

Berman v Schwarz
2021 NY Slip Op 32497(U)
November 23, 2021
Supreme Court, Kings County
Docket Number: Index No. 512577/15
Judge: Lawrence S. Knipel
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At an IAS Term, Part NJTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of November, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X
JAY BERMAN,

Plaintiff,

- against -

Index No. 512577/15

SIMON SCHWARZ, SIMON SCHWARZ as
Administrator of the estate of SAMUEL SCHWARZ
and CONGREGATION NACHLAS JACOB ANSHE
SFARD OF JACKSON HEIGHTS,

Defendants.
-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

122-137, 139

Opposing Affidavits (Affirmations) _____

142-147, 149-150

Reply Affidavits (Affirmations) _____

151-152

Upon the foregoing papers in this trip and fall personal injury action, defendant Congregation Nachlas Jacob Anshe Sfard of Jackson Heights (the Congregation) moves (in motion sequence [mot. seq.] eight), by order to show cause, for an order, pursuant to CPLR 2201, 3001, 3215 (f) and 5015 and “the Court’s inherent discretion”: (1) clarifying the court’s earlier orders and directives, particularly the May 17, 2019 order of the court

(Martin, J.) (May 2019 Default Order)¹ to assure that the Congregation's cross claims asserted against defendant Simon Schwarz (Simon) shall be heard at trial; and/or (2) vacating that branch of the May 2019 Default Order which granted Simon a default judgment on his cross claims asserted against the Congregation and modifying the March 12, 2021 order of this court (March 2021 Order), which referred the case to a special referee for an inquest on damages against the Congregation in accordance with the May 2019 Default Order; and/or (3) vacating the May 2019 Default Order and the March 2021 Order.

Background

On October 15, 2015, plaintiff Jay Berman (Berman) commenced this action against Simon and Samuel Schwarz (collectively, the Schwarz defendants) by filing a summons and a verified complaint alleging that Berman, a pedestrian, was injured on February 8, 2014, when he tripped and fell on ice and snow on the sidewalk in front of the Schwarz defendants' property at 1402 Avenue N in Brooklyn (Property). The complaint asserted a single cause of action against the Schwarz defendants for negligence.

The 2014 Quiet Title Action

Meanwhile, in 2014, prior to the commencement of this action, the Congregation commenced an action against the Schwarz defendants to quiet title to the Property and declaring the Schwarz defendants' deed to the Property is void (2014 Quiet Title

¹ See NYSCEF Doc. No. 84.

Action).² By a February 23, 2015 decision and order, the court granted the Congregation summary judgment and declared that the Schwarz defendants' deed to the Property was "invalid, void, cancelled and of no further force or effect" and directed the City Register to expunge the deed from the record. The February 23, 2015 decision and order in the 2014 Quiet Title Action was subsequently affirmed on appeal.

The Amended Complaint

Consequently, on August 5, 2016, Berman amended his complaint in this personal injury action to, among other things, name the Congregation as a party defendant. The amended complaint alleges that all of the defendants, including the Congregation, owned, operated, managed, maintained, supervised, controlled and/or repaired the sidewalks in front of the Property and were negligent.

On August 22, 2016, the Schwarz defendants answered the amended complaint, denied the material allegations therein, including the allegations in paragraph 6 of the amended complaint that they "jointly and/or severally owned" the Property at the time of Berman's accident. The Schwarz defendants alleged in their answer that "an order dated February 23, 2015 from the Supreme Court, Kings County [in the 2014 Quiet Title Action] decided [that] the deed dated May 17, 2007 and recorded July 23, 2008 was determined to be invalid, void, cancelled and of no further force or effect" and "[t]itle was

²

See Congregation Nachlas Jacob Anshe Sfard of Jackson Heights v Schwarz, et al., Kings County index No. 500026/14.

restored to the Co-defendant Congregation . . . as title owner.” The Schwarz defendants also asserted affirmative defenses and a cross claim against the Congregation for contribution and indemnification.

On March 1, 2017, the Congregation answered the amended complaint, denied several material allegations therein except admitted “fee ownership of the building and appurtenances pursuant to a metes and bounds description contained in a deed filed with the Kings County Register.” The Congregation also asserted affirmative defenses and a cross claim against the Schwarz defendants for contribution and indemnification. On March 9, 2017, the Schwarz defendants replied to the Congregation’s cross claim denying the allegations therein.

The Second Amended Complaint

On January 29, 2018, the Schwarz defendants moved for summary judgment dismissing the amended complaint on the ground that they were not the owners of the Property in February 2014, the time of Berman’s accident, and thus, they owed no duty to Berman. On June 5, 2018, Berman cross-moved to amend the amended complaint to assert claims for equitable estoppel, unjust enrichment and fraud.

By an August 24, 2018 decision and order, the court (Martin, J.) denied the Schwarz defendants’ summary judgment motion without prejudice and with leave to renew at the conclusion of discovery and held that “[a]t this juncture, there are issues of fact including, but not limited to, whether said defendants were in control of the subject

property during the relevant time period.” Importantly, the court granted Berman’s cross motion for leave to amend the amended complaint, deemed the second amended complaint timely served and directed all defendants “to interpose an answer within 20 days of service of this order with notice of entry.”

The Congregation’s Appearance Default

On October 15, 2018, the Schwarz defendants answered the second amended complaint, asserted several affirmative defenses and a cross claim against the Congregation for contribution and indemnification. However, the Congregation failed to answer or otherwise respond to the second amended complaint and failed to reply to the cross claim asserted against it by the Schwarz defendants.

The May 2019 Default Order

On November 28, 2018, Berman moved for a default judgment against the Congregation. On February 20, 2019, the Schwarz defendants cross-moved for a default judgment on their cross claims asserted against the Congregation. The Congregation failed to oppose the motion and cross motion.

By the May 2019 Default Order, the court (Martin, J.) granted Berman’s motion and the Schwarz defendants’ cross motion for a default judgment against the Congregation without opposition.³ The May 2019 Default Order was served by Berman

³ Notably, the Congregation’s defense counsel was previously relieved of representing the Congregation in March 2018, and the Congregation failed to obtain new counsel in time to answer the second amended complaint or the

upon the Congregation with notice of entry thereof on June 3, 2019. Subsequently, by the March 2021 Order, this court referred the case to a special referee for an inquest on damages against the Congregation.

Berman and The Schwarz Defendants' Settlement

Meanwhile, on or about March 28, 2019, Berman and the Schwarz defendants entered into a settlement agreement and Berman released the Schwarz defendants from liability regarding his trip and fall accident. Pursuant to the settlement, Berman and the Schwarz defendants entered into a March 29, 2019 stipulation discontinuing the action as against the Schwarz defendants.

The Congregation's Instant Motion to Vacate its Default

On June 15, 2021 – more than two years after the Congregation was served with notice of entry of the May 2019 Default Order – the Congregation moved, by order to show cause, for an order vacating the May 2019 Default Order and the March 2021 Order.

The Congregation submits an affirmation from Joshua Schwarz (Joshua), its “authorized representative,” who affirms that “[t]he Congregation should not be held liable for Mr. Berman’s accident because at the time of the accident, Simon . . . had

Schwarz defendants’ cross claims or to oppose Berman’s November 2018 motion and the Schwarz defendants’ February 2019 cross motion for a default judgment. According to the Congregation, it was unable to obtain new counsel for nearly three years, until February 2021.

improperly deeded the property to himself and was operating it and making special use of it.” Joshua thus argues that the Congregation has a meritorious defense to liability and has a valid cross claim against Simon.

Joshua further affirms that “the Congregation has a valid excuse for its default in the proceedings and the untimeliness of this application” because “the Congregation was simply naïve as to how to handle this situation and was overwhelmed by the infidelity of Simon.” Joshua explains that his brother, Jacob, who was handling the Congregation’s defense, fell ill in 2017 and “[i]t was difficult for me to take up the mantle of the litigation after Jacob fell ill since I had not been handling this and it was all new and confusing to me.” Joshua also affirms that it “took time” to obtain new counsel for the Congregation after its defense counsel was relieved in March 2018 and the “effort was interrupted by Covid-19, which made it difficult to carry on with the task and find an attorney, and moreover, as I understand it, courts were closed and time limits and deadlines tolled.”

The Congregation also submits an affirmation from its defense counsel affirming that the Congregation was unable to obtain new counsel until February 2021. Defense counsel argues that while “[t]he Congregation’s counsel is well aware that a motion for relief under CPLR 5015 must be brought within a year . . . this should not be an obstacle to the relief requested . . .” Defense counsel explains that:

“the extenuating circumstances that we are dealing with a small religious congregation should be taken into account. Religious organizations such as this one are essentially charitable in nature, and simply do not deal well in the secular

world. The Congregation was caught like a doe in the headlights by this whole situation. Indeed, it is for this very reason that it is given to the Courts to provide special protection to religious corporations. (See Religious Corporations Law §12.) Like a municipality, a religious corporation should be afforded ‘sympathetic judicial recognition’ of the problems confronting it when forced to leave the spiritual realm into the secular.”

Essentially, defense counsel asserts that it took more than two years for the Congregation to move to vacate its default because it was unable to function “in the secular world.”

The Schwarz Defendants’ Opposition

The Schwarz defendants, in opposition, submit an attorney affirmation asserting that “the Congregation completely ignores the fact that the Plaintiff settled its claims with the Schwarz Defendants and released them from liability[,]” and therefore, “any cross-claims for contribution made by the Congregation against the Schwarz Defendants are no longer viable, and the Congregation is unable to state a claim for any indemnification against the Schwarz Defendants.”

Regarding the Congregations motion to vacate the May 2019 Default Order, defense counsel argues that:

“[t]he Congregation sought to vacate the default judgment order more than one year after service of the order with notice of entry, did not show reasonable excuse for the delay, and failed to demonstrate that such a vacatur or clarification/modification would be anything but prejudicial to the other parties in this case, especially given the settlement and release of the Schwarz Defendants.”

Defense counsel also asserts that if the May 2019 Default Order is vacated “[t]his six year

old case will essentially have to start from the beginning, as much discovery, including depositions, has not taken place” and “[m]emories of any witnesses to the accident that allegedly occurred more than seven years ago will have faded.”

Berman’s Opposition

Berman, in opposition, submits an attorney affirmation adopting the factual accounts, law and legal arguments asserted by the Schwarz defendants. Berman’s counsel further notes that the Congregation’s current counsel filed its notice of appearance on February 5, 2021, yet inexplicably waited an additional five months before moving to vacate the May 2019 Default Order.

Discussion

CPLR 5015 (a) (1) provides that:

“(a) On Motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

“1. Excusable default. *If such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party . . .*” (emphasis added).

“A party seeking to vacate a default in appearing pursuant to CPLR 5015 (a) (1) must demonstrate a reasonable excuse for the default and a potentially meritorious defense to

the action” (92-18 149th Street Realty Corp. v Stolzberg, 152 AD3d 560, 562 [2017] [internal quotations omitted]). “Whether an excuse is reasonable is a determination within the sound discretion of the Supreme Court” and, when making that discretionary determination, the court should consider relevant factors, such as the extent of the delay and prejudice to the opposing parties (Crevecoeur v Mattam, 172 AD3d 813, 814 [2019] [quoting Walker v Mohammed, 90 AD3d 1034, 1034 (2011)]).

The Supreme Court has the inherent authority to vacate a judgment in the interest of justice even after the statutory one-year period has lapsed (see HSBC Bank USA, Nat. Ass’n v Miller, 121 AD3d 1044, 1045-1046 [2014]). Here, the intervention of the Covid-19 pandemic constitutes a force majeure which profoundly disrupted orderly operation of society in general and our courts in particular, sufficient to excuse the delay herein.

Accordingly, the Congregations’ motion to vacate its default is granted, The May 17, 2019 order granting a default judgment against the Congregation, and the March 12, 2021 order referring the case to a special referee for an inquest on damages against the Congregation are hereby vacated.

This constitutes the decision and order of the court.

E N T E R,
 HON. LAWRENCE KNIBEL
 ADMINISTRATIVE JUDGE

J. S. C.