

Fordan v. Air & Liquid Sys. Corp.

Supreme Court of New York, New York County

March 15, 2021, Decided

190450/2018

Reporter

2021 N.Y. Misc. LEXIS 1093 *; 2021 NY Slip Op 30789(U) **

190450/2018

[**1] RICHARD E. FORDAN, AS ADMINISTRATOR OF THE ESTATE OF ALFREDO FORDAN, DECEASED, PRESENTACION FORDAN, Plaintiff, - v - AIR & LIQUID SYSTEMS CORPORATION, ALFA LAVAL, INC., ARMSTRONG INTERNATIONAL, INC., ARMSTRONG PUMPS INC., ATWOOD & MORRILL CO., INC., AURORA PUMP COMPANY, BLACKMER PUMP, BORGWARNER MORSE TEC LLC, BW/IP INTERNATIONAL CO., CAMERON, CARRIER CORPORATION, CBS CORPORATION, CERTAIN-TEED CORPORATION, CLARK-RELIANCE CORPORATION, CLEAVER-BROOKS COMPANY, DEZURIK, INC., ELECTROLUX HOME PRODUCTS, INC., ELLIOTT TURBOMACHINERY CO., INC., FAIRBANKS COMPANY (THE), FALK CORPORATION (THE), DEZURIK, INC., ELECTROLUX HOME PRODUCTS, INC., ELLIOTT TURBOMACHINERY CO., INC., FAIRBANKS COMPANY (THE), FALK CORPORATION (THE), FLOWSERVE US, INC., FMC CORPORATION, FOSTER WHEELER, LLC, GARDNER DENVER, INC., GENERAL ELECTRIC COMPANY, GG OF FLORIDA INC., GORMAN-RUPP COMPANY (THE), GOULDS PUMPS, INC., GREENE, TWEED & CO., INC., GRINNELL CORPORATION, HONEYWELL INTERNATIONAL, INC., HOWDEN BUFFALO, INC., I.T.T. INDUSTRIES, INC., I.T.T. INDUSTRIES, INC., JENKINS BROS., JOHN CRANE, INC., METROPOLITAN LIFE INSURANCE CO., NASH ENGINEERING COMPANY (THE), NELES-JAMESBURY, INC., O.C. KECKLEY COMPANY, RHEEM MANUFACTURING COMPANY, INC., RILEY POWER, INC., SPENCE ENGINEERING COMPANY, INC., SPIRAX SARCO, INC., SUPERIOR LIDGERWOOD MUNDY CORP., TACO, INC., UNION CARBIDE CORPORATION, VELAN VALVE CORP., WARREN PUMPS LLC, WILLIAM POWELL COMPANY (THE), YORK INTERNATIONAL CORPORATION, ZURN INDUSTRIES, INC., Defendant. INDEX NO.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

orders, reasonable excuse, vacate, order to show cause, asbestos, default, summary judgment motion, meritorious claim, notice of entry, law office, deposition transcript, meritorious defense, one year, inadvertent, argues, deposition testimony, instant action, instant motion, further order, constitutes, deposition, insulation, pertaining, exposure, proffers, cleaned, exposed, records, Notice

Judges: [*1] PRESENT: HON. ADAM SILVERA, J.S.C.

Opinion by: ADAM SILVERA

Opinion

DECISION + ORDER ON MOTION

[**2] Upon the foregoing documents, it is ordered that plaintiffs' order to show cause seeking to vacate the two

Unopposed Summary Judgment Motion and Orders, signed by counsel on September 3, 2019 and received by the Court on September 10, 2019, which dismissed the instant action against defendants The Nash Engineering Co. and Atwood & Morrill Co., Inc., is decided below.

Plaintiff seeks to vacate the two Unopposed Summary Judgment Motion and Orders which plaintiff's counsel states was signed by them in error due to a law office failure. Plaintiff argues that there is a reasonable excuse for the inadvertent signing of the orders and that plaintiff has a meritorious claim. In opposition, the defendant The Nash Engineering Co. (hereinafter referred to as "defendant Nash") argues that plaintiff failed to establish a meritorious claim in that plaintiff failed to identify such defendants as a source of his exposure to asbestos, but rather, plaintiff relies solely upon the deposition transcript of George Zachmann. According to defendant Nash, Mr. Zachmann's deposition was taken as part of a separate asbestos action and cannot [*2] be used herein. Defendant Nash further argues that Mr. Zachmann was never listed as a fact witness. Moreover, defendant Nash avers that the instant order to show cause must be denied as it is untimely. Defendant Atwood & Morrill Co., Inc. join in defendant Nash's opposition and adopt the same arguments.

In order to vacate a default judgment or order pursuant to [CPLR §5015\(a\)\(1\)](#), a motion must be made within one year of service of a copy of the judgment with notice of entry and the [**3] moving party has the burden of demonstrating both: (1) a reasonable excuse for the default; and (2) a meritorious defense to the action. See *Navarro v A. Trenkman Estate, Inc.*, 279 AD2d 257, 258 (1st Dep't 2001); [Cedeno v Wimbledon Building Corp.](#), 207 AD2d 297, 297 (1st Dep't 1994).

Here, plaintiff established a reasonable excuse for the default in that, due to a law office failure, the two subject orders were placed in the wrong pile of paperwork by a paralegal, and thus, inadvertently signed by plaintiff's counsel. Notably, defendant Nash's opposition is silent as to the issue of law office failure and any potential prejudice. The Appellate Division, First Department, has held that law office failure could constitute a reasonable excuse for a default. See *Knight v Acacia Network, Inc.*, 177 AD3d 499, 499 (1st Dep't 2019). It is undisputed that plaintiff did not intend to voluntarily dismiss the subject defendants from the [*3] instant action. It is well settled that there is a "strong public policy of this State to dispose of cases on their merits". *Chelli v Kelly Group, P.C.*, 63 AD3d 632, 633 (1st Dep't, 2009). The

Chelli court found that inadvertent law office failure, which did not prejudice the opposing side, constitutes a reasonable excuse for the default. See *id.* Thus, plaintiff has established a reasonable excuse.

Plaintiff has also established a meritorious claim in that plaintiff's deposition testimony revealed that, while serving in the US Navy, he boarded the USS LaSalle in August 1963 where he cleaned up insulation left behind during the installation of new equipment. Plaintiff testified that as he cleaned up such insulation, it created dust which he inhaled and exposed him to asbestos. In support of the instant motion, plaintiff proffers, *inter alia*, the deposition testimony of George Zachmann, a shipyard worker aboard the USS LaSalle, who testified that the subject defendants manufactured equipment that was on board the ship where plaintiff was exposed to asbestos. Plaintiff further proffers Naval records pertaining to the USS LaSalle which establish the same. Thus, plaintiff has established a meritorious claim.

[**4] In opposition, the subject defendants allege [*4] that plaintiff has failed to establish a meritorious defense in that plaintiff relies solely on the deposition of Mr. Zachmann to create a nexus between defendants' products and plaintiff's asbestos exposure. However, such argument fails. The Appellate Division, First Department has held that "evidence otherwise excludable at trial may be considered in...a motion for summary judgment as long as it does not become the sole basis for the court's determination". [Oken v A.C.&S.](#), 7 AD3d 285, 285 (1st Dep't 2004). Here, plaintiff relies on Mr. Zachmann's deposition transcript as well as records pertaining to the USS LaSalle which reference the subject defendants. See Notice of Motion, Exhs. K and L. Thus, Mr. Zachmann's deposition transcript is not the sole evidence relied upon by the Court.

The subject defendants further argue that plaintiff's motion is time-barred pursuant to [CPLR §5015\(a\)](#). According to defendants, the instant motion to vacate was filed more than one year from the date that the two orders were entered. The Court notes that [CPLR §5015\(a\)\(1\)](#), specifically states that a motion must be made within one year of service of a copy of the judgment with notice of entry. However, no such notice of entry was filed. The date of September 16, 2019 relied upon [*5] by defendants is the date the two orders were electronically filed. As no notice of entry was ever filed by defendants, the instant order to show cause is timely.

As plaintiff has established both a reasonable excuse and a meritorious defense, the instant timely order to show cause to vacate the two orders is granted.

Accordingly, it is

ORDERED that plaintiff's order to show cause to vacate the two Unopposed Summary Judgment Motion and Orders, signed by counsel on September 3, 2019 and received by the Court on September 10, 2019 is granted; and it is further

[5]** ORDERED that defendants The Nash Engineering Co. and Atwood & Morrill Co., Inc. are restored as defendants in this action; and it is further

ORDERED that, within 30 days of entry, plaintiff shall serve upon all parties a copy of this decision and order, together with notice of entry.

This constitutes the Decision and Order of the Court.

3/15/2021

DATE

/s/ Adam Silvera

ADAM SILVERA, J.S.C.

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