

Tri-State Snacks & Concessions, Inc. v City of New York

2022 NY Slip Op 32991(U)

September 7, 2022

Supreme Court, New York County

Docket Number: Index No. 154192/2012

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. JUDY H. KIM</u></p> <p style="text-align: right;"><i>Justice</i></p> <p>-----X</p> <p>TRI-STATE SNACKS & CONCESSIONS, INC. D/B/A TIAN</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>THE CITY OF NEW YORK,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p>PART 05RCP</p> <p>INDEX NO. <u>154192/2012</u></p> <p>MOTION DATE <u>05/04/2020</u></p> <p>MOTION SEQ. NO. <u>003</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 003) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48
were read on this motion to VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Plaintiff's motion, pursuant to CPLR §5015, to vacate the prior order dismissing the complaint, is granted.

Plaintiff commenced this action on July 2, 2012, asserting claims against defendant the City of New York (the "City") for, inter alia, property damage, business interruption, and past and future loss of business profits stemming from a fire that occurred in the North Sewage Treatment Plant located directly beneath plaintiff's premises (NYSCEF Doc. No. 1 [Complaint at ¶25-31]). On September 26, 2012, the City interposed an Answer (NYSCEF Doc. No. 40 [Answer]).

Following several court conferences, plaintiff's counsel failed to appear for a compliance conference scheduled for February 7, 2019. At that conference, the court (Hon. Julio Rodriguez, III) issued an order adjourning the compliance conference to March 21, 2019 and warned that plaintiff's failure to appear "may result in court action pursuant to 22 NYCRR 202.27, including possible dismissal" (NYSCEF Doc. No. 43 [February 7, 2019 Order]). Plaintiff's counsel failed to appear for the March 21, 2019 conference and the court (Hon. Julio Rodriguez, III) issued an

order adjourning the compliance conference to April 18, 2019 and again warned plaintiff of potential dismissal (NYSCEF Doc. No. 44 [March 21, 2019 Order]). On April 18, 2019, plaintiff's counsel failed to appear and the court (Hon. Julio Rodriguez, III) issued an order dismissing the complaint (NYSCEF Doc. No. 45 [April 18, 2019 Order]).

Plaintiff now moves for an order, pursuant to CPLR §5015, to vacate the April 18, 2019 order dismissing plaintiff's complaint and to restore the action to the pre-trial calendar. In support of this motion, plaintiff's counsel submits an affirmation stating that:

In a recent file review on March 11, 2020 reconciling my office calendaring system with the Court's calendar, your affirmant ruefully discovered that Plaintiff's claim was dismissed on 4/18/19. The dismissal was only discovered accidentally when your affirmant was experiencing problems with the case management software used by my office to manage client cases. After consulting with my computer/IT professionals and relaying to them the symptoms of my increasing computer issues, I was informed that my calendaring system had been corrupted by an unauthorized intrusion during December of 2018. An immediate audit of the case-files revealed to my dismay that the corruption of the system resulted in inaccurate reports of deadlines and duties that I was obligated to perform on behalf of my clients. To my further dismay human entries of upcoming dates made by my paralegals were sometimes deleted or corrupted. While many of these deadlines were able to be later salvaged, the weekly reports which were ran every Monday as per office protocols, including 61 separate report runs times dating back from December of 2018 were inaccurate. Data entered by my staff failed to save into the digital calendar, and the email merge and notifications were corrupted...The failure of the computer calendaring system was especially devastating in light of the fact that I had spent thousands upon thousands of dollars previously with another two separate Computer Specialists to repair all of the systems for both my office and those of my suite-mates, and had been assured that the systems were integrated, repaired, and protected for the future.

(NYSCEF Doc. No. 38 [McHale Aff. at ¶¶8-9]).

In further support of this motion, plaintiff submits, inter alia, invoices for computer repairs paid by plaintiff's counsel (NYSCEF Doc. No. 46 [Computer Repair Invoices]) and an affidavit

by Thomas Cheung, president of plaintiff Tri-State Snacks & Concessions, Inc. d/b/a Tian (“Tri-State”), attesting to the merits of plaintiff’s claim (NYSCEF Doc. No. 49 [Plaintiff’s Affidavit of Merit]). Specifically, Cheung’s affidavit references, among other things, a report from the New York City Department of Environmental Protection stating that the outbreak of the fire that damaged plaintiff’s premises was “likely caused by a failure to regulate, manage, maintain, control and inspect the machinery and equipment within the engine room” of the North Sewage Treatment Plant (NYSCEF Doc. No. 49 [Affidavit of Merit at ¶¶13-16]).

For the reasons stated below, plaintiff’s motion is granted without opposition.

DISCUSSION

“To obtain relief from an order or judgment on the basis of excusable default pursuant to CPLR §5015(a)(1), a party must provide a reasonable excuse for the failure to appear and demonstrate the merit of the cause of action or defense” (Mediavilla v Gurman, 272 AD2d 146, 148 [1st Dept 2000]). It is within the court’s sound discretion to determine whether the movant’s excuse for default is sufficient (Chevalier v 368 E. 148th St. Assoc., LLC, 80 AD3d 411, 413 [1st Dept 2011]).

Plaintiff’s counsel has demonstrated a reasonable excuse for plaintiff’s default, insofar as counsel’s failure to appear at the scheduled conferences was neither willful nor part of a pattern of dilatory behavior but was due to an “inadvertent law office failure”—software corruption that caused, among other things, inaccurate scheduling and deadline reporting (See e.g., Chelli v Kelly Group, P.C., 63 AD3d 632, 633 [1st Dept 2009] [no willful default where, despite implementing system to track court conferences, attorneys were not alerted to upcoming compliance conference]).

In addition, plaintiff's factually detailed affidavit of merit is sufficient to establish a potentially meritorious cause of action (Cf. Cruz v Bronx Lebanon Hosp. Ctr., 73 AD3d 597, 598 [1st Dept 2010] [factually scant affidavit of merit sufficient to establish potentially meritorious claim in light of small amount of discovery completed]; Feders v Lamprecht, 43 AD3d 276, 277 [1st Dept 2007] [same]). Accordingly, plaintiff's motion to vacate the order dismissing plaintiff's complaint is granted without opposition.

Accordingly, it is hereby

ORDERED that plaintiff's motion to vacate the order dismissing plaintiff's complaint is granted and this case shall be restored to the active calendar; and it is further

ORDERED that within twenty days of entry, plaintiff shall serve a copy of this decision and order with notice of its entry upon all parties, the Clerk of the Court (60 Centre St., Room 119), and the Clerk of the General Clerk's Office (60 Centre St., Rm. 119) in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on this court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that upon receipt of the foregoing, the Clerk of the General Clerk's Office shall immediately restore the case to the active calendar.

This constitutes the decision and order of the Court.



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9/7/2022
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: