STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

EVOLUTION IMPRESSIONS, INC.,

Plaintiff,

v.

AMENDED
DECISION and ORDER
INDEX No. 2005/06051

JAMES D. LEWANDOWSKI, DAVID HICKEY, GREGORY MAREK, GIORGIO BRACAGLIA and 1 SOURCE PARTNERS, INC.,

Defendant.

With respect to the motion to vacate the default judgment, it is well settled that a party seeking to vacate a default judgment pursuant to CLR §5015(a)(1), must establish both a justifiable excuse and a meritorious defense. Di Lorenzo v. Dutton Lumber Co., 67 N.Y.2d 138 (1986); Campbell v. Ghafoor, 8 A.D.3d 319 (3d Dept. 2004). The determination of what constitutes a reasonable excuse is left to the sound discretion of the trial court. Abrams v. City of New York, 13 A.D.3d 566 (2nd Dept. 2004). Further, while a court has the discretion to accept law office failure as a reasonable excuse, Santiago v. New York Cit Health and Hospitals Corp., 10 A.D.3d 393 (2d Dept. 2004), the failure must at least be explained and a pattern of wilful default and neglect should not be excused. Gironda v. Katzen, 19 A.D.3d 644 (3d Dept. 2005). The failure to submit any excuse for the failure to respond to the original motion, and the failure to give a reasonable excuse for a lengthy delay in moving

to vacate, constitutes a pattern of wilful neglect and default which should not be excused. Bekker v. Fleischman, ____ A.D.3d ___, 2006 WL 3528712 (2d Dept. December 5, 2006). Such a pattern of default and neglect is properly imputed to the client. Edwards v. Feliz, 28 A.D.3d 512 (2d Dept. 2006). However, a detailed explanation by counsel of record as to why default occurred is sufficient to explain and excuse a default judgment. Gironda v. Katzen, 19 A.D.3d 644.

I agree that defendants did not establish excusable default. A review of the occurrences in this case inescapably leads me to conclude that the defendants did what they could to ignore the case when possible, contrary to their professed wish on this motion that a default not happen. If there was law office failure, it has not been demonstrated. Moreover, there is nothing presented to explain why the motion was not responded to and, in particular why the motion to vacate was not filed sooner. Defendants evidently either made no effort to obtain an affidavit from Mr. Parrinello or Mr. Sekharan to detail an excuse or even to explain the default, or if an attempt to secure their testimony was made facts supporting defendants' argument on the excusable default issue were not forthcoming. The failure to provide any explanation of the default, or even to explain why they could not obtain one, if that is indeed the case, is fatal to defendants' argument on the excusable default predicate to

their motion. Cf., Gironda v. Katzen, 19 A.D.3d at 645.[1] Clear and convincing evidence circumstantially and otherwise shows that the matter was going to be ignored by defendants until attempts to seize their property took place. Nahar v. Awan, 33 A.D.3d 680, 681 (2d Dept. 2006) (defendant took no action to vacate until after plaintiff attempted to enforce the judgment against the bank account). An affidavit by a client to the effect that it was his belief that the attorney was diligently handling the case is insufficient. Roussomidou v. Zafiriadis, 238 A.D.2d 568 (2d Dept. 1997); Matter of Scimeca, 174 A.D.2d 830, 831 (3d Dept. 1991). I simply cannot conclude on this record that defendants have met their burden to show that a legally excusable default in answering the motion occurred. This failure to respond to the motion must be viewed in context. Defendants were negligent throughout the proceedings, causing two motions to compel, which were granted, a successful post judgment motion, which was opposed by defendants without a cross-motion to vacate, for contempt, refusal to otherwise cooperate with duly served asset deposition notices, and finally this belated motion to vacate. Moreover, the motion for summary judgment was served months in advance of the final return date, and adjourned

But that is not the end of the matter. The real issue on

[1] Plaintiff's counsel sought an explanation from both counsel, and was rebuffed in the attempt.

this motion is whether plaintiff's moving papers on the motion for summary judgment were sufficient to entitle them to the relief sought as a matter of law. Liberty Taxi Mgmt., Inc. v. Gincherman, 32 A.D.3d 276, 277 n.* (1st Dept. 2006); Rivers v. Butterhill Realty, 145 A.D.2d 709, 710 (3d Dept. 1988); Cugini v. System Lumber Co., Inc., 111 A.D.2d 114, 115 (1st Dept. 1985); Worldwide Asset Purchasing, LLC v. Karafotias, 9 Misc.3d 390, 394 (Civ. Ct. City of N.Y. 2005). Accordingly, I turn to defendants' argument on this motion that judgment could not have been ordered on plaintiff's moving papers.

That portion of the judgment granted which represented a disgorgement of compensation earned prior to their resignation and after the first act of faithless service was consistent with New York law, In re Blumenthal, 32 A.D.3d 767 (1st Dept. 2006); Maritime fish Products, Inc. v. Worldwide Fish Products, Inc., 100 A.D.2d 81, 89 (1st Dept. 1984),[2] and was established by proof of defendants' physical appropriation of plaintiff's business records, including customer bid information, while still employed by plaintiff, and diversion of business opportunities to their new venture which they were setting up prior to their resignation from Evolution, dating back to August 2004. Duane Jones Co., Inc.

[2] Compare Design Strategy, Inc v. Davis, 469 F.3d 284, 299-300 (2d Cir. 2006), with, Phansalkar v. Andersen Weinroth & Co., L.P., 344 F.3d 184, 199-207 (2d Cir. 2003), both canvassing and applying New York law.

v. Burke, 309 N.Y. 172 (1954); Beverage Marketing USA, Inc. v. South Beach Beverage Co., Inc., 20 A.D.3d 439, 440 (2d Dept. 2005), rev'ing, 2 Misc.3d 1009(A), 2004 WL 784555 (Sup. Ct. Nassau Co. 2004)(making the same arguments defendants press here and which were, perforce, rejected by the Appellate Division); Lincoln Steel Products, Inc. v. Schuster, 49 A.D.2d 618 (2d Dept. 1975); Harry R. Defler Corp. v. Kleeman, 19 A.D.2d 396, 403-04 (4th Dept. 1963), aff'd on op. below, 19 N.Y.2d 694 (1967); Abrahmson v. Dry Goods Refolding Co., Inc., 166 N.Y.S. 771 (Sup. Ct. App. Term 1st Dept. 1917).

That part of the judgment encompassing the lost profits accruing from the named diverted business opportunities was similarly consistent with New York law, as cited above, given plaintiff's showing with respect to each named entity.

However, that portion of the judgment fixing the amount of compensation to be disgorged, and the amount of lost profits attributable to the lost business opportunities, must be vacated. Plaintiff's showing on the original motion was conclusory only, claiming in counsels's affidavit, dated May 23, 2006, "lost gross profit of $263,962 as a result of the diversion of these accounts and the income stream produced by them," and forfeitable compensation "from August 1, 2004 through their respective resignations in an amount (enumerated with respect to each defendant) totaling "$170,868.89." O'Brien affidavit ¶41, ¶43.

There is no back-up documentation provided nor any estimate of lost profits and compensation paid during the relevant period from someone with personal knowledge, in particular from Thomas Gruber as President and CEO of Evolution, who provided an affidavit but did not address damages.

Ordinarily, when an interlocutory judgment is entered on a claim for damages under the faithless servant doctrine, an accounting is ordered "for the profits realized by the defendants resulting from their illegal acts [which] may furnish the most reliable method of computing the loss." Harry R. Defler Corp. v. Kleeman, 19 A.D.2d at 403.[3] Accordingly, the judgment is vacated to this limited extent and an accounting ordered by reason of the failure of plaintiff to show entitlement to any particular amount of lost profits and forfeitable compensation as a matter of law. Liberty Taxi Mgmt., Inc. v. Gincherman, 32 A.D.3d 276, 277 n.* (1st Dept. 2006); Rivers v. Butterhill Realty, 145 A.D.2d 709,

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[3] As well stated:

> Nor can Stani seriously contest that an accounting of defendant's profits is a proper remedy in a case concerning misappropriation of trade secrets; a remedy which the Second Circuit has called "an appropriate measure of damages under New York law." Softel, Inc. v. Dragon Medical and Scientific Communications, Inc., 118 F.3d 955, 969 (2d Cir.1997) (citing David Fox & Sons, Inc. v. King Poultry Co., 23 N.Y.2d 914 (1969)).

Topps Co., Inc. v. Cadbury Stani S.A.I.C., 380 F.Supp.2d 250, 268-69 (S.D.N.Y. 2005)(collecting the New York authorities on the subject).

710 (3d Dept. 1988); Cugini v. System Lumber Co., Inc., 111 A.D.2d 114, 115 (1st Dept. 1985); Worldwide Asset Purchasing, LLC v. Karafotias, 9 Misc.3d 390, 394 (Civ. Ct. City of N.Y. 2005).

Sandra Volta, Esq. is hereby appointed referee to compute the amount owing upon proper proof thereof and on notice.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: January 25, 2007
Rochester, New York