

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

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C/kmb

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Submitted - December 14, 2011

WILLIAM F. MASTRO, A.P.J.
RUTH C. BALKIN
CHERYL E. CHAMBERS
SANDRA L. SGROI, JJ.

2011-06930

DECISION & ORDER

Grace Zaidman, respondent, v Sabina Zaidman,
appellant, et al., defendant.

(Index No. 36154/07)

Lester Schwab Katz & Dwyer, LLP, New York, N.Y. (Steven B. Prystowsky of counsel), for appellant.

Baron Associates, P.C., Brooklyn, N.Y. (Daniel Davidovic of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant Sabina Zaidman appeals from an order of the Supreme Court, Kings County (Solomon, J.), dated June 9, 2011, which denied her motion pursuant to CPLR 5015(a)(1) to vacate an order of the same court (R. Miller, J.), dated June 9, 2008, granting the plaintiff's unopposed motion pursuant to CPLR 3215(e) for leave to enter judgment against her upon her default in appearing or answering the complaint, and for leave to serve a late answer.

ORDERED that the order dated June 9, 2011, is affirmed, with costs.

The plaintiff commenced this action to recover damages for personal injuries in or about September 2007. The defendant Sabina Zaidman (hereinafter the defendant) failed to answer the complaint, and, by notice of motion dated April 25, 2008, the plaintiff moved pursuant to CPLR 3215(e) for leave to enter a default judgment against her (hereinafter the 2008 motion). The Supreme Court granted that unopposed motion in an order dated June 9, 2008 (hereinafter the 2008 order). Almost three years later, in 2011, the defendant moved pursuant to CPLR 5015(a)(1) to vacate her

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default and for leave to serve a late answer to the complaint. The defendant asserted that the 2008 order was a nullity because the plaintiff had failed to comply with CPLR 3215(f) in making the 2008 motion. That section requires a party seeking a default judgment to file, among other things, “proof of the facts constituting the claim . . . by affidavit made by the party” (CPLR 3215[f]). The Supreme Court denied the defendant’s motion, inter alia, to vacate her default. It reasoned that the defendant had not offered a reasonable excuse for failing to appear in the action or to oppose the motion for leave to enter a default judgment. The Supreme Court also concluded that the defendant’s own submissions in support of her motion to vacate her default established the merit of the plaintiff’s cause of action.

An order granting a motion for leave to enter a default judgment is not a “nullity” merely because the movant has not complied with the requirements of CPLR 3215(f) regarding proof of the facts of the claim (*see Citimortgage, Inc. v Phillips*, 82 AD3d 1032, 1033; *Midfirst Bank v Al-Rahman*, 81 AD3d 797, 797-798; *Neuman v Zurich N. Am.*, 36 AD3d 601, 602; *Araujo v Aviles*, 33 AD3d 830; *Bass v Wexler*, 277 AD2d 266, 267; *Freccia v Carullo*, 93 AD2d 281, 288-289; *cf. State of New York v Williams*, 44 AD3d 1149; *Natradeze v Rubin*, 33 AD3d 535; *Westcott v Niagara-Orient Agency*, 122 AD2d 557). Rather, a party moving to vacate a default and extending the time to answer pursuant to CPLR 5015(a)(1) must establish a reasonable excuse for the default and demonstrate the existence of a potentially meritorious defense (*see Bank of Am. v Faracco*, 89 AD3d 879; *Stephan B. Gleich & Assoc. v Gritsipis*, 87 AD3d 216, 221; *Midfirst Bank v Al-Rahman*, 81 AD3d at 797-798; *Coulter v Town of Highlands*, 26 AD3d 456, 457). Regardless of the merit of the defendant’s contention that the plaintiff failed to comply with the factual proof requirement of CPLR 3215(f), the defendant established neither a reasonable excuse for her default nor the existence of a potentially meritorious defense. Consequently, the Supreme Court’s denial of her motion to vacate her default and extend her time to answer the complaint was not an improvident exercise of discretion (*see Lane v Smith*, 84 AD3d 746, 747-748; *Citimortgage, Inc. v Brown*, 83 AD3d 644, 645).

MASTRO, A.P.J., BALKIN, CHAMBERS and SGROI, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court