

**Brown v Megabus**

2020 NY Slip Op 30213(U)

January 28, 2020

Supreme Court, New York County

Docket Number: 153935/2016

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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DONNEZZETTA BROWN,

Plaintiff,

- v -

MEGABUS, JOHN DOE

Defendant.

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INDEX NO. 153935/2016
MOTION DATE 01/07/2020
MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96

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

Upon the foregoing documents, the motion to vacate a default judgment is granted.

Background

Plaintiff claims that on July 17, 2015, she was exiting a Megabus on 23rd Street and 7th Avenue in Manhattan when the doors of the bus closed on her left foot, causing her injuries.

On December 19, 2018 defendant filed a motion to compel plaintiff to appear for a deposition and respond to outstanding discovery demands, or in the alternative, to preclude plaintiff from testifying as to the same (NYSCEF Doc. No. 37).

On January 9, 2019, the Law Office of Dominick W. Lavelle, counsel for plaintiff at the time, filed their opposition to defendant's motion to compel. Plaintiff indicated that all demands had been responded to and plaintiff was to appear for a deposition on January 15, 2019 (NYSCEF Doc. No. 55).

On January 10, 2019, defendant filed their reply and included a list of the outstanding authorizations that it sought (NYSCEF Doc. No. 56).

On February 22, 2019, before a decision was issued on the motion to compel, plaintiff's counsel filed an order to show cause requesting to be relieved as counsel for plaintiff (NYSCEF Doc. No. 60).

By decision and order dated March 26, 2019, this court granted the order to show cause and relieved Dominick K. Lavelle as counsel for plaintiff (NYSCEF Doc. No. 63). This court also ordered former counsel to serve a copy of the order with notice of entry upon plaintiff at her last known address via certified mail, return receipt requested. This court scheduled all parties to appear for a conference on June 11, 2019, and adjourned defendant's motion to compel and/or preclude to the same date. This court noted that if plaintiff or a new attorney for plaintiff failed to appear, the case may be dismissed or the motion may be granted on default.

On May 6, 2019, plaintiff's former counsel mailed a copy of the order with notice of entry to plaintiff via regular and certified mail, and filed a copy of the same with NYSCEF (NYSCEF Doc. No. 64).

On June 11, 2019, neither plaintiff nor an attorney on behalf of plaintiff appeared for the argument and conference. As such, defendant's motion to compel and/or preclude was granted, and the case was dismissed (NYSCEF Doc. No. 65).

Plaintiff has since obtained new counsel who now moves, under CPLR 5015(a)(1), to vacate the default judgment (NYSCEF Doc. No. 70).

In an affidavit by plaintiff, she swears that she was unaware of the scheduled conference and argument date because she was out of the country from May 14, 2019 to June 7, 2019, and did not receive the order with notice of entry before she left (NYSCEF Doc. No. 72 ¶ 11). She also swears that she did not learn about the conference until the afternoon of June 11, 2019, and

that she came to the courthouse when she became aware, but arrived after the court day had ended.

In opposition, defendant argues that this case has a long and “tortuous history” of inexplicable delays and discovery disputes (NYSCEF Doc. No. 80). Defendant contends that it is prejudiced by these delays since it was deprived of an opportunity to defend itself.

### Discussion

“It is well established that in order to obtain relief from an order or judgment on the basis of an excusable default pursuant to CPLR 5015(a)(1), the moving party must provide a reasonable excuse for the failure to appear and must further demonstrate that the case has merit.” (*Navarro v. A. Trenkman Estate, Inc.*, 279 A.D.2d 257, 285, 719 N.Y.S.2d 34 [1st Dept 2001]). It is “within the sound discretion of the motion court to determine whether the proffered excuse and the statement of merits are sufficient” (*Id.*).

Plaintiff has sworn that she did not receive the notice of the June 11, 2019 court date until the time to appear had passed (NYSCEF Doc. No. 72 ¶ 11). This is a reasonable excuse. Plaintiff has also sworn that this matter arose from injuries sustained when she was getting off a Megabus on July 17, 2015, when the bus operator closed the door on her foot, causing her serious injuries (NYSCEF Doc. No. 72 ¶ 4). This is a meritorious claim.

Since plaintiff has provided both a reasonable excuse for her non-appearance on June 11, 2019 as well as a meritorious claim, the default judgment will be vacated.

“[T]his state has adopted a liberal policy with respect to opening defaults so that the parties may have their day in court” (*Bellomo v Shiffman*, 157 A.D.2d 590, 551 N.Y.S.2d 776 (Mem) [1st Dept 1990]). If Ms. Brown now cooperates and provides authorizations and other paper discovery, and sits for her deposition, she will have her day in court.

When this court dismissed this matter on June 11, 2019, it also granted defendant's motion to compel and/or preclude (NYSCEF Doc. No. 65). It is undisputed that plaintiff's deposition has been adjourned multiple times, despite several court orders (NYSCEF Doc. Nos. 10, 11, 33, 36). Although there is disagreement as to the reasons for the adjournments, the fact remains that this case was filed almost four years ago, and plaintiff still has not been deposed or provided all authorizations.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted to the extent that the default judgment is vacated and this case is restored to the active calendar; and it is further

ORDERED that plaintiff must provide defendant with the outstanding authorizations indicated in defendant's reply affirmation (NYSCEF Doc. No. 56) by March 3, 2020. Even if plaintiff claims that the authorizations have been provided, plaintiff must provide fresh ones now; and it is further

ORDERED that defendant must process said authorizations within 15 days of receipt of same; and it is further

ORDERED that plaintiff's deposition date will be determined at the next conference.

Next conference: June 16, 2020.

1-28-2020

DATE

ARLENE P. BLUTH, 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