

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D16741
Y/cb

_____AD3d_____

Argued - October 12, 2007

STEPHEN G. CRANE, J.P.
ANITA R. FLORIO
DANIEL D. ANGIOLILLO
EDWARD D. CARNI, JJ.

2006-09126

DECISION & ORDER

Joseph Savino, et al., respondents-appellants v
“ABC Corporation,” etc., defendant, S&E Landholding,
Inc., et al., appellants-respondents.

(Index No. 13340/99)

Leahy & Johnson, P.C., New York, N.Y. (Peter James Johnson, Jr., and James P. Tenney of counsel), for appellants-respondents.

Law Offices of F. John Calabro, P.C., White Plains, N.Y. (Fortunato Calabro and James R. Lambert of counsel), for respondents-appellants.

In an action to recover damages for personal injuries, etc., the defendants S&E Landholding, Inc., Leonardo Giordano, and Giuseppe Emanuelle appeal, as limited by their brief, from so much of an order of the Supreme Court, Richmond County (McMahon, J.), dated May 2, 2006, as denied that branch of their motion which was to dismiss the complaint insofar as asserted against the defendant Leonardo Giordano on the ground that he was not a proper party, and the plaintiffs cross-appeal from so much of the same order as granted that branch of the motion of the defendants S&E Landholding, Inc., Leonardo Giordano, and Giuseppe Emanuelle which was to vacate a judgment of the same court dated May 24, 2005, entered upon their default in appearing for conferences or participating in discovery.

ORDERED that the order is affirmed, without costs or disbursements.

CPLR 5015(a)(1) permits a court to vacate a default where the moving party demonstrates both a reasonable excuse for the default and the existence of a meritorious defense (*see*

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M.S. Hi-Tech, Inc. v Thompson, 23 AD3d 442, 443; *Orwell Bldg. Corp. v Bessaha*, 5 AD3d 573, 574). The determination of what constitutes a reasonable excuse is left to the sound discretion of the court (see *Ray Realty Fulton, Inc. v Lee*, 7 AD3d 772; *Orwell Bldg. Corp. v Bessaha*, 5 AD3d 574). Accordingly, in view of the reasonable excuse and the existence of a meritorious defense, the Supreme Court providently exercised its discretion in granting that branch of the motion of the defendants S&E Landholding, Inc., Leonardo Giordano, and Giuseppe Emanuelle (hereinafter the appellants) which was to vacate the judgment dated May 24, 2005 (see *New York Univ. Hosp. Rusk Inst. v Illinois Nat. Ins. Co.*, 31 AD3d 511).

Although the Supreme Court's order vacating the judgment did not contain a provision expressly vacating the prior order dated December 14, 2004, upon which the default judgment was based, we construe the order vacating the judgment as implicitly and necessarily vacating that prior order. Accordingly, the Supreme Court, in effect, granted that branch of the appellants' motion which was to vacate the order dated December 14, 2004.

The parties' remaining contentions are without merit.

CRANE, J.P., FLORIO, ANGIOLILLO and CARNI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court