

**APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW
YORK, SECOND DEPARTMENT**

Gordon v. Boyd

96 A.D.3d 719 (N.Y. App. Div. 2d Dep't 2012) · Decided June 6, 2012

SUMMARY

The New York Appellate Division, Second Department, affirmed an order granting the plaintiff leave to renew opposition to the defendants' motion to dismiss. Upon renewal, the court properly denied dismissal because the purported release did not conclusively refute the plaintiff's allegations that he did not sign it and because he sufficiently alleged grounds to set it aside.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Second Department
WRITING FOR THE COURT	Angiolillo, J.P.; Eng, J.; Lott, J.; Cohen, J.
JURISDICTION	New York
DECIDED	June 6, 2012
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants appealed from an order granting the plaintiff leave to renew opposition to defendants' motion to dismiss, effectively vacating the prior dismissal order, and denying the motion to dismiss upon renewal.
STANDARD OF REVIEW	Abuse of discretion as to the grant of leave to renew; de novo review of the legal sufficiency of dismissal under CPLR 3211(a)(1) and (5).
PRECEDENTIAL VALUE	Published New York Appellate Division opinion
PARTIES	Boyd, Defendants v. Gordon, Plaintiff

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QUESTIONS PRESENTED

1. Whether the Supreme Court providently exercised its discretion in granting plaintiff leave to renew opposition to defendants' motion based on law office failure.
2. Whether the release submitted by defendants conclusively established a defense warranting dismissal under CPLR 3211(a)(1).
3. Whether plaintiff sufficiently averred grounds to set aside the release, precluding dismissal under CPLR 3211(a)(5).

HOLDINGS

1. The Supreme Court did not improvidently exercise its discretion in granting plaintiff leave to renew opposition to defendants' motion based on law office failure.
2. Defendants were not entitled to dismissal under CPLR 3211(a)(1) because the release they submitted did not utterly refute plaintiff's factual allegations and conclusively establish a defense as a matter of law.
3. Defendants were not entitled to dismissal under CPLR 3211(a)(5) because plaintiff sufficiently averred grounds for setting aside the release.

KEY QUOTATIONS

“A motion for leave to renew pursuant to CPLR 2221 (e) “may, in the Supreme Court’s discretion, be based on facts known to the party seeking renewal at the time of the original motion,” but the movant must offer “a reasonable justification for the failure to present such facts on the original motion”” (720)

“Law office failure can be accepted as a reasonable excuse in the exercise of the court’s sound discretion” (720)

“the documentary evidence submitted by them failed to utterly refute the plaintiffs factual allegations and conclusively establish a defense as a matter of law” (720)

FACTUAL BACKGROUND

The plaintiff brought an action for personal injuries. Defendants sought dismissal based on documentary evidence, relying on a release allegedly signed by the plaintiff, and also invoked a defense under CPLR 3211(a)(5). Plaintiff asserted that he did not personally sign the release and that it was signed by someone without authority to act for him. Plaintiff's failure to present those facts on the original motion was attributed to law office failure.

PROCEDURAL HISTORY

The Supreme Court, Westchester County, initially granted defendants' motion under CPLR 3211(a)(1) and (5) and dismissed the complaint. It later granted plaintiff leave to renew based on law office failure, effectively vacated the earlier order, and denied defendants' dismissal motion upon renewal. The Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- *Dervisevic v. Dervisevic*, 89 A.D.3d 785, 786 (2011)
- *Nwauwa v. Mamos*, 53 A.D.3d 646, 649 (2008)
- *Farber v. Breslin*, 47 A.D.3d 873, 876 (2008)
- *Newin Corp. v. Hartford Accident & Indemnity Co.*, 37 N.Y.2d 211, 217 (1975)
- *Storman v. Storman*, 90 A.D.3d 895, 898 (2011)
- *Anger v. Ford Motor Co., Dealer Dev.*, 80 A.D.2d 736 (1981)

OPINION

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PER CURIAM.

*720In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Westchester County (Giacomo, J.), entered September 21, 2011, which granted that branch of the plaintiffs motion which was for leave to renew his opposition to their motion pursuant to CPLR 3211 (a) (1) and (5) to dismiss the complaint, which had been granted in an order of the same court entered March 29, 2011, and upon renewal, in effect, vacated the order entered March 29, 2011, and thereupon denied their motion pursuant to CPLR 3211 (a) (1) and (5) to dismiss the complaint. Ordered that the order entered September 21, 2011, is affirmed, without costs or disbursements. A motion for leave to renew pursuant to CPLR 2221 (e) “may, in the Supreme Court’s discretion, be based on facts known to the party seeking renewal at the time of the original motion,” but the movant must offer “a reasonable justification for the failure to present such facts on the original motion” (*Dervisevic v Dervisevic*, 89 AD3d 785, 786 [2011] [internal quotation marks omitted]). “Law office failure can be accepted as a reasonable excuse in the exercise of the court’s sound discretion” (*Nwauwa v Mamos*, 53 AD3d 646, 649 [2008]). Under the circumstances of this case, the Supreme Court did not improvidently exercise its discretion in granting that branch of the plaintiffs motion which was for leave to renew his opposition to the defendants’ motion to dismiss the complaint on the ground of law office failure (*id.*). Upon renewal, the Supreme Court properly, in effect, vacated its previous order and denied the defendants’ motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (5). The document submitted by the defendants in support of their motion to dismiss was a release allegedly signed by the plaintiff. Upon renewal, in opposition to the motion, the plaintiff submitted evidence in support of his allegation that he did not personally sign the release and it was signed by someone without authority to act on his behalf. Under these circumstances, the defendants were not entitled to dismissal pursuant to CPLR 3211 (a) (1) since the documentary evidence submitted by them failed to utterly refute the plaintiffs factual allegations and conclusively establish a defense as a matter of

law (see *Farber v Breslin*, 47 AD3d 873, 876 [2008]). Moreover, the plaintiff sufficiently averred grounds for setting aside the release, and therefore, the defendants were not entitled to dismissal pursuant to CPLR 3211 (a) (5) (see *Newin Corp. v Hartford Acc. & Indent. Co.*, 37 NY2d 211, 217 [1975]; *Storman v Storman*, 90 AD3d 895, 898 *721[2011]; *Farber v Breslin*, 47 AD3d at 877; *Anger v Ford Motor Co., Dealer Dev.*, 80 AD2d 736 [1981]). Angiolillo, J.P., Eng, Lott and Cohen, JJ., concur.