| **Rindler v Vaturi** |
| --- |
| 2016 NY Slip Op 30077(U) |
| January 14, 2016 |
| Supreme Court, New York County |
| Docket Number: 451503/15 |
| Judge: Barbara Jaffe |
|  |
|  |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

----------x

RONALD RINDLER,

Plaintiff,

-against-

JOEL VATURI,

Defendant.

----------x

Index No. 451503/15

Mot. seq. no. 002

**DECISION AND ORDER**

BARBARA JAFFE, J.:

**For plaintiff:**
Daniel G. Ruggiero, Esq.
PO Box 291
Canton, MA 02021
339-237-0343

**For defendant:**
Matthew S. Salerno, Esq.
Latham & Watkins LLP
885 Third Ave,
New York, NY 10022
212-906-1200

By notice of motion e-filed on June 25, 2015, defendant moves for an order granting him summary judgment. He provided for a return date of July 15, 2015 and notice that pursuant to CPLR 2214(b), answering papers and any cross-motion were to be served seven days before the return date, which would be July 8, 2015.

On July 13, 2015, five days after the due date for answering papers, by affirmation e-filed improperly as a notice of motion, plaintiff's counsel sought an order extending his time to respond to the instant motion. It was "returned for correction." (NYSCEF 190). Counsel apparently failed to consult the court's website for the rules pertaining to e-filng.

In lieu of filing a correction, on July 13, 2015, plaintiff e-filed a motion seeking letters rogatory, setting a return date of July 24, 2015, and notifying defendant that pursuant to CPLR 2214(b), answering papers and any cross-motion were to be served seven days before the return

date, in effect affording defendant one day to file his opposition. (NYSCEF 195). Counsel apparently failed to consult the Civil Practice Law and Rules concerning motion practice, nor did he consider this outrageous imposition on defendant's counsel. Defendant nonetheless complied with that notice, filing opposition the following day. (NYSCEF 219).[1]

In a so-called "plaintiff's supplemental affidavit in opposition to defendant's motion for summary judgment," e-filed by counsel on July 23, 2015, plaintiff stated the following:

> This reply is being submitted by Plaintiff directly. It has been submitted against the advice and counsel of my attorney because my attorney has explained to me that the time period to file this affidavit has expired and that there was an agreement between counsel and discussion with the Court clerk that no further submissions for these motions would be allowed.

(NYSCEF 234). Plaintiff also therein states, apparently referring to his attorney's aborted attempt to seek an extension of time to respond to the instant motion, that he and his attorney ("we")

> appeared before your court [on July 15] to participate in what we had hoped would be oral argument on motions. Apparently because of the heavy calendar and the fact that the motion is filed in the Submission Part, even though oral argument was requested, oral argument was not possible and the return date has been rescheduled for July 24th.

(*Id.*). This document is neither signed nor notarized, and it reflects counsel's apparent failure to consult the court website or ask a court clerk that day as to the rules pertaining to the scheduling of motions and oral argument.

The record reflects that on July 24, the case was adjourned in the submissions part to August 5, 2015, and that day scheduled for oral argument for October 7. Having known that the

---

[1] Having failed to allege that the individuals he sought to depose would not appear voluntarily to be deposed, I denied the motion on the record at oral argument on October 7, at which plaintiff failed to appear (*infra*). (NYSCEF 241).

motion was rescheduled for July 24, counsel apparently failed to check to see what happened then. As two of the four motions on the July 15 calendar in the Submissions Part were filed by plaintiff, there is no reason not to fault him for failing to check their status.

As a matter of courtesy in some instances, and as a matter of necessity in others, given the failure of attorneys to track motion practice in their cases, my court attorney emails reminders of scheduled oral arguments a few days in advance. In this case, at 9:46 on the morning of October 2, 2015, my court attorney emailed the parties a reminder that oral argument was scheduled for October 7 and that any requests to adjourn or stipulations to adjourn must be submitted/e-filed by 4 pm October 6. Neither plaintiff nor his attorney appeared at oral argument.

On October 19, counsel emailed my court attorney advising that he had "just found" her October 2 email and "discovered the wrong address is on file although all of my pleadings use my gmail account." Counsel apparently again failed to consult the court's rules for e-filing on the court's website.

By order to show cause dated December 28, 2015, plaintiff moved for an order vacating his default on the ground that counsel was not aware of the date for oral argument because he had not provided the court with his new email address, which was necessary because the email address he filed with the court had been "hacked" on some unspecified date. I declined to sign the order. (NYSCEF 248).

Given counsel's repeated failure to consult the applicable rules and law before filing various documents, there is no basis for finding excusable neglect here. Consequently, I consider defendant's motion on default.

In a so-called amended complaint, verified by counsel, seeking declaratory, injunctive,

equitable relief, and monetary damages, counsel refers to his own affirmation in opposition to a defense motion to dismiss and for sanctions and attorney fees (mot. seq. no. one) as containing the basis for moving for leave to amend the complaint. Thus, in the purported amended complaint, it is only alleged that defendant repeatedly defamed and slandered plaintiff by "falsely and maliciously, and with reckless disregard for the truth stated as a fact that plaintiff committed crimes and suffers from a mental disease," which would tend to injure him in his trade or business. (NYSCEF 52).

In the referenced affirmation, counsel relies on email communications among the parties and other family members, and notes handwritten by defendant's mother addressed to defense counsel, to allege that defendant has continually slandered plaintiff by claiming that he embezzled monies from a trust, committed fraud against the Internal Revenue Service, told others that plaintiff is mentally unfit, that he has endangered his wife's life, that "everyone" fears for her life with plaintiff, and that he has caused his children's "financial and judicial lives to be in danger." (*Id.*).

Defendant argues, based on voluminous documentary evidence, that the allegedly defamatory statements are true and/or substantially true, or constitute opinion. Having established, *prima facie*, that the statements are either true, substantially true, or constitute non-actionable opinion, and there being no factual issue raised by virtue of plaintiff's default, it is accordingly

ORDERED, that defendant Joel Vaturi's motion for an order granting him summary judgment dismissing the complaint is granted in its entirety, and the complaint is dismissed with costs to defendant as taxed by the clerk of the court, and the clerk is directed to enter judgment

accordingly.

ENTER:

Barbara Jaffe, JSC

DATED: January 14, 2016
New York, New York