

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

D20819
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_____AD3d_____

Submitted - September 29, 2008

FRED T. SANTUCCI, J.P.
MARK C. DILLON
THOMAS A. DICKERSON
CHERYL E. CHAMBERS, JJ.

2007-09385

DECISION & ORDER

Barry Cooper, etc., respondent, v Mark Cooper,
appellant.

(Index No. 4244/07)

Paykin Mahon Rooney & Krieg, LLP, New York, N.Y. (Albert K. Lawler of
counsel), for appellant.

Gerald A. Bunting, New York, N.Y., for respondent.

In an action for a declaratory judgment, the defendant appeals from so much of an
order of the Supreme Court, Nassau County (Warshawsky, J.), entered September 13, 2007, as
denied his motion to vacate a judgment entered July 7, 2007, upon his default in answering or
appearing.

ORDERED that the order is affirmed insofar as appealed from, with costs.

A defendant seeking to vacate a default in appearing or answering must demonstrate
a reasonable excuse for the default and a meritorious defense to the action (*see* CPLR 5015[a][1];
Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., 67 NY2d 138, 141; *Canty v Gregory*, 37 AD3d
508; *Mjahdi v Maguire*, 21 AD3d 1067; *Taylor v Saal*, 4 AD3d 467). The determination of what
constitutes a reasonable excuse lies within the discretion of the Supreme Court (*see Bergdoll v*
Pentecoste, 17 AD3d 613; *Matter of Gambardella v Ortov Light.*, 278 AD2d 494; *MacMarty Inc.*
v Scheller, 201 AD2d 706, 707).

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The Supreme Court properly concluded that the defendant's excuse for his default, which was in the nature of a law office failure, was insufficient to vacate the default judgment entered against him (*see Incorporated Vil. of Hempstead v Jablonsky*, 283 AD2d 553, 554; *Miles v Blue Label Trucking*, 232 AD2d 382). In view of the lack of reasonable excuse, it is unnecessary to consider whether the defendant demonstrated a meritorious defense (*see Levi v Levi*, 46 AD3d 519, 520; *American Shoring, Inc. v D.C.A. Constr., Ltd.*, 15 AD3d 431).

SANTUCCI, J.P., DILLON, DICKERSON and CHAMBERS, JJ., concur.

2007-09385

DECISION & ORDER ON MOTION

Barry Cooper, etc., respondent, v Mark Cooper,
appellant.

(Index No. 4244/07)

Motion by the respondent, inter alia, to dismiss an appeal from an order of the Supreme Court, Nassau County, entered September 13, 2007, on the grounds that the appellant "has appealed from the wrong order" and that the appeal has been rendered academic. By decision and order of this Court dated May 14, 2008, that branch of the motion which was to dismiss the appeal was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion, the papers filed in opposition thereto, and upon the submission of the appeal, it is

ORDERED that the branch of the motion which is to dismiss the appeal is denied.

SANTUCCI, J.P., DILLON, DICKERSON and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court