

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 08-01460

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

IN THE MATTER OF THE APPLICATION OF
JAMES R. GOUGH, PETITIONER-RESPONDENT,
FOR THE APPOINTMENT OF A GUARDIAN FOR
JEAN G.S., AN ALLEGED INCAPACITATED
PERSON, RESPONDENT.

MEMORANDUM AND ORDER

DIBBLE & MILLER, P.C., APPELLANT.

DIBBLE & MILLER, P.C., ROCHESTER (G. MICHAEL MILLER OF COUNSEL),
APPELLANT PRO SE.

WOODS OVIATT GILMAN LLP, ROCHESTER (CHRISTIAN N. VALENTINO OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered April 30, 2008 in a proceeding pursuant to Mental Hygiene Law article 81. The order denied the order to show cause of Dibble & Miller, P.C.

It is hereby ORDERED that the order so appealed from is unanimously affirmed with costs.

Memorandum: Petitioner commenced this proceeding seeking the appointment of a guardian for his mother, an alleged incapacitated person (AIP). Appellant, a nonparty law firm, appeals from an order denying its order to show cause seeking, inter alia, to vacate that part of a prior order requiring appellant to refund \$22,401.55 to the AIP's trust account. We note at the outset that, contrary to petitioner's contention, the order is appealable as of right. Even assuming, arguendo, that appellant moved by order to show cause for leave to reargue that part of the prior motion requiring it to reimburse the AIP's trust account, we note that Supreme Court in fact granted leave to reargue and, upon reargument, adhered to its prior decision, thus rendering the order appealable as of right (see CPLR 5701 [a] [2] [viii]; *Grasso v Schenectady County Pub. Lib.*, 30 AD3d 814, 816 n 1; *Marine Midland Bank v Fisher*, 85 AD2d 905).

We reject appellant's contention that the court erred in denying the order to show cause. A movant seeking to vacate a prior order pursuant to CPLR 5015 (a) must establish one of the statutory grounds, which include excusable default, newly discovered evidence, and fraud, misrepresentation, or other misconduct by an adverse party. It is the movant's burden "to show that the prior order[] should be set aside by submission of sufficient evidence supporting the grant of such relief"

(Matter of Commissioner of Social Servs. of Ulster County v Powell, 39 AD3d 946, 948, lv dismissed 9 NY3d 975, rearg denied 10 NY3d 737) and, here, appellant failed to meet that burden.

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court