

Bowman v Addicts Rehabilitation Ctr. Found., Inc.
2006 NY Slip Op 30712(U)
October 30, 2006
Supreme Court, New York County
Docket Number: 103631-2006
Judge: Carol R. Edmead
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[* 1]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----x
STAR A. BOWMAN,

Plaintiff,

Index No. 103631-2006

-against-

DECISION/ORDER

ADDICTS REHABILITATION CENTER FOUNDATION,
INC., and ADDICTS REHABILITATION CENTER FUND,
INC.,

Defendants.

-----x
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff, Star A. Bowman ("plaintiff") commenced this action seeking damages for injuries she alleges were sustained as a result of the negligence of the operation of a substance abuse center, in which plaintiff was a client. Plaintiff's initial complaint alleged that defendant Addicts Rehabilitation Center Foundation, Inc. ("ARC Foundation") negligently managed, controlled and operated the subject facility, and employed the individual who sexually harassed her. Plaintiff's amended complaint added the name of defendant Addicts Rehabilitation Center Fund, Inc. ("ARC Fund") to the allegations alleged against ARC Foundation. Defendants have not answered the amended complaint.

Defendants now move to vacate any default entered against ARC Foundation and to dismiss the complaint as asserted against ARC Foundation, on the ground that ARC Foundation is not a proper party to this action.

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In support of dismissal, counsel for defendants contends that ARC Foundation never provided any services to plaintiff or employed the persons plaintiff claims committed the acts alleged in the complaint. In further support, defendants also submit the certificates of incorporation for ARC Foundation and ARC Fund to demonstrate that they are each separate and distinct legal entities. Also, as demonstrated by a Certificate issued to ARC Fund, only ARC Fund is licensed to provide substance abuse treatment, and ARC Foundation had not such certificate. It is further claimed that ARC Fund is the employer of all counselors and other individuals engaged in providing rehabilitation services.

Plaintiff opposes the vacatur of any default, arguing that defendants' failed to supply an affidavit of merit from the client and failed to offer a reasonable excuse for defendants' failure to answer the amended complaint.

Plaintiff also argues that dismissal is unwarranted because plaintiff's counsel failed to submit an affidavit from anyone from ARC Foundation or ARC Fund to support the assertion that ARC Foundation did not operate the facility. Plaintiff submits that defendants' attorney cannot serve as a witness to the interpretation or meaning of the incorporation documents, or provide an affirmation as proof on the issues raised.

In reply, defendants argue that their submissions demonstrate that ARC Fund is the entity licensed to provide substance abuse treatment services and that ARC Fund is distinct from the Foundation.

Analysis

While not specifically stated, the court infers from the defendants' motion that ARC Fund seeks to vacate its default in answering plaintiff's amended complaint and seeks leave to serve a

late answer. A strong public policy exists which favors the disposition of matters on their merits (*see OPM Group Ltd. v Williams*, 29 AD3d 354, 813 NYS2d 656 [1st Dept 2006]). In addition, the Court notes that ARC Foundation served answer to the initial complaint, in which the allegations of the complaint were denied, except as to paragraphs 2, 4 and 5 in the complaint. Thus, defendant ARC Foundation admits that it operated a drug treatment center at the subject premises as a domestic non-for-profit corporation organized under New York State law, but denies the allegations concerning the incidents giving rise to plaintiff's injuries. Under the circumstances, it cannot be said that there was a pattern of delay or other indication that the default was willful, or that plaintiff would be prejudiced by late joinder of issue (*Keles v Kennedy*, 238 AD2d 185, 656 NYS2d 239 [1st Dept 1997] *citing Matter of Gibson [MVAIC]*, 45 AD2d 678, 356 NYS2d 77 and *Troiano v Otsego Mut. Fire Ins. Co.*, 99 AD2d 719, 472 NYS2d 331).

Though it has been held that a party seeking to vacate an order entered upon his or her default is required to demonstrate both a reasonable excuse for the default and the existence of a meritorious cause of action or defense (*see CPLR 5015[a][1]*; *Hageman v Home Depot USA*, 25 AD3d 760, 808 NYS2d 763; *Zrake v New York City Dept. Of Educ.*, 17 AD3d 603, 793 NYS2d 151), the Court notes that plaintiff has not sought the entry of judgment based on defendants' default, and no such order entered upon defendants' default exists (*see Mendoza v Bi-County Paving*, 227 AD2d 302, 642 NYS2d 884 [1st Dept 1996] [stating that it was proper to treat defendant's motion for leave to serve a late answer as one to vacate its default, where defendant had not received notice of the motion for a default judgment or of the ensuing order]).

Therefore, defendants shall serve and file an amended answer within 30 days of the date

of this order.

With respect to defendants' motion to dismiss the action as against ARC Foundation, counsel for defendants failed to state on which section of the CPLR defendants' motion is based. Thus, it is unclear as to whether defendants' motion is based on the ground that their defense is based upon documentary evidence (CPLR 3211[a][1]) or that summary judgment warrants dismissal (CPLR 3212). Since issue has not been joined as to the amended complaint, any application for summary judgment would be premature and improper pursuant to CPLR 3212 [a] (which states that "Any party may move for summary judgment in any action, after issue has been joined"); *Weinstock v Handler*, 254 AD2d 165, 679 NYS2d 48 [1st Dept 1998] *citing Republic Nat. Bank of New York v Winston, Inc.*, 107 AD2d 581, 582, 483 NYS2d 311).

Thus, the Court turns to CPLR 3211 [a] [1], which provides that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," dismissal is warranted (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]). The test on a CPLR 3211 [a] [1] motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

Here, defendants' motion for a judgment of dismissal is not rendered improper on the ground that it is based on an attorney's affirmation, given that the affirmation is used to introduce

documentary evidence, *to wit*: certificates of incorporation of each defendant (*see generally, Delaney v Westchester County*, 90 AD2d 819 [2d Dept 1982] [stipulation as documentary evidence] *appeal dismissed* by 59 NY2d 763 [1983]; *Igarashi v Higashi*, 289 AD2d 128, 735 NYS2d 33 [1st Dept 2001] [deeds signed by plaintiff]; *Morgenthau & Latham v Bank of New York Co.*, 305 AD2d 74, 760 NYS2d 438 [1st Dept 2003] [informal judicial admissions by plaintiffs' "attorney-in-fact"]; *Beagle v Parillo*, 116 AD2d 856 [3d Dept 1986]).

However, such documents are insufficient to support the relief requested. The documentary evidence relied upon are not in admissible form (*see Neuschotz v Newsday Inc.*, 12 Misc 3d 1198 [Supreme Court New York County 2006]). Furthermore, although the incorporation documents demonstrate that ARC Fund is an entity licensed to provide substance abuse treatment services at the subject location, and that ARC Fund is a legal entity separate and distinct from ARC Foundation, such documents do not conclusively establish that ARC Foundation is free from liability in this action. In this regard, the affirmation of defendants' attorney, who lacks personal knowledge on the issue of operation and control of the subject premises, is insufficient to establish that ARC Foundation does not manage, control, or operate substance abuse services at the subject location, and that ARC Foundation did not employ anyone possibly related to the alleged incidents alleged by plaintiff.

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by defendants to vacate any default entered against ARC Foundation is granted to the extent that defendants shall serve and file an amended answer to the amended complaint within 30 days from the date of this order; and it is further

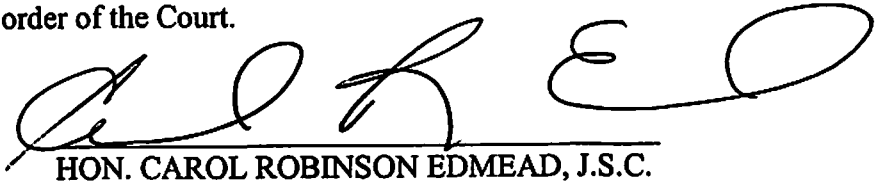
ORDERED that the branch of the motion by defendants to dismiss the complaint as

asserted against ARC Fund is denied, without prejudice to renew; and it is further

ORDERED that the parties shall enter into a preliminary conference forthwith.

This constitutes the decision and order of the Court.

Dated: 10/30/06



HON. CAROL ROBINSON EDMED, J.S.C.

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J.S.C.

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