

Cornwall Warehousing, Inc. v Lerner

Supreme Court of New York, Appellate Division, First Department

April 16, 2019, Decided ; April 16, 2019, Entered

8994, 153561/14

Reporter

171 A.D.3d 540 *; 98 N.Y.S.3d 192 **; 2019 N.Y. App. Div. LEXIS 2840 ***; 2019 NY Slip Op 02825 ****; 2019 WL 1601485

[****1] Cornwall Warehousing, Inc., et al., Appellants, v Jonathan C. Lerner et al., Respondents.

Counsel: [***1] Berg & David, PLLC, Brooklyn (Shane Wax of counsel), for appellants.

Bressler, Amery & Ross, P.C., New York (Michael T. Hensley of counsel), for respondents.

Judges: Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

Opinion

[**193] [*540] Order, Supreme Court, New York County (Carmen Victoria St. George, J.), entered on or about November 27, 2017, which denied plaintiffs' motion to vacate an order, same court (Paul Wooten, J.), entered on or about November 13, 2015, granting, on default, defendants' motion to strike the complaint, unanimously reversed, on the law, the facts, and in the exercise of discretion, without costs, the motion granted and the complaint reinstated.

Plaintiffs demonstrated a reasonable excuse for their default (CPLR 5015 [a] [1]), based on law office failure, as detailed in the affirmation of their former counsel who miscalendared the motion (CPLR 2005; *People's United Bank v Latini Tuxedo Mgt., LLC*, 95 AD3d 1285, 1286, 944 NYS2d 909 [2d Dept 2012]). Plaintiffs then moved to vacate the order entered on their default, showing that they had a meritorious defense to the underlying motion to strike their complaint pursuant to CPLR 3126 (3), since they were not in default of any disclosure order (*see John Quealy Irrevocable [*541] Life Ins. Trust v AXA Equit. Life Ins. Co.*, 151 AD3d 592, 593, 58 NYS3d 26

171 A.D.3d 540, *541; 98 N.Y.S.3d 192, **193; 2019 N.Y. App. Div. LEXIS 2840, ***1; 2019 NY Slip Op 02825, ****¹

[1st Dept 2017], *lv dismissed* 30 NY3d 1091, 69 NYS3d 859, 92 NE3d 1249 [2018]; *DaimlerChrysler Ins. Co. v Seck*, 82 AD3d 581, 582, 919 NYS2d 20 [1st Dept 2011]). Plaintiffs also demonstrated a potentially meritorious cause of action by providing the affidavit of their president [***2] setting forth the basis of their legal malpractice claim (*see Cheri Rest. Inc. v Eoche*, 144 AD3d 578, 579-580, 42 NYS3d 113 [1st Dept 2016]).

In light of the strong public policy of this State to dispose of cases on their merits, the court improvidently exercised its discretion in denying plaintiffs' motion to vacate the order entered on default (*DaimlerChrysler Ins. Co. v Seck*, 82 AD3d at 582; *see Chelli v Kelly Group, P.C.*, 63 AD3d 632, 883 NYS2d 26 [1st Dept 2009]). Concur—Renwick, J.P., Gische, Kapnick, Kern, Moulton, JJ.

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