NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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GARIBALDY JIMENEZ AND ROSA ROJAS,

Index No. **31479/19E**

Plaintiff,

Hon. **FIDEL E. GOMEZ**

- against - Justice

SAVITRIE DEONARINE, KAMALDAI JAIJAIRAM, ASHFAQ AHMAD, NEW PLATINUM BUILDERS CORP., AND UNITED G. CONSTRUCTION A/K/A UNITED GENERAL CONSTRUCTION. INC.,

Defendant.

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The following papers numbered 1 to 4, Read on this motion noticed on 4/26/22, and duly submitted as no. 3 on the Motion Calendar of 4/26/22.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law		

Defendants motion is Decided in accordance with the Decision and Order annexed hereto.

Dated: 6/14/2022

_____

Hon. _____

FIDEL E. GOMEZ, AJSC

MOTION X DENIED

X NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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GARIBALDY JIMENEZ AND ROSA ROJAS,

Plaintiff(s),

- against -

SAVITRIE DEONARINE, KAMALDAI JAIJAIRAM, ASHFAQ AHMAD, NEW PLATINUM BUILDERS CORP., AND UNITED G. CONSTRUCTION A/K/A UNITED GENERAL CONSTRUCTION. INC.,

Defendant(s).
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DECISION AND ORDER

Index No: 31479/19E

In this action for, *inter alia*, defective home contracting services, defendants move seeking an order vacating this Court's Decision and Order, which defaulted defendants and set this matter down for inquest. Defendants contend that their failure to appear at this Court's Rule 14 conference was the result of law office failure, that they have a meritorious defense to the claims in the complaint, and that their counterclaims have merit. Plaintiffs oppose the instant motion asserting that defendants fail to establish a reasonable excuse for their failure to appear at the conference and fail to establish the merits of their defenses.

For the reasons that follow hereinafter, defendants' motion is denied.

The instant action is for defective home contracting services, recklessness, negligence and performing work without a license.

The complaint alleges the following. On May 4, 2019, plaintiffs, by agreement, retained defendants to perform construction work at the premises located at 1336 Thieriot Avenue, Bronx, NY 10462 (1336). Specifically, the agreement was between plaintiffs and defendant UNITED G CONSTRUCTION A/K/A UNITED GENERAL CONSTRUCTION INC. (United General). It is alleged that all other defendants were agents of United General. Pursuant to the agreement between the parties, United General would provide "labor and materials for work in the kitchen, bathroom, dining room, a bedroom, as well as plumbing and electrical work." The price for the foregoing work was $45,000. In May 2019, defendants began work at 1336 and between May 2019 and July of that year, plaintiffs paid defendants $55,000. Ultimately, defendants failed to complete all the work and the work they did complete was "not done in a skilled, workman or timely manner." Based on the foregoing, plaintiffs interpose four causes of action. The first cause of action is for damage to 1336, rendering it uninhabitable. Specifically, plaintiffs allege that as a result of defendants' defective work at 1336 and their abandonment of the premises, 1336 was rendered uninhabitable. As such, plaintiffs were required to retain new contractors in order to render 1336 habitable. Plaintiffs' second cause of action is for unjust enrichment, premised on defendants failure to complete the work within the agreement and in providing defective work. Significantly, plaintiffs allege that as a result of defendants'

actions, they were forced to retain the services of new contractors at a cost exceeding $70,000. Plaintiffs' third cause of action is for negligence and/or recklessness. Plaintiffs allege that as a result of defendants' failure to maintain 1336 in a safe condition, defendants caused damage to 1336. Plaintiffs' last cause of action is for failure to possess a home improvement license. Specifically, plaintiffs allege that defendants misrepresented that they possessed a valid home improvement license when, in fact, they did not.

On March 7, 2022, at a virtual conference pursuant to Rule 14 of the Rules of the Commercial Division (22 NYCRR 202.70), where defendants failed to appear, the Court defaulted defendants and ordered an inquest. Specifically, this Court stated that

> [p]laintiff appeared and defendants did not. Plaintiff orally moves for an order defaulting defendants for their failure to appear. The Court hereby grants plaintiff's oral application and orders an inquest pursuant to 22 NYCRR 202.27(a).

Defendants' motion to vacate this Court's Decision and Order which set this matter down for inquest after defendants defaulted by failing to appear at the virtual conference, is denied. Significantly, defendants fail to proffer a reasonable excuse for failing to appear and also fail to establish the existence of meritorious defenses to all the claims in the complaint; both

requirements for vacatur of an order issued pursuant to 22 NYCRR § 202.27.

CPLR § 3404 and 22 NYCRR 202.27 both prescribe mechanisms for dismissal of cases when parties fail to appear for required calendar calls. CPLR § 3404 states that

> [a] case in the supreme court or a county court marked off or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order.

22 NYCRR §202.27 states that

> [a]t any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows:
>
> (a) If the plaintiff appears but the defendant does not, the judge may grant judgment by default or order an inquest.
>
> (b) If the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or cross-claims.
>
> (c) If no party appears, the judge may make such order as appears just.

While the foregoing statutes are similar, the circumstances under which they apply are not. CPLR § 3404 only applies to cases which

are on the trial calendar, meaning those cases for which plaintiff has filed a note of issue (*Jiles v New York City Transit Authority*, 290 AD2d 307, 307 [1st Dep. 2002]; *Johnson v Sam Minskoff & Sons, Inc.*, 287 AD2d 233, 235 [1st Dept 2001]; *Lopez v Imperial Delivery Service, Inc.*, 282 AD2d 190, 190 [2d Dept 2001]). Restoration of cases dismissed pursuant to CPLR § 3404 requires that plaintiff demonstrate (1) the merit of the action; (2) a reasonable excuse for the delay in seeking to restore the action; (3) lack of intent to abandon the case and; (4) lack of prejudice to the non-moving party (*Enax v New York Telephone Company*, 280 AD2d 294, 295 [1st Dept 2001]; *Lopez* at197). While CPLR § 3404 contemplates restoration within one year, a case which remains inactive for several years after dismissal may nevertheless be restored if the moving party can satisfy the test just described (*Lopez* at 197).

22 NYCRR 202.27 applies to those cases which have not yet been placed on the trial calendar, meaning those cases for which no note of issue has been filed (*Uddaraju v City of New York*, 1 AD3d 140, 141 [1st Dept 2003]); *Lopez* at 196). A failure to appear for a pre-note of issue calendar call or conference is deemed a default and restoration is, thus, governed by CPLR § 5015(a)(1) (*Johnson* at 236). Specifically, restoration requires the moving party to demonstrate (1) a reasonable excuse for the failure to appear at the calendar call where the case was dismissed; and (2) that the case is meritorious (*id.*; *Foley Inc. v Metropolis Superstructures*,

Inc., 130 AD3d 680, 680 [2d Dept 2015]; *Jones v New York City Housing Authority*, 13 AD3d 489, 489 [2d Dept 2004]). Consequently, the time within which to move for a restoration of the case, meaning vacatur of the dismissal for defaulting or not appearing is usually one year after the service of the order or judgment entered upon the default (*Johnson* at 236; *Lopez* at 197). A failure to move to vacate the default within the year usually bars the restoration of the case regardless of the excuse or the merits (*id*. at 197; *Nahmani v Town of Ramapo*, 262 AD2d 291, 291 [2d Dept 1999]). However, vacatur after a year of the default is nevertheless warranted in the interests of justice (*Johnson* at 236; *State of New York v Kama*, 267 AD2d 225, 225 [1st Dept 1999] [Defendant's failure to answer resulting in default was excusable even when vacatur was sought five years after the default. The Court found that defendant's excuse for failure to appear and seek a vacatur was due to extensive illness requiring multiple hospitalizations. Court further reasoned that since the default was taken even though plaintiff knew that defendant might have needed a guardian appointed to avoid the default, the interests of justice mandated a vacatur of the default and a restoration of the case.]). In such cases, the excuse for the default must be more compelling than if made within the year prescribed by CPLR §5015(a)(1) (*Johnson* at 197 [illness constituted a reasonable excuse for a default and the delay in timely moving to restore and vacate the default]. Law

office failure constitutes an excusable reason for a resulting default (*Uddaraju* at 141; *Mediavilla v Gurman*, 272 AD2d 146, 148 [1st Dept 2000]).

While the restoration of cases dismissed pursuant to CPLR § 3404 can be vacated and the case restored even if a party waits years after the dismissal to seek such relief, dismissals pursuant to 22 NYCRR 202.27 have to be, in most cases, vacated within a year (*Lopez* at 197). The rationale being that in dismissing post note of issue cases pursuant to CPLR § 3404, where discovery is usually complete, a restoration usually leads to an immediate trial and no further discovery or delay ensues (*id.*). Conversely, allowing pre-note of issue cases, dismissed pursuant to 22 NYCRR 202.27, to remain unrestored for more than a year is contrary to the court's role in expeditiously moving cases at the discovery stage, where discovery is not complete and, once restored, further discovery in those case must ensue (*id.*).

In support of the instant motion, defendants, by counsel, assert that the failure to appear at the virtual conference was law office failure by prior counsel. Specifically, defendants state that because Viscardi, Basner and Bigelow, PC (VBB) sent defendants' current counsel a consent to change attorney form, VBB expected that current counsel would appear at the conference because VBB "apparently felt their relationship with defendants had

been severed and I would, thereafter, substitute in."

Defendants also submit a consent to change attorney form, dated April 5, 2022. The form is not executed by VBB, but is executed by current counsel and defendants.

Defendants submit an affidavit by defendant SIVITRIE DEONARINE (Deonarine), who states, in relevant part, as follows. Deonarine contends that plaintiffs will need expert testimony to establish the claims in their complaint, that defendants' current counsel has not been granted an opportunity to inspect 1336 with an expert, that plaintiffs have not yet been deposed, that plaintiffs have not provided receipts for sums spent in repairing 1336 after defendants' defective work, that 1336 housed an illegal apartment, that allegations that defendants were unlicensed are untrue, and that plaintiffs' lawyer unethically communicated with defendants, while defendants had counsel. With regard to defendants' counterclaim, Deonarine states that per a change order, the cost of the work was augmented by $144,000 of which defendants have only received $25,000.

Based on the foregoing, the instant motion is denied. As noted above, 22 NYCRR 202.27 applies to those cases which have not yet been placed on the trial calendar, meaning those cases for which no note of issue has been filed (*Uddaraju* 141; *Lopez* at 196). Moreover, a failure to appear for a pre-note of issue calendar call

or conference is deemed a default and restoration is, thus, governed by CPLR § 5015(a)(1) (*Johnson* at 236). In the foregoing case, restoration requires the moving party to demonstrate (1) a reasonable excuse for the failure to appear at the calendar call where the case was dismissed; and (2) that the case is meritorious (*id.*; *Jones* at 489), or that the defenses have merit (*Foley, Inc.* at 680).

Here, the default in question arose from defendants' failure to appear at a conference, prior to the filing of a note of issue, and pursuant to 22 NYCRR 202.27. Thus, vacatur of the default is governed by CPLR § 5015(a)(1).

With regard to the excuse for defendants' failure to appear, defendants, by counsel, allege that it was the result of law office failure - namely VVB's belief that current counsel would appear based on VVB's termination. This contention, however, is without merit. It is well settled that law office failure is a cognizable excuse for vacating a default (*Uddaraju v City of New York*, 1 AD3d 140, 141 [1st Dept 2003]; *Mediavilla v Gurman*, 272 AD2d 146, 148 [1st Dept 2000]). However, to be cognizable, law office failure must be established with detailed factual allegations explaining the reason for the failure (*Grezinsly v Mount Hebron Cemetery*, 305 AD2d 542, 542 [2d Dept 2003]; *Morris v Metropolitan Transp. Auth.*, 191 AD2d 682, 683 [2d Dept 1983]). When the explanation given for

the default, based on law office failure, is vague and unsubstantiated, it fails to rise to the level of a reasonable excuse (*Abrams v City of New York*, 13 AD3d 566, 566 [2d Dept 2004]; *Grinkorn v Seeley*, 30 AD3d 376, 377 [2d Dept 2006]). On this record, current counsel's excuse is conclusory, unsupported by the record, and therefore, insufficient as a matter of law. First, counsel's affidavit is patently speculative since he states that "the firm [VBB] apparently" did not appear because prior counsel had already severed its relationship with defendants. Indeed, nothing in counsel's affirmation establishes that he endeavored to ascertain why counsel failed to appear, making his assertion nothing less than speculation. Second, counsel's affidavit is belied by the record - namely, the change of attorney form. Specifically, the form is dated April 5, 2022, almost a month after defendants or VBB failed to appear and the date on which this Court issued its order. This is significant since it undercuts counsel's assertion that VBB - defendants' prior counsel - did not appear at the conference on March 7, 2022 upon the belief that VBB's attorney-client relationship had been severed. Indeed, the consent to change attorney form militates in favor of the conclusion that a month earlier, VBB had no reason to believe that it was anything else but defendants' counsel, for whom it needed to appear at the conference. To that end, there are a myriad of reasons why VBB may not have appeared, not - as urged - simply law office failure.

With regard to the merits of defendants' defense, Deonarine's affidavit, submitted for that purpose, misses its mark. Significantly, rather than controvert the allegations in the complaint by asserting that defendants were not reckless, negligent, did not abandon 1336, and did in fact provide good and workmanlike service, Deonarine simply questions the sufficiency of plaintiffs' proof and urges that more discovery is necessary. This, of course, is wholly insufficient since questioning the merits of another's claim is not tantamount to establishing the merits of one's own claims and/or defenses.

Accordingly, the instant motion is denied. Notably, vacatur of the note of issue is denied because here, the same was filed upon this Court's direction and premised on the default, which survives this motion. As such, denial of the motion to vacate the default necessarily warrants denial of the motion to vacate the note of issue. It is hereby

ORDERED that plaintiffs serve a copy of this Decision and Order with Notice of Entry upon all defendants within thirty (30) days hereof.

Dated : June 14, 2022
Bronx, New York

HON. FIDEL E. GOMEZ, AJSC