

Ruiz v Laophermsook
2022 NY Slip Op 30093(U)
January 12, 2022
Supreme Court, New York County
Docket Number: Index No. 157136/2019
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

Justice

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INDEX NO. 157136/2019

CATALINA (KATHY) RUIZ,

Plaintiff,

MOTION SEQ. NO. 003

- v -

ROE LAOPHERMSOOK,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for

RESTORE/VACATE

In this action seeking damages for, inter alia, defamation and tortious interference with business and contractual relationships, plaintiff Catalina (Kathy) Ruiz moves, in effect, pursuant to CPLR 5015(a), to vacate the decision and order of this Court, entered November 17, 2020, which granted defendant Roe Laophermsook's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) on default. Defendant opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff commenced this action on July 22, 2019 alleging that, on April 24, 2019, defendant defamed her by claiming that she took credit for work she did not perform. Doc. 1. She also claimed tortious interference with current and prospective contractual relationships she had with clients, intentional and negligent infliction of emotional distress, as well as an injunction restraining defendant from defaming her. Doc. 1.

On May 14, 2020, defendant filed a motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7). Doc. 19. The motion was submitted unopposed on September 18, 2020. By decision and order entered November 17, 2020, this Court granted defendant's motion on default and dismissed the complaint. Doc. 25.

On September 22, 2021, plaintiff discharged her attorney and began to represent herself pro se. Doc. 27.

Plaintiff now moves for an order “[r]estoring the original [p]etition to the Court’s calendar.” Doc. 30.¹ In support of the motion, plaintiff argues that “a number of extraordinary circumstances . . . have prevented [her] from prosecuting this case in a timely manner”, including the loss of her job in April 2020 due to the Covid-19 pandemic; the birth of her child in May 2020; “multiple physical challenges and significant emotional distress resulting from such circumstances” (Doc. 31 at par. 2); and “other important matters, including her overall health.” Doc. 31 at par. 15. She further maintains that she was not “served with any papers declaring this case dismissed.” Doc. 31 at par. 2. Additionally, plaintiff asserts that defendant should not benefit from her failure to oppose the motion to dismiss since she had withdrawn her motion for default against defendant and allowed him to answer. Doc. 41

In opposition, defendant argues that since the motion actually seeks to vacate the order of this Court entered November 17, 2020, it must be considered pursuant to CPLR 5015(a), and that plaintiff has failed to establish a reasonable excuse for her default and a meritorious claim, as required by that statute. Doc. 34.

In reply, plaintiff argues, inter alia, that defendant “took advantage of [her] fragile state” by moving to dismiss the case. Doc. 41. Plaintiff reiterates her argument that defendant should

¹ This appears to be an inadvertent error since plaintiff commenced the action by filing a summons and complaint.

not benefit from her failure to oppose his dismissal motion since she had withdrawn her motion for a default judgment and allowed him to answer the complaint. Doc. 41. She also maintains that this case should be decided on the merits and not on default. Doc. 41.

LEGAL CONCLUSIONS:

Where, as here, a complaint is dismissed due to a plaintiff's default in opposing a motion to dismiss, the plaintiff seeking to vacate the default must demonstrate both an excusable default and a meritorious defense (CPLR 5015[a]; *See Liparulo v New York City Health & Hosps. Corp.*, 193 AD3d 593 [1st Dept 2021]; *Fink v Antell*, 19 AD3d 215, 215 [1st Dept 2005]).

“Notwithstanding the preference for deciding cases on the merits, the preference will not justify vacating a default judgment where the moving party has failed to satisfy [this] burden . . .”

(*Liparulo*, 193 AD3d at 594 [citation omitted]). The question of whether a default judgment should be vacated is one to be decided in the discretion of the court (*Burke v Schiavone Constr. Co.*, 87 AD2d 747 [1st Dept 1982]).

As noted previously, plaintiff argues that numerous factors prevented her “from prosecuting this case.” However, she does not specifically assert that these factors prevented her from opposing defendant's motion. Even if she had made this assertion, however, she fails to substantiate with any medical documentation her claims that certain emotional and physical challenges, as well as her overall health, caused her to default on the motion (*See Ida S. v Angel Guardian Children & Family Servs. [In re Guardianship of Joei R.]*, 302 AD2d 334 (1st Dept 2003), *app. denied*, 100 NY2d 575 (2003); *Siskin v. 221 Sullivan Street Realty Corp.*, 180 AD2d 544 [1st Dept 1992]).

Additionally, plaintiff's argument that *she* was unable to respond to the motion to dismiss is misleading, since she was represented by the attorney who commenced this action on her

behalf in 2019 at the time the motion to dismiss was filed. As set forth above, the motion to dismiss was filed on May 14, 2020, submitted on September 18, 2020 and decided November 17, 2020. However, the plaintiff was represented by her attorney until September 22, 2021, when she discharged him and began to proceed pro se. Plaintiff sets forth no reason why her attorney failed to oppose the motion, and her contention that she never received the order dismissing the complaint is of no moment herein given her representation by counsel and the fact that the motion was filed on NYSCEF (*See generally Woodward v Millbrook Ventures LLC*, 148 AD3d 658 [1st Dept 2017] citing 22 NYCRR 202.5-b[f][2][ii]).

Given plaintiff's failure to present an excuse for her default, it is unnecessary for this Court to consider the merits of her claim (*see Tribeca Tech. Solutions, Inc. v Goldberg*, 110 AD3d 536, 537 [1st Dept 2013] citing *Admiral Ins. Co. v Marriott Intl., Inc.*, 79 AD3d 572 [1st Dept 2010], *lv denied* 17 NY3d 708 [2011]).

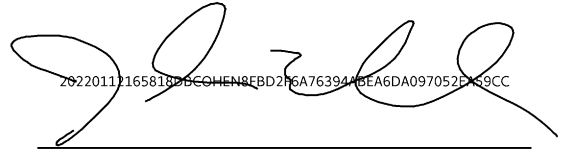
In denying plaintiff's motion, this Court further notes that she has failed to comply with paragraph 2(H) of the Part 58 Rules, which provides, inter alia, that:

All motion papers and exhibits thereto must be e-filed separately and must contain a concise and accurate description of the document filed on NYSCEF. The failure to comply with this rule may result in the denial of the motion.

Here, all of the exhibits submitted by plaintiff in support of this motion are filed on NYSCEF in bulk and are not separately labeled. Docs. 29, 33. This violation of the Part 58 Rules further militates in support of the denial of the motion.

Accordingly, it is hereby:

ORDERED that plaintiff's motion is denied.



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1/12/2022

DATE

DAVID B. COHEN, 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