

<b>De Zaio v Rosenbloom</b>
2021 NY Slip Op 32887(U)
December 7, 2021
Supreme Court, New York County
Docket Number: Index No. 653238/2018
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 57

-----X  
MICHAEL DE ZAIO,

Plaintiff,

- v -

LEE ROSENBLOOM, NY57 D/B/A PLAZA GALLERY,  
NEW YORK GALLERY, PLAZA APPRAISAL SERVICES,  
INC., DOE CORPORATIONS AND/OR ENTITIES

Defendant.  
-----X

INDEX NO. 653238/2018

MOTION DATE 09/30/2021

MOTION SEQ. NO. 004

**DECISION + ORDER ON  
MOTION**

HON. SHAWN KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD

Defendant Lee Rosenbloom moves to vacate the Court's March 12, 2020 order granting Plaintiff's motion for default pursuant to CPLR §5015 and further to dismiss Plaintiff's July 6, 2019 Amended Complaint for failure to join necessary parties pursuant to CPLR §3211(a)(10).

Plaintiff opposes the motion and cross moves for sanctions against both Defendants Rosenbloom and NY57.

**Motion to Vacate**

Defendant Rosenbloom moves to vacate the default judgment against Rosenbloom based on a reasonable excuse and meritorious defenses. He claims that as a *pro se* party he misunderstood his requirement to file a new answer to the amended complaint and it was his understanding that he had a motion pending to dismiss the complaint against him.

**Timeliness**

Defendant Rosenbloom admits that his motion to vacate is filed about a year and a half after the default judgment was granted. However, he contends that it is not untimely due to the COVID-19 pandemic.

The default judgment was granted on March 12, 2020, by order of Justice Andrew Borrok. (NYSCEF Doc. No. 78). Due to the COVID-19 pandemic, on March 20, 2020, Pursuant to Executive Law Section 29-a, Governor Andrew Cuomo issued Executive Order 202.8, tolling New York's statute of limitations and other procedural deadlines until April 19, 2020. Subsequent Executive Orders further extended the initial toll of the statute of limitations that Governor Cuomo signed at the beginning of the COVID-19 pandemic to November 3, 2020 (*see* Executive Orders 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, and 202.67). Defendant Rosenbloom's motion to vacate the default judgment is timely.

There is a strong public policy in this state towards having cases decided on their merits, however a party must first demonstrate it is entitled to vacate its default (*Navarro v A. Trenkman Estate, Inc.*, 279 AD 2d 257, 719 NYS 2d 34 [1st Dept 2000]). A party seeking to vacate a default judgment pursuant to CPLR §5015 and CPLR §317, must demonstrate both a reasonable excuse for the default as well as a meritorious cause of action. A determination of what is a reasonable excuse for the default is within the discretion of the Court (*Crespo v A.D.A. Mgt.*, 292 AD2d 5, 739 NYS2d 49 [1st Dept 2002]).

Defendant has not demonstrated either a reasonable excuse for the default or the existence of any meritorious defenses. The record is abundantly clear that Defendant was given ample leeway and direction by the court and nonetheless failed to repeatedly appear and failed to file an Answer to the Amended Complaint.

As previously stated by Justice Borrok,

As an initial matter, the court notes that Mr. Rosenbloom does not dispute liability, he does not deny any of the facts concerning the defendants' default in this case, he does not deny that he failed to file an answer to the complaint or retain counsel for NY57 despite having multiple opportunities to do so, or that he failed to appear for the preliminary conference, or that he failed to file an answer to the amended complaint or otherwise appear or move to dismiss. Significantly, he does not even deny that he owes Mr. De Zaio money for the Tiffany Submariner that somehow disappeared; he merely contends that Mr. De Zaio altered the receipt or produced a second receipt and disputes the actual market value of the watch without offering any supporting evidence. (NYSCEF Doc. No. 78).

Accordingly, Defendant's motion to vacate the default judgment is denied and Defendants' motion to dismiss Amended Complaint does not need to be addressed.

#### **Plaintiff's Cross Motion for Sanctions**

The remedy of sanctions is to be one reserved for situations of "extreme behavior" (*Hunts Point Term. Produce Coop. Ass'n v New York City Econ. Dev. Corp.*, 54 AD3d 296, 296 [1st Dept 2008]). Indeed, in order to avoid a chilling effect, even arguments "lacking in legal merit" must have something even more "egregious" in order to rise to the level of frivolous conduct warranting sanctions (*see Parametric Capital Mgmt., LLC v Lacher*, 26 AD3d 175, 175 [1st Dept 2006]). Sanctions must "not be imposed in such a manner as to restrict ultimately unpersuasive, yet good-faith, arguments" (*Levy v Carol Mgmt. Corp.*, 260 AD2d 27, 35 [1st Dept 1999]). In evaluating frivolousness, a "court must consider the circumstances under which the conduct took place and whether or not the conduct was continued when its lack of legal or factual basis was apparent or should have been apparent" (*Matter of Kover*, 134 AD3d 64, 74 [1st Dept 2015]). Plaintiff's cross motion for sanctions is denied.

It is hereby,

ORDERED that defendant's motion to vacate its default herein is denied and the matter shall be set down for an assessment of damages; and it is further

ORDERED that plaintiff's cross motion for sanctions is denied; and it is further

ORDERED that, upon the filing by the plaintiff with the General Clerk's Office (60 Centre Street, Room 119) of a copy of this order with notice of entry and a note of issue, and the payment of the fee therefor, the Clerk shall place this matter upon the trial calendar for an assessment of damages; and it is further

ORDERED that such filing with the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

12/7/2021

DATE



SHAWN KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE