

Allcare Homecare Agency, Inc. v Lokshin
2019 NY Slip Op 33768(U)
December 2, 2019
Supreme Court, Kings County
Docket Number: 512939/2019
Judge: Richard Velasquez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2nd day of DECEMBER, 2019.

PRESENT:
HON. RICHARD VELASQUEZ
Justice.

-----X
ALLCARE HOMECARE AGENCY, INC.,

Plaintiff(s),

Index No.: 512939/2019

-against-

Decision and Order

ELENA LOKSHIN,

Defendant(s).
-----X

KINGS COUNTY CLERK
FILED
2019 DEC 24 AM 9:34

The following papers numbered 14 to 30 read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed _____	14-19
Opposing Affidavits (Affirmations) _____	30

After oral argument and a review of the submissions herein, the Court finds as follows:

Plaintiff ALLCARE HOMECARE AGENCY, INC., moves by Order to Show Cause for an order pursuant to CPLR 5015, 2221(e) and 2005 restoring the plaintiffs prior motion seeking a preliminary injunction. Plaintiff opposes the same.

ANALYSIS

MS
#2

First, the court shall address plaintiffs request to vacate the order and restore the Order to show cause to the calendar. Pursuant to CPLR 5015 (a), a court is empowered to vacate a default judgment for several reasons, including excusable neglect; newly-discovered evidence; fraud, misrepresentation or other misconduct by an adverse party; lack of jurisdiction; or upon the reversal, modification or vacatur of a prior order. "These categories represent a codification of the principal grounds upon which courts have traditionally vacated default judgments as part of their "inherent discretionary power" (see *Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5015:11, at 476 [1992]*). "It thus follows that section 5015 (a) does not provide an exhaustive list as to when a default judgment may be vacated. Indeed, the drafters of that provision intended that courts retain and exercise their inherent discretionary power in situations that warranted vacatur but which the drafters could not easily foresee" (see *id.*; *3d Preliminary Report of Advisory Comm on Practice and Procedure, 1959 NY Legis Doc No. 17, at 204*), quoting *Woodson v. Mendon Leasing Corp.*, 100 NY2d 62, 68, 790 NE2d 1156 (2003). "In addition to the grounds set forth in section 5015 (a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice" (see *Ladd v Stevenson*, 112 NY 325, 332 [1889]; see generally 10 Weinstein-Korn-Miller, NY Civ Prac 5015.01, at 50-299; 5015.12, at 50-338 [2002]). As one commentator has noted, "It might have been more elegant to add an additional paragraph [to CPLR 5015 (a)] as a kind of catchall category, ... but the intent seems clear enough without it" (*Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5015:11, at 476-477*), quoting *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 68, 790 N.E.2d 1156 (Court of Appeals 2003).

Moreover, CPLR 2005 empowers the courts to exercise discretion in determining motions to vacate defaults emanating from law office failure. Among the factors to be considered are the meritorious nature of the defense, whether the neglect was excusable, lack of prejudice, brevity and non-deliberateness of the delay and a good faith intent to defend or prosecute the action (see *Zaldua v. Metropolitan Suburban Bus Auth.*, 97 A.D.2d 842, 468 N.Y.S.2d 917; *Mineroff v. Macy's & Co.*, 97 A.D.2d 535, 467 N.Y.S.2d 895; *Pettinato v. Sunscape At Bay Shore Home Owners Assn.*, 97 A.D.2d 434, 467 N.Y.S.2d 628) quoting *Stolpiec v. Wiener*, 100 A.D.2d 931, 932, 474 N.Y.S.2d 820, 821 (1984).. "The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the Supreme Court" (see *Morales v. Perfect Dental, P.C.*, 73 A.D.3d 877, 878, 899 N.Y.S.2d 883), and in exercising that discretion, the court may accept law office failure as an excuse (see CPLR 2005; *Star Indus., Inc. v. Innovative Beverages, Inc.*, 55 A.D.3d 903, 904, 866 N.Y.S.2d 357). However, law office failure should not be excused where " **'a default results not from an isolated, inadvertent mistake, but from repeated neglect'** " (*Gutman v. A to Z Holding Corp.*, 91 A.D.3d 718, 719, 936 N.Y.S.2d 316, quoting *Chery v. Anthony*, 156 A.D.2d 414, 417, 548 N.Y.S.2d 535), or **where allegations of law office failure are vague, conclusory, and unsubstantiated** (see *Cantor v. Flores*, 94 A.D.3d 936, 936–937, 943 N.Y.S.2d 138; see *Star Indus., Inc. v. Innovative Beverages, Inc.*, 55 A.D.3d at 904, 866 N.Y.S.2d 357); quoting *Glukhman v. Bay 49th St. Condo., LLC*, 100 A.D.3d 594, 595, 953 N.Y.S.2d 304, 305 (2012).

In the present case, the plaintiff has demonstrated a reasonable excuse of law office failure for the default as it was calendared incorrectly for the per diem that was to

appear for the matter. Law office failure is widely accepted by this court a reasonable excuse, in the present case, it is clear that the "default results from an isolated, inadvertent mistake" and such allegations of law office failure here are not vague, conclusory, and unsubstantiated. As such the plaintiff has demonstrated a reasonable excuse of law office failure. Therefore, this court finds that the prior order denying relief due to plaintiff's failure to appear pursuant to Uniform Rule 202.27 should be vacated based on the reasonable excuse of law office failure and "to promote the interests of substantial justice and fairness".

Accordingly, plaintiff's Order to Show Cause for a preliminary injunction is hereby restored to the calendar with a return date of January 15, 2020. Opposition, if any, MUST be served and filed on or before January 1, 2020. Courtesy copies of all papers MUST be hand delivered to courtroom 469 on or before January 8, 2020.

This constitutes the Decision/Order of the Court.

Date: December 2, 2019

RM
RICHARD VELASQUEZ, J.S.C.
So Ordered
Hon. Richard Velasquez

KINGS COUNTY CLERK
FILED
2019 DEC 24 AM 9:34

DEC 02 2019