 (1st Dep't 2016); Pryce v. Montefiore Med. Ctr., 114 A.D.3d 594, 594-95 (1st Dep't 2014); Galaxy Gen. Contr.

Corp. v. 2201 7th Ave. Realty LLC, 95 A.D.3d 789, 790 (1st Dep't 2012); Ward v. New York City Health & Hosps. Corp., 82 A.D.3d 471, 472 (1st Dep't 2011). Whether law office failure or another explanation, a conclusory or unsubstantiated excuse is insufficient. Carmody v 208-210 E. 31st Realty, LLC, 135 A.D.3d 491, 491 (1st Dep't 2016); Pryce v. Montefiore Med. Ctr., 114 A.D.3d at 594-95; Galaxy Gen. Contr. Corp. v. 2201 7th Ave. Realty LLC, 95 A.D.3d at 790; DeRosario v. New York City Health and Hosps. Corp., 22 A.D.3d 270, 271 (1st Dep't 2005).

The excuse offered by plaintiffs' attorney for not appearing at the July 2014 status conference, that he forgot to enter it on his calendar and was on vacation, Fish Aff. ¶ 10, might satisfy the standard for law office failure, were it not for plaintiffs' pattern of delay and inaction. Imovegreen, LLC v. Frantic, LLC, 139 A.D.3d at 539-40; Pryce v. Montefiore Med. Ctr., 114 A.D.3d at 594-95; Galaxy Gen. Contr. Corp. v. 2201 7th Ave. Realty LLC, 95 A.D.3d at 790; Ward v. New York City Health & Hosps. Corp., 82 A.D.3d at 472. Plaintiffs commenced their action in 2009 and, despite repeated orders, have never meaningfully responded to defendant's disclosure requests, appeared for their depositions, or taken defendant's deposition. Plaintiffs failed to appear for court conferences regarding disclosure in March 2011 and November 2013 as well as in July 2014. Defendant twice moved to dismiss plaintiffs' action due to their failure to prosecute the action based on these very failures to proceed with disclosure. Both motions were resolved based on plaintiffs' stipulations to

respond to defendant's outstanding disclosure requests and to proceed with depositions. Aff of Bruce M. Young Ex. E. After both stipulations, plaintiffs failed to comply.

Plaintiffs offer no explanation for this pattern of delay and inaction extending over more than four years. Although plaintiffs finally did provide their medical records to defendant, having previously been required to do so by multiple stipulations and orders, id., plaintiffs did so admittedly only after the action was dismissed and in an effort to obtain a stipulation to restore the action or vacate the dismissal as necessary. Fish Aff. ¶¶ 11-12. Other than this effort, plaintiffs never explain why after they learned the action was dismissed they waited nearly a year, up to the deadline, to move to vacate the dismissal. C.P.L.R. § 5015(a)(1). Thus, regardless of plaintiffs' explanation for their nonappearance at the particular status conference July 28, 2014, their failure to offer a reasonable excuse for their overall pattern of delay and inaction warrants denial of their motion to vacate the dismissal. Imovegreen, LLC v. Frantic, LLC, 139 A.D.3d at 539-40; Pryce v. Montefiore Med. Ctr., 114 A.D.3d at 594-95; Galaxy Gen. Contr. Corp. v. 2201 7th Ave. Realty LLC, 95 A.D.3d at 790; Ward v. New York City Health & Hosps. Corp., 82 A.D.3d at 472.

B. Lack of a Meritorious Claim

Although plaintiffs' lack of reasonable excuse for their pattern of neglect is sufficient itself to warrant denial of their motion to vacate the dismissal, Colony Ins. Co. v Danica

Group, LLC, 115 A.D.3d 453, 454 (1st Dep't 2014); Rownd v. Teachers Retirement Sys. of City of N.Y., 52 A.D.3d 321, 321 (1st Dep't 2008), the court also denies plaintiffs' motion because they have failed to demonstrate a meritorious claim. To meet this requirement, plaintiffs must present admissible evidence on personal knowledge of the facts underlying their claims. Torres v. Harmonie Club of City of N.Y., 122 A.D.3d 518, 519 (1st Dep't 2014); Silva v. Lakins, 118 A.D.3d 556, 557 (1st Dep't 2014); Peacock v. Kalikow, 239 A.D.2d 188, 190 (1st Dep't 1997). See Grossberg Tudanger Adv., Inc. v. Weinreb, 177 A.D.2d 377, 377 (1st Dep't 1991); Tuthill Fin. v. Abakporo, 139 A.D.3d 1041, 1043 (2d Dep't 2016). An affidavit's allegations must be detailed and evidentiary and not vague or conclusory. Imovegreen, LLC v. Frantic, LLC, 139 A.D.3d at 540; Gal-Ed v. 153rd St. Assoc., LLC, 73 A.D.3d 438, 438 (1st Dep't 2010); Casimir v. Consumer Home Mortg. Inc., 65 A.D.3d 954, 954 (1st Dep't 2009); Peacock v. Kalikow, 239 A.D.2d at 190.

The complaint to which plaintiffs now attest alleges that they were injured when they stepped onto a watery, wet, or slick substance on an escalator in Grand Central Station and when the escalator swayed or buckled. Fish Aff. Ex. 1 ¶ 4. The complaint then alleges that defendant was in "ownership, dominion, possession, and/or control" of the escalator, but provides not a single fact to support this vague, conclusory allegation. Nor do plaintiffs' affidavits, which merely attest to the complaint's allegations, the action's merit, and plaintiffs's intent not to

abandon the action, provide any facts supporting this conclusion regarding defendant's connection to the escalator, let alone its responsibility for a slippery condition or sudden unexpected movement on the escalator. Plaintiffs offer no other evidence detailing how defendant exerted any control over the allegedly hazardous condition of the escalator: evidence they might have gathered, had they taken defendant's deposition or conducted other disclosure. This failure to show that their action is meritorious warrants denial of their motion as well. C.P.L.R. § 5015(1)(1); Imovegreen, LLC v. Frantic, LLC, 139 A.D.3d at 540; Gal-Ed v. 153rd St. Assoc., LLC, 73 A.D.3d at 438; Casimir v. Consumer Home Mortg. Inc., 65 A.D.3d at 954; Peacock v. Kalikow, 239 A.D.2d at 190.

III. CONCLUSION

For all these reasons as explained above, the court denies plaintiffs' motion to vacate the dismissal of their action. C.P.L.R. § 5015(a)(1).

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DATED: December 23, 2016

LUCY BILLINGS, J.S.C.

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