

Wallack Freight Lines, Inc. v Next Day Express, Inc.
2013 NY Slip Op 31026(U)
March 26, 2013
Sup Ct, Suffolk County
Docket Number: 29295-1995
Judge: Ralph F. Costello
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXVII SUFFOLK COUNTY

COPY

PRESENT:

Honorable Ralph F. Costello

_____^x
WALLACK FREIGHT LINES, INC.,

Plaintiff,

R/D 11-27-01
S/D 11-27-01
Motion No. 006-MD

-against-

NEXT DAY EXPRESS, INC., MARK
J. LEWANDOWSKI, SR., MARK J.
LEWANDOWSKI, JR. and JOHN
WATERS,

Defendants

PLAINTIFF'S ATTORNEY
MICHAEL L. KOHL, PC
221 Broadway - Ste 303
Amityville, NY 11701-9912

DEFENDANT'S ATTORNEY
PERRY & CAMPANELLI, LLP
310 Old Country Rd. Ste 202
Garden City, NY 11530

_____^x

Upon reading and filing the following papers relative to this matter: (1) Defendant Waters' Order to Show Cause dated November 13, 2001 seeking an Order of this Court pursuant to CPLR §5015(a)(1) vacating a default judgment as to said defendant; (2) Plaintiff's Affirmation in Opposition dated November 21, 2001; Defendant Waters' Reply Affirmation dated November 26, 2001; and all the exhibits annexed thereto, and the matter having been submitted to the Court on its regular motion calendar, and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing, the Court issues the following Order relative to this matter: it is

ORDERED that defendant's Motion by Order to Show Cause dated November 13, 2001 seeking an Order of this Court pursuant to CPLR §5015(a)(1) vacating a default judgment as and against defendant Waters is hereby denied.

The underlying action in this matter concerns a business relationship alleged to have existed by and between the plaintiff and the defendants Mark J. Lewandowski, Sr., Mark J. Lewandowski, Jr. and the movant in this matter, John Waters. According to the complaint which alleges ten causes of action, these two gentlemen who have been employees of the plaintiff, allegedly left the employ of the plaintiff and formed a company which according to the allegations in the complaint, had been competing with the plaintiff corporation even before these gentlemen had left the employ of the plaintiff.

The complaint itself was served, issue was joined in this matter, the matter was assigned to the undersigned for the purpose of handling discovery. Several conferences were held before the Court with the conference most relevant to this matter being that held on February 13, 2001. At that time, while defendant Waters was represented by counsel, there was no appearance at the conference on behalf of defendant Waters. Based on the default at that time, the Court scheduled an inquest for April 24th which was actually held on April 25, 2001. That inquest resulted in a judgment in the amount of \$1,751,055.50. According to plaintiff the defendant's Order to Show Cause judgment on that amount was entered on October 3, 2001 and subsequently on October 22, 2001 defendant Waters received an information subpoena restraining notice of income execution which according to the Waters affidavit of November 12, 2001, was the first notice he had of the conference of February 13, 2001, the inquest date and the judgment itself.

A motion pursuant to CPLR §5015(a)(1) to vacate a default judgment, is addressed to the discretion of the Court. It is within that discretion whether the Court vacates the default or allows it to stand. Korea's Exchange Bank v. Attilio 186 AD2d 634 (2nd Dept., 1992); I.J. Handa, P.C. v. Imperato 159 AD2d 484 (2nd Dept., 1990).

In vacating a default judgment on the basis that there was an excusable default, the movant must demonstrate an acceptable or reasonable excuse for the default itself and a meritorious defense to the underlying action. Lazarevich v. Lotwin 176 AD2d 646 (1st Dept., 1991); also see General Electric Technical Services Co., Inc. v. Perez 156 AD2d 781 (3rd Dept., 1989). Both elements must be established. If there is a failure to prove either the first or second but not the other, the motion must be

denied. See General Electric Technical Services Co., Inc., supra.

In the underlying matter, it is the claim on behalf of the defendant Waters as to a reasonable excuse for his default in this matter and the reason to vacate the same, is that relative to the February 13th conference, no effort was made to contact him regarding the same. The Court however is unaware and no reference is made by defendant Waters as to any requirement by case law or statute that he had to be additionally notified as of the date of the conference that the conference was being held and that a default would be entered against him. In paragraph 2 of the attorney's Reply Affirmation, it states "The plaintiff has not offered any evidence to suggest that any effort was made to contact the defendant or any attorney at the February 13, 2001 conference." (Valicenti, Affirmation on November 26, 2001). Again however the Court is unaware of any requirement that he be notified specifically of the same as of the date of the conference. Further, on paragraph 17 of the attorney's Affirmation in Support of the original Order to Show Cause, counsel does admit that attorney LaMarca did have notification of the restoration of the case, that he failed to appear at the aforesaid conference. While defendant Waters now claims that attorney LaMarca was not his representative, the other information provided to the Court including reference to Mr. LaMarca as representing Mr. Waters on the appeal of the prior Order and further the unrefuted claim that Mr. LaMarca was notified of the inquest and refused to appear for the same.

Further, at Exhibit J in the original moving papers, counsel provides a copy of a letter of December 21, 2000 from Mr. Kohl directed to chambers of the undersigned. At that point Mr. Kohl requested that the case be restored to our calendar. In the lower right margin, there is a note addressed to Dana who is our calendar clerk and would enter the dates in the computer so as to create a calendar for a particular date. That note is in the handwriting of my law secretary who signed it at the bottom. According to Mr. Flanagan, my law secretary, the note indicated that the matter was added to the conference calendar of February 13th based on Mr. Kohl's request and that he personally did call counsel with the date namely Mr. Kohl and Mr. LaMarca. Therefore the Court finds that as of the date of the default in February 13th and further at the time of the inquest in this matter, Mr.

Waters was represented by Mr. LaMarca particularly as to the date of the inquest, Mr. LaMarca specifically refused to appear while further information as provided by the defendant's counsel himself on the instant Motion, does admit that Mr. LaMarca knew of the February 13th conference. Therefore the Court must find that the reason proffered as the reasonable excuse by the defendant in this matter is insufficient. Dowling Textile Co. v. Land 179 AD2d 621 (2nd Dept., 1992).

Further, as to a meritorious defense, paragraph 25 of counsel's Affirmation in Support of the original Order to Show Cause and at defendant's Affirmation at paragraph 7 (which is incorrectly referred to as paragraph 8 in the aforesaid attorney's Affirmation) the sum and substance of the meritorious defense by defendant Waters is "I didn't do it".

Far from providing any scintilla of a meritorious defense, and without buttressing or support from any legal arguments, defendant's claim that he did not perform the acts which underlie the ten causes of action in the complaint, is insufficient to rise to the level of a meritorious defense and the motion should be denied on those grounds also. Schiavetta v. McKeon 190 AD2d 724 (2nd Dept., 1993).

Therefore, it is the ruling of the Court as a matter of law that defendant Waters has failed to provide either a reasonable excuse and meritorious defense in this matter and therefore failed to meet the burden as required under CPLR §5015(a)(1) to vacate the aforesaid default judgment and therefore the motion is denied.

The foregoing constitutes the complete Order of the Court in this matter. Counsel for the movant is directed to serve a copy of this Order with notice of entry upon all other counsel within five days of receipt of same.

Dated: March 26, 2002

RALPH F. COSTELLO

S.S.C.

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