

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

D25636
Y/prt

_____AD3d_____

Submitted - November 4, 2009

MARK C. DILLON, J.P.
HOWARD MILLER
RANDALL T. ENG
L. PRISCILLA HALL
SANDRA L. SGROI, JJ.

2009-05313

DECISION & ORDER

Evanthia Valiotis, respondent, v Antonios Psaroudis,
et al., defendants, Constantino Psaroudis, appellant.

(Index No. 3984/08)

George Bassias, Astoria, N.Y., for appellant.

Ira S. Newman, Great Neck, N.Y., for respondent.

In an action, inter alia, to recover damages for fraudulent misrepresentation and breach of contract, the defendant Constantino Psaroudis appeals from so much of an order of the Supreme Court, Queens County (Rosengarten, J.), dated May 11, 2009, as denied that branch of the defendants' motion which was to vacate so much of an order of the same court entered November 8, 2008, as directed the entry of judgment against him upon his default in appearing or answering the complaint insofar as asserted against him.

ORDERED that the order is reversed insofar as appealed from, on the law, without costs or disbursements, that branch of the defendants' motion which was to vacate so much of the order entered November 8, 2008, as directed the entry of judgment against the defendant Constantino Psaroudis is granted, without prejudice to the plaintiff filing, if she be so advised, a new motion for leave to enter a default judgment outside the scope of the bankruptcy stay.

The appellant's deadline for timely answering the plaintiff's complaint was March 31, 2008. Without answering, the appellant filed a bankruptcy petition on August 13, 2008, which had the effect of staying the instant action (*see* 11 USC § 36[a][1]). While the stay was pending, the

January 5, 2010

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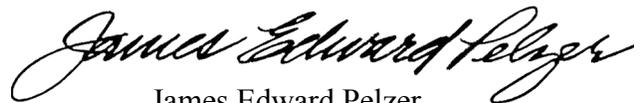
plaintiff moved for, and obtained, an order entered November 8, 2008, directing the entry of a judgment on default. The appellant's bankruptcy proceeding was dismissed by order dated December 10, 2008.

The Supreme Court erred in denying that branch of the defendants' motion which was to vacate so much of the order entered November 8, 2008, as directed the entry of judgment against the appellant. The order, insofar as it pertained to the appellant, issued when a stay was in effect during the appellant's bankruptcy proceeding, was not merely voidable, but void (*see Rexnord Holdings, Inc. v Bidermann*, 21 F3d 522; *In Re Best Payphones*, 279 B.R. 92, 97-98 [SDNY]; *Carr v McGriff*, 8 AD3d 420, 423). Since the order insofar as it pertained to the appellant was void, the appellant did not have to establish an excusable default or a meritorious defense for its vacatur. In the absence of a further motion by the plaintiff for a default judgment outside the scope of the bankruptcy stay, the Supreme Court's denial of that branch of the defendants' motion which was to vacate so much of the order as directed the entry of judgment against the appellant amounted to, in effect, an improper ratification of that order.

The plaintiff's remaining contentions either are without merit or have been rendered academic.

DILLON, J.P., MILLER, ENG, HALL and SGROI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court