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

D33671
C/kmb

_____AD3d_____ Submitted - January 4, 2012

PETER B. SKELOS, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
SHERI S. ROMAN
JEFFREY A. COHEN, JJ.

2011-06041 DECISION & ORDER
2011-06052

Toll Brothers, Inc., respondent, v Richard Dorsch, appellant.

(Index No. 5579/10)

H. Scott Ziemelis, Goshen, N.Y., for appellant.

Peter B. Ackerman, White Plains, N.Y., for respondent.

In an action to recover damages, inter alia, for breach of contract, the defendant appeals (1) from an order of the Supreme Court, Orange County (Slobod, J.), dated January 19, 2011, which granted the plaintiff's unopposed motion for leave to enter a judgment against him in the principal sum of $18,099.31, upon his failure to appear or answer, and (2), as limited by his brief, from so much of an order of the same court dated May 18, 2011, as, in effect, denied that branch of his motion which was pursuant to CPLR 5015(a)(1) to vacate the order dated January 19, 2011.

ORDERED that the appeal from the order dated January 19, 2011, is dismissed, as no appeal lies from an order entered upon the default of the appealing party (*see* CPLR 5511; *Development Strategies Co., LLC, Profit Sharing Plan v Astoria Equities, Inc.*, 71 AD3d 628); and it is further,

ORDERED that the order dated May 18, 2011, is reversed insofar as appealed from, on the facts and in the exercise of discretion, and that branch of the defendant's motion which was pursuant to CPLR 5015(a)(1) to vacate the order dated January 19, 2011, is granted; and it is further,

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

"A defendant seeking to vacate a default pursuant to CPLR 5015(a)(1) must demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action" (*Clover M. Barrett, P.C. v Gordon*, _____AD3d_____, 2011 NY Slip Op 09581, *1 [2d Dept 2011]; *see Development Strategies Co., LLC, Profit Sharing Plan v Astoria Equities, Inc.*, 71 AD3d 628). "Other factors which the court should consider include whether the default prejudiced the opposing party, whether it was willful or evinced an intent to abandon the litigation, and whether vacating the default would serve the strong public policy of resolving cases on their merits when possible" (*Dimitriadis v Visiting Nurse Serv. of N.Y.*, 84 AD3d 1150, 1150-1151; *see U.S. Bank, N.A. v Dick*, 67 AD3d 900, 902; *Moore v Day*, 55 AD3d 803, 804).

Here, the defendant established both a reasonable excuse for the default, and the existence of a potentially meritorious defense to the action. Further, there was no showing by the plaintiff that it was prejudiced by the default or that the default was willful, and public policy favors the resolution of cases on their merits (*see Dimitriadis v Visiting Nurse Serv. of N.Y.*, 84 AD3d at 1151; *Moore v Day*, 55 AD3d at 805; *Li Gang Ma v Hong Guang Hu*, 54 AD3d 312, 313; *Ahmad v Aniolowiski*, 28 AD3d 692, 693). Accordingly, under the circumstances of this case, the Supreme Court improvidently exercised its discretion in denying that branch of the defendant's motion which was pursuant to CPLR 5015(a)(1) to vacate his default.

In light of our determination, we need not reach the defendant's remaining contention.

SKELOS, J.P., DICKERSON, HALL, ROMAN and COHEN, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court