

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

D33550  
N/kmb

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Argued - November 1, 2011

MARK C. DILLON, J.P.  
RUTH C. BALKIN  
JOHN M. LEVENTHAL  
ARIEL E. BELEN, JJ.

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2010-07664  
2010-11489

DECISION & ORDER

Jason Yearwood, appellant, v Post Park, LLC, et al.,  
respondents.

(Index No. 12896/06)

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Dinkes & Schwitzer, P.C., New York, N.Y. (Joelle Tantalø Jensen of counsel), for appellant.

MacCartney, MacCartney, Kerrigan & MacCartney, Nyack, N.Y. (William K. Kerrigan and Catherine H. Friesen of counsel), for respondent Dekalb Development Corp.

In an action to recover damages for personal injuries, the plaintiff appeals from (1) an order of the Supreme Court, Westchester County (Lefkowitz, J.), entered July 9, 2010, which, upon an order of the same court entered June 17, 2010, conditionally granting those branches of the separate motions of the defendant Dekalb Development Corp. and the defendants Post Park, LLC, and Corato Contracting Corp. which were, in effect, pursuant to CPLR 3126 to preclude him from presenting certain evidence at trial unless he complied with certain court-ordered discovery by a date certain, and upon the plaintiff's default in appearing at a compliance conference scheduled on June 28, 2010, granted the unopposed application of the defendant Dekalb Development Corp. to preclude him from presenting certain evidence at trial, and (2) an order of the same court entered October 20, 2010, which denied his motion to vacate the order entered July 9, 2010.

ORDERED that the appeal from the order entered July 9, 2010, is dismissed, as no appeal lies from an order entered upon the default of the appealing party (*see* CPLR 5511), and, in any event, the appeal from that order has been rendered academic in light of our determination of

the appeal from the order entered October 20, 2010; and it is further,

ORDERED that the order entered October 20, 2010, is reversed, on the law, on the facts, and in the exercise of discretion, the plaintiff's motion to vacate the order entered July 9, 2010, is granted, the order entered July 9, 2010, is vacated, and the matter is remitted to the Supreme Court, Westchester County, for further proceedings, including a new compliance conference; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

A motion to vacate an order based on excusable default requires the movant to demonstrate a reasonable excuse for the default and the existence of a potentially meritorious claim or defense (*see Alberton Devs., Inc. v All Trade Enters., Inc.*, 74 AD3d 1000; *White v Incorporated Vil. of Hempstead*, 41 AD3d 709, 710; *Lee v Arellano*, 18 AD3d 620; *Kumar v Yonkers Contr. Co., Inc.*, 14 AD3d 493, 494; *Reices v Catholic Med. Ctr. of Brooklyn & Queens*, 306 AD2d 394).

Under the circumstances here, the plaintiff offered a reasonable excuse for his default and demonstrated the existence of a potentially meritorious claim (*see White v Incorporated Vil. of Hempstead*, 41 AD3d at 710; *Reices v Catholic Med. Ctr. of Brooklyn & Queens*, 306 AD2d 394). Accordingly, the Supreme Court should have granted the plaintiff's motion to vacate the order entered July 9, 2010.

DILLON, J.P., BALKIN, LEVENTHAL and BELEN, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court