

Mundle v Tracey Towers Hous. Co., Inc.

2022 NY Slip Op 34739(U)

July 27, 2022

Supreme Court, Bronx County

Docket Number: Index No. 24899/2018

Judge: Laura G. Douglas

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 6

Karen Mundle,

Index No. 24899/2018

-against-

Hon. LAURA G. DOUGLAS
Justice Supreme Court

Tracey Towers Housing Co., Inc.,
et al

Justice Supreme Court

The following papers numbered 1 to 2 were read on this motion (Seq. No. 4)
for Vacate Order noticed on April 6, 2022
submitted

| | |
|--|----------|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | No(s). 1 |
| Answering Affidavit and Exhibits | No(s). 2 |
| Replying Affidavit and Exhibits | No(s). |

Upon the foregoing papers, it is ordered that this motion is by plaintiff for an order vacating this Court's Decision/Order dated October 2, 2020 is decided in accordance with the attached Memorandum Decision/Order.

Motion is Respectfully Referred to Justice:
Dated:

Dated: 7-27-22

Hon. [Signature]
LAURA G. DOUGLAS
Justice Supreme Court, J.S.C.

- CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 6

Index No. 24899/2018

KAREN MUNDLE,

Plaintiff,

DECISION/ORDER

-against-

Present:

**Hon. Laura G. Douglas
J.S.C.**

TRACEY TOWERS HOUSING CO., INC., TRACEY TOWERS
ASSOCIATES, LP, TRACEY TOWERS ASSOCIATES,
R.Y MANAGEMENT CO., INC., NEW YORK CITY HOUSING
AUTHORITY, and THE CITY OF NEW YORK,

Defendants.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to vacate Decision/Order and related relief (seq. no. 4):

Papers

Numbered

| | |
|---|----------|
| Order to Show Cause dated November 23, 2021, Affirmation of Howard Essner, Esq. dated November 19, 2021 in Support of Motion, and Exhibits (“A” through “D”)..... | 1 |
| Affirmation of Mark S. Grodberg, Esq. dated February 21, 2022 in Opposition to Motion, Statement of Material Facts by Mark S. Grodberg, Esq. dated February 21, 2022, and Memorandum of Law by Mark S. Grodberg, Esq. dated February 21, 2022 in Opposition to Motion..... | 2 |

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

The plaintiff (“Mundle”) seeks an order pursuant to CPLR Rule 5015(a)(1) vacating this Court’s Decision/Order dated October 2, 2020 which dismissed her complaint and scheduling a compliance conference for purposes of addressing outstanding disclosure. The motion is granted solely as ordered below and is denied in all other respects.

In a Decision/Order dated October 2, 2020, this Court granted the summary judgment motion brought by defendants Tracey Towers Housing Co., Inc., Tracey Towers Associates, LP, Tracey Towers Associates, and R.Y. Management Co., Inc. (collectively, “Tracey Towers”) without opposition from

Mundle. After having granted multiple adjournments of the motion's return date, the Court adjourned the motion to September 29, 2020. Mundle's attorney avers that his office erred in calendaring this date as October 19, 2020 (*see* Essner Aff., ¶ 6). Counsel apparently discovered this error on September 30, 2020 and e-filed a letter explaining the error and requesting a further adjournment (*see* NYSCEF doc. no. 81). However, the motion had already been submitted unopposed by that time and ultimately decided.

Initially, the Court will excuse what appears to be a minimal two-week odd delay in the filing of the instant motion, even accounting for the various tolls and extensions provided by the various Executive and Administrative Orders issued to address the Covid-19 pandemic (*see* Grodberg Aff. ¶ 17). A court retains the authority to vacate its own orders in the interests of justice (*see* CPLR § 2004 and *Hunter v. Enquirer/Star, Inc.*, 210 AD2d 32 [1st Dept 1994]). The novel issues and timetables triggered by the pandemic provide a valid excuse for Mundle's two-week miscalculation. Tracey Towers has not sustained any meaningful prejudice from this delay.

To vacate her default under CPLR Rule 5015(a)(1), Mundle must demonstrate both a reasonable excuse for the failure to oppose the summary judgment motion and a meritorious claim (*see Dormitory Authority of the State of New York v M.T.P. 59 St. LLC*, 103 AD3d 602 [1st Dept 2013]). What constitutes a reasonable excuse rests within the court's discretion (*see Rodgers v 66 E. Tremont Heights Housing. Development Fund Corp.*, 69 AD3d 510 [1st Dept 2010]), accounting for the length of the delay, prejudice to the opposing party, and New York's policy favoring resolution of matters on their merits (*see Mejia v Ramos*, 113 AD3d 429 [1st Dept 2014]). To demonstrate a meritorious defense, Mundle must offer evidence from an individual with personal knowledge of the facts beyond conclusory allegations (*Peacock v Kalikow*, 239 AD2d 188 [1st Dept 1997]). However, the proof needed to obtain relief under CPLR Rule 5015(a)(1) is less than that required in opposing a summary judgment motion (*see Inwald Enters., LLC v Aloha Energy*, 153 AD3d 1008 [3rd Dept 2017]).

Here, the error in calendaring the motion's return date is a reasonable excuse for the absence of opposition papers. Law office failure does not preclude a court from excusing a default or delay (*see Mediavilla v. Gurman*, 272 AD2d 146 [1st Dept 2000]). The various letters submitted by Mundle's attorney to this Court requesting additional time to oppose the summary judgment motion demonstrate that Mundle did not willfully neglect to oppose it. Mundle's failure to oppose the summary judgment motion appears to be an isolated incident as opposed to a pattern of willful neglect (*see Santiago v Valentin*, 125 AD3d 459 [1st Dept 2015]). There is no indication that Mundle intended to abandon her

case against Tracey Towers or that Tracey Towers would be prejudiced by the delay in considering the merits of Mundle's opposition papers in determining the summary judgment motion (*see Kramarenko v New York Community Hosp.*, 134 AD3d 770 [1st Dept 2015]). Finally, New York has a strong policy that litigation be decided on the merits (*see Navarro v A. Trenkman Estate, Inc.*, 279 AD2d 257 [1st Dept 2001]).

Tracey Towers' contentions that Mundle has failed to demonstrate a meritorious cause of action or an issue of fact that requires a trial are unavailing. The affidavit and photograph submitted by Mundle in support of the instant motion set forth a *prima facie* showing of a legally meritorious claim. To obtain the relief sought, Mundle need not establish her claim as a matter of law and defeat all defenses. Mundle avers that she tripped and fell on a depressed, broken, and poorly maintained section of an exterior step that was not flush with the stair itself while walking up a flight of stairs located in an outdoor parking garage owned and/or operated by Tracey Towers. Any alleged inconsistencies in Mundle's testimony is more appropriately addressed in a dispositive motion or during cross-examination at trial.

Under these circumstances, Mundle's failure to oppose the summary judgment motion will be excused and the ensuing dismissal vacated. In light of what appears to be the outstanding depositions of witnesses on behalf of Tracey Towers (*see Essner Aff.*, ¶ 11) and in order to avoid the argument that summary judgment is precluded by outstanding discovery (*see CPLR Rule 3212(f)*), Tracey Towers has leave to refile a motion for summary judgment within 90 days following the filing of a note of issue or after completion of these depositions - or Mundle's waiver of same or an order denying them.


Accordingly, it is hereby

ORDERED that this Court's Decision/Order dated October 2, 2020 and any resulting judgment(s) are vacated in their entireties; and it is further

ORDERED that the motion for summary judgment made by defendants Tracey Towers Housing Co., Inc., Tracey Towers Associates, LP, Tracey Towers Associates, and R.Y. Management Co., Inc. (motion seq. no. 3) is denied without prejudice to refile as noted above.

The foregoing constitutes the Decision/Order of this Court.

DATED: July 27, 2022
Bronx, New York



HON. LAURA G. DOUGLAS
J.S.C.