

<b>Greenberg v Ehrman</b>
2006 NY Slip Op 30860(U)
January 3, 2006
Supreme Court, New York County
Docket Number: 113029/04
Judge: Faviola A. Soto
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: IAS PART 7

-----  
 FREDERIC GREENBERG,

Petitioner,

-against-

WILLIAM EHRMAN, EHRMANN VALUE FUND, L.P.,  
 and EHRMANN CAPITAL PARTNERS, L.L.C.

Respondents.

-----

Index No. 113029/04

DECISION & ORDER

HONORABLE FAVIOLA A. SOTO, J.:

This motion was randomly reassigned to this court pursuant to the order of Justice Lewis Bart Stone dated November 7, 2005.

Respondent William Ehrman moves, pursuant to CPLR 5015(a), to relieve him from the court's order and judgment dated November 8, 2004; that order, granted on default, confirmed an arbitration award and adjudged, inter alia, that petitioner shall have judgment against movant in the amount of \$1,145,514.60, with interest. Petitioner opposes, and cross-moves for an order: I) pursuant to 22 NYCRR Section 130-1.1, directing movant and conditionally his attorneys to pay the reasonable attorneys' fees incurred in opposing this motion and imposing sanctions; and ii) directing movant's counsel to accept service of a subpoena directed to movant in aid of enforcement of the judgment in this action, pursuant to CPLR 5224. Movant opposes the cross-motion.

Background: The Arbitration

By 13 page Demand for Arbitration dated November 5, 2003, claimant Frederic Greenberg commenced an arbitration with the American Arbitration Association (AAA), against respondents William Ehrman, Ehrmann Value Fund, L.P (EVF), and Ehrmann Capital Partners, L.L.C.. The arbitration agreement was dated May 1, 2002, and signed by the parties. By letter dated December 24, 2003, the law firm of Latham & Watkins LLP advised the AAA that they

represented William Ehrman and EVF in the arbitration. By letter dated December 3, 2004, petitioner requested one arbitrator. By letter dated December 10, 2003, Alan Kraus, Esq., of Latham & Watkins, wrote the AAA, stating that the firm represents William Ehrman and EVF, apologized for not responding sooner to the AAA letter of December 2 which requested an answer by December 4, but that counsel “was not able to speak to Mr. Ehrman until the end of last week about the number of arbitrators issue”, and requested a panel of three arbitrators. Petitioner responded, citing AAA Rule L-2, which provides that under these circumstances one arbitrator hears and determines the case. By letter dated December 15, 2003, the AAA wrote to both counsel, granting the request of Mr. Kraus for an extension. By letter dated December 23, 2003, Mr. Kraus, again stating that his firm represents William Ehrman and EVF, enclosed their arbitrator selection list, adding that they may need to make additional changes and will complete the checklist for conflicts, following their review with and obtaining of relevant information from, Mr. Ehrman.

Following the March 15, 2004 preliminary hearing, a Preliminary Hearing and Schedule Order was issued. It provided for: service and filing of a summary of witness testimony and prehearing briefs; an exchange of copies of exhibits; hearings to be held on June 22, 23 and 24; and for claimant to send a document request by March 23, with respondents to respond by April 23. By demands dated March 22 and 23, 2004, claimant request documents from respondents.

By letter dated April 4, 2004, William Ehrman wrote a letter addressed to the AAA which stated that his father has been in intensive care, he received the information requests, and requested time. The arbitrator extended respondents’ time to produce documents to May 7, 2004. Following a conference call and by letter dated May 14, 2004, addressed to petitioner’s attorney

and William Ehrman, certain dates were adjourned or extended, including the hearing, which was rescheduled to August 9 and 10, 2004.

The hearing was held on August 9, 2004. Petitioner and three other witnesses testified, and 37 exhibits were introduced into evidence. The arbitrator noted in the arbitration award, dated August 25, 2004, that he heard the proofs and allegations of the claimant, that respondents failed to appear after due notice, and that the award was made based on the evidence. The arbitrator awarded claimant: i) \$60,695.79 with interest of \$9,331.97, against all respondents, liability to be joint and several; and ii) on claimant's breach of contract and misrepresentation claim, \$866,173.71, with interest of \$279, 340.89, for a total award of \$1,145,514.60, against respondent William Ehrman.

The Special Proceeding to Confirm the Award and Commencement of Enforcement of Judgment

By notice of petition dated September 9, 2004, and verified petition dated September 7, 2004, petitioner sought a judgment, pursuant to CPLR 7510, confirming the award of the arbitrator and directing that judgment be entered. The petition was submitted on October 25, 2004.

By decision dated October 28, 2004, the court granted the petition, on default, and directed settlement of the order.

The order and judgment, dated November 8, 2004, was entered in the Clerk's office on November 23, 2004.

An action was commenced in Connecticut Superior Court seeking a Connecticut state court judgment based on this court's judgment, and, on March 23, 2005, a judgment was issued

and entered.

On May 11, 2005, the Marshall located in Fairfield County, Connecticut issued a property execution in connection with the Connecticut judgment, pursuant to which \$26,036.83 that was due and owing to Ehrman from a third party was seized on petitioner's behalf.

#### The Motion and Cross-Motion

By notice of motion dated July 22, 2005, respondent Ehrman now moves in the interests of justice to vacate the judgment of this court. Relying on affidavits from Ehrman and a psychologist, counsel argues that Ehrman should be relieved of his default because when the arbitration was commenced and held and during this proceeding, Ehrman was "mentally ill and psychologically incapable of responding to claims", and "did not recover from his illness until after the award had been confirmed, at which time, in June, 2005, he sought counsel to represent him". Respondent also argues he has a number of meritorious defenses. Respondent cites certain cases, and argues that the circumstances herein are similar.

The psychologist, licensed in Connecticut, sets forth his opinion and states that the affidavit is based on his personal knowledge of Ehrman from an unspecified number of counseling sessions with Ehrman from September 2001 until July, 2003, when Ehrman withdrew from treatment, "recent conversations"/ "recent contacts" with Ehrman, and Ehrman's "intent to have further counseling sessions".

The psychologist states Ehrman was referred to him by Ehrman's internist and began to see him in September 2001 because of what was "described as significant trouble coping with certain personal problems resulting from issues involving an investment fund", and that Ehrman's "feelings of self-worth were abnormally tied to the success of the funds he managed

and his ability to satisfy his investors". The psychologist further states the following, all based on what Ehrman told him during 2002: Ehrman advised him that "he had been experiencing increasing anxiety and physical symptoms that he [Ehrman] believed traced to his emotional health"; Ehrman advised him that he was prescribed Corgard by his internist/cardiologist; Ehrman told him that he had great difficulty sleeping and would wake up repeatedly in the middle of the night, "worrying about his business and personal matters"; Ehrman complained of an "increasingly worsening ability to focus on his personal problems, which he [Ehrman] described as debilitating"; and that Ehrman told him that "he had lost interest in areas that previously interested him and that he had largely withdrawn from both business and social activities".

The psychologist then states that by the summer of 2003, Ehrman "repeatedly complained he was unable to complete even routine matters and that he was losing his ability to function", and Ehrman told him that he "could not focus his attention on matters that required concentration or provoked anxiety".

The psychologist opined that "[d]uring the course of our therapy sessions, it became apparent that Mr. Ehrman was suffering from severe stress, both at home and at work. Such stress was, in my view, a substantial cause of problems that, in the normal course, would have been promptly and properly addressed by a healthy, functioning person".

In July 2003, Ehrman suddenly withdrew from treatment, which the psychologist believes was because "it had simply become too painful for him to continue to face these issues in counseling sessions".

The psychologist opines that: "an extremely severe defense mechanism of denial

afflicted Mr. Ehrman. There is no question it has significantly impacted his judgment and ability to function on a daily basis, particularly with his ability to cope with difficult matters, especially matters related” to the problems faced by EVF. He further states that the “common psychological expression for this is ‘suppression’”, which he opines is what occurred to Ehrman.

The psychologist continues to state that his recent conversations with Mr. Ehrman convinced him that at the time the law suits were commenced in 2004 and thereafter, Mr. Ehrman “felt hopeless about his future”, the law suits “exacerbated the sense of alienation and depression”, and that “[p]lainly, he suffered an unmanageable level of anxiety that prevented him from dealing rationally with important matters and undermining his own interests in ways that cannot be explained by any rational thought process”.

The psychologist further states that it is his professional opinion that Ehrman was “psychological incapable of dealing with his problems”. He asserts that Ehrman could not “face situations that would place before his eyes events that reflected business failures”, and “simply could not respond, as a normal person would, to the law suits filed against him”, as he “was psychologically incapable of doing so”. The psychologist concludes that through the “support and encouragement of his family”, Ehrman is prepared to address his continuing problems and re-commence psychological therapy, and will now be able to “face his former investors, to participate in litigation with them and to address their grievances”.

In Ehrman’s affidavit, he argues that an understanding of his background is critical to understanding how the action arose and how the default in the arbitration and in this action occurred, and proceeds to detail his background and the background of the EVF. He then asserts that: the problems that led to the collapse of the fund, including a severe bear market beginning

in 2000, led to his becoming ill; he began having physical symptoms as a result of the stress; he told his internist of his feelings of depression and physical symptoms; he was referred to the psychologist; he explained to the psychologist the tremendous stress he was having due to problems affecting the investment industry and his fund; by 2002, he was having panic attacks; the psychological problems became worse during the second half of 2002; in 2003, he could not face his own personal financial problems, and by the summer of 2003, could not complete even routine matters; the psychologist was so concerned he began to inquire if Ehrman was suicidal; he withdraw from therapy in July 2003 because he could not deal with what he was facing; instead of hiring an attorney, he could not address the problems and spent more and more time in his room; when he received letters of legal documents in the mail, he would put them away planning to open them, but did not do so; he felt hopeless, and when he ended up being sued in a number of personal matters, he was pushed further into a deeper and debilitating depression; he again began communicating with the psychologist who is helping him deal with his problems; his default was not the result of a lack of defenses or a willful effort.

He reviews the history of the arbitration, and asserts that had he been psychologically capable of doing so, he would have asserted a number of meritorious defenses, including: he made vigorous and enormous efforts to preserve the funds in an extraordinary bad market condition, and that the demand for arbitration does not allege facts supporting an inference that anything he said or did was fraudulent; petitioner had no right to distributions on demand, petitioner waived or merged any claim of purported fraud when he entered into the separation agreement; and he did not distribute monies to petitioner not because of fraud or breach of contract but because he needed to preserve liquidity and earlier he himself ceased to take a salary;

by January 2003, margin calls wiped out the fund's liquidity and his "own mental health had so severely deteriorated" that he could "no longer face investors, triggering further difficulties". He denies making any misrepresentations, denies that he induced petitioner to forgo enforcing a claim for breach of contract, and asserts that petitioner's ability to withdraw money from the fund was circumscribed by the rights of other investors and the contractual agreements.

Petitioner opposes and cross-moves for sanctions and attorneys' fees and to direct respondent's attorneys to accept service of a subpoena in aid of enforcement of the judgment. Relying on petitioner's affidavit and the affirmation of counsel, who also represented petitioner in the underlying arbitration, and on letters, documents and other exhibits, petitioner argues that the motion is without basis.

Relying, inter alia, on various documents and letters, petitioner argues that Ehrman's claim that his mental condition of stress made him incapable of participating and attending to matters until June of 2005 and led to his defaults are unfounded. The exhibits include: letters evidencing Ehrman's appearance in and participation in the arbitration, both by his attorneys and on his own; other correspondence from Ehrman relating to Ehrman's handling of business matters in 2003, 2004 and January and February of 2005; faxes regarding Ehrman's vacations in 2003 and 2004; documents indicating three separate conveyances of mortgages by Ehrman in October and November of 2004 in the total amount of \$5,462,463.00; documents showing listings of Ehrman's real estate as of September 2004.

Petitioner further argues that Ehrman's submissions fail to show a basis for vacating his default due to his psychological state, as the conditions set forth in the psychologist's affidavit of "denial" "stress" and "suppression", and Ehrman's own descriptions of his condition, do not

evidence an excusable failure to appear in this action. Additionally, petitioner argues that as the opinions of the psychologist are based on Ehrman's state prior to July 2003 when Ehrman withdrew from counseling, the conclusions should be disregarded.

Petitioner distinguishes the cases cited by respondent. He cites other cases which he argues are applicable to the circumstances herein and show that the motion should be denied.

Additionally, petitioner argues that not only has Ehrman failed to show a sufficient excuse for his failure to appear in the proceeding, Ehrman further fails to posit a meritorious defense to this special proceeding to confirm the arbitration award: Ehrman's alleged defenses relate to the arbitration, and do not constitute a valid defense to the proceeding to confirm the award or a basis to vacate or modify the award. Nor, petitioner argues, is the instant motion timely, as it was not brought within ninety days of delivery of the arbitration award, and the arbitration award cannot now be vacated or modified.

Petitioner additionally argues that other considerations also demonstrate that the motion should be denied: I) the Arbitration award was not granted on default, but, pursuant to Rule 29 of the AAA Commercial Rules and as shown in the arbitrator's decision, was made based on the evidence petitioner presented; and ii) as Ehrman does not request that the court vacate the Arbitration award, and as the Arbitration award is not now subject to attack by Ehrman, this motion serves no valid purpose.

In support of the cross-motion, petitioner argues that the awarding of attorneys' fees and sanctions pursuant to 22 NYCRR 130-.1 is appropriate because the motion contains misstatements of material facts and is wholly without basis in law.

Petitioner argues that the documents that are referenced in the opposing papers and

attached as exhibits prove indisputably that Ehrman's assertions that he could not handle his personal affairs due to his alleged psychological state are untrue, as the exhibits show, among other things, that: Ehrman retained counsel in connection with the arbitration; Ehrman appeared in the arbitration; Ehrman corresponded extensively regarding his financial interests; Ehrman retained control of the financial affairs of his wife and daughter; Ehrman placed his Connecticut residence on the market and conveyed mortgages.

Petitioner further argues that the motion is completely without merit in law, as Ehrman failed to show and cannot show an excusable default or a meritorious defense. For example, the cases relied upon by respondent involved defaulting parties who suffered the acute and debilitating psychological problems of schizophrenia and bipolar disorder and had to be hospitalized. Nor is there a basis to argue that the concept of excusable default should be extended from those circumstances to those herein, where the defaulting party argues he failed to appear because he felt badly his problems and was uncomfortable discussing them. Additionally, petitioner argues that the affidavit from the psychologist fails to support the requested relief, particularly as the affidavit concerns Ehrman's mental state prior to July 2003, and cannot serve as a basis for a medical opinion on Ehrman's condition during the arbitration and the special proceeding.

Petitioner similarly argues that Ehrman's legal argument regarding the meritorious defense is without merit, as the alleged substantive arguments regarding defenses in the arbitration are not defenses to a motion to confirm the arbitration award, and are not within the scope of a CPLR 7511 motion to vacate or modify.

Accordingly, petitioner requests that the court direct Ehrman to pay petitioner the

attorneys' fees incurred in opposing the motion, which at that time amounted to \$7,387.50, and to conditionally order Ehrman's counsel to pay these fees if Ehrman fails to do so after 30 days, as Ehrman failed to satisfy the judgment and his counsel failed to perform due diligence, raised arguments that have no basis in fact or law, and failed to withdraw the motion after being advised by petitioner's counsel of the falsity of Ehrman's statements.

Petitioner also argues that the court under these circumstances can direct Ehrman's New York counsel to accept service of a subpoena directed to Ehrman, in aid of enforcement of the judgment in the proceeding, regarding the nature and extent of Ehrman's assets and conveyances of assets.

Ehrman opposes the cross-motion. Respondent argues that there is no basis to impose attorneys' fees and sanctions, as the motion: I) is supported by a reasonable argument and by the facts; ii) is based on certain inquiries taken by counsel and reasonable reliance on the client; iii) was not undertaken for delay; and iv) the motion did not knowingly assert any material false statements.

Respondent replies that petitioner mischaracterizes the moving papers. He argues that the papers show that Ehrman was suffering from a debilitating psychological condition that prevented him from rationally participating in this proceeding, that he was "unable to present a defense due to severe psychological incapacity", and that there "is no credible explanation, other than a severe and debilitating psychological impairment" for why Ehrman would allow himself to be defaulted in these actions after he led a highly professional life for thirty years and has patently obvious defenses. (In these papers, Ehrman dates his recovery from "mental illness which had prevented him from facing the issues arising out of the collapse of EVF" to May,

2005.) Ehrman argues that the cases cited by petitioner are not applicable here

Ehrman further argues that public policy supports vacatur, that petitioner's procedural arguments should be rejected, and that if the court grants this motion, Ehrman intends to file a new arbitration, which he argues would not be barred.

Respondent also sets forth his explanation for Ehrman's actions and statements made in the moving affidavits, and disagrees that the exhibits attached to the opposing papers signify what petitioner indicates.

Ehrman in his affidavit replies that: 1) he did not advise his current attorneys or state in his prior affidavit that Latham & Watkins represented him and the company respondents because he has no recollection of them being retained, never met with them, nor had any dealings with them, in connection with this matter; 2) to the best of his recollection, Latham & Watkins was retained by his business associate to represent companies which he "was or had been affiliated, in various matters, at or about that time", but he never engaged them to represent him in the arbitration and was unaware they were retained until he reviewed petitioner's papers; 3) he never saw a copy of a letter from Latham & Watkins on which he was copied; 4) he was contacted by the AAA in April 2004, requested more time to respond to the request, but failed to follow up for the reasons he and the psychologist gave; 5) he took "no further steps in the arbitration because [he] just could not face [his] former investors, including Petitioner", and 6) he did not travel to Italy at any time in 2004.

In the replying affirmation, Ehrman's counsel states that this is not the only litigation in which Ehrman defaulted as a result of his illness, and Ehrman is seeking relief from, settled, or trying to settle, at least 12 other actions which he claims all occurred after the collapse of the

Fund in or about January 2003, not including small claims cases that are being investigated in Florida and Connecticut courts by counsel.

As to the request that the court order Ehrman's counsel to accept service of an enforcement subpoena in New York, Ehrman argues that there is no showing here that these circumstances support the issuance of the order. Ehrman argues that: 1) Ehrman has not attempted to evade service; 2) Ehrman is not seeking affirmative relief in New York; 3) Ehrman has been served numerous times in Connecticut and in Florida, and 4) there is no reason why petitioner cannot enforce his judgment in Connecticut and Florida (noting that Ehrman has a pending motion to stay enforcement of petitioner's judgment in Connecticut).

Petitioner replies that sanctions are appropriate, as the motion is devoid of merit. He argues that Ehrman has failed to show otherwise, and that Ehrman has made further false statements in his reply papers. Additionally, petitioner argues that a mere review by Ehrman's counsel of the documents, including the letters from Ehrman's arbitration counsel Latham & Watkins, should have alerted counsel as to the falsity of Ehrman's statements. Petitioner further argues that respondent has failed to show why his counsel should not be directed to accept service, with petitioner thereby being spared the additional costs of having to chase Ehrman down. Petitioner states that to date, attorneys' fees in the amount of \$4,125.00 have been incurred on the cross-motion.

#### Discussion

For relief under CPLR 5015(a), a party must demonstrate both a reasonable excuse for its default and a meritorious defense. The court has carefully reviewed the papers and the prior proceeding(s), and finds that respondent Ehrman has failed to meet that burden.

Notably absent from the carefully constructed affidavit from a psychologist is a diagnosis of a psychological illness or condition that supports respondent's unfounded and conclusory assertions that he suffered from a mental condition or illness that would constitute a reasonable explanation for his default or that his default in this proceeding (and his failure to appear at the arbitration hearing) was the result of that illness or condition.

For example, even assuming that in certain circumstances a showing that a defaulting party was suffering from clinical depression might constitute a reasonable explanation for a failure to appear, the psychologist does not diagnose even a mild clinical depression, much less the deep and debilitating depression that Ehrman diagnoses for himself. Similarly, assuming that under certain circumstances a reasonable excuse is shown because the failure to appear resulted because the party suffered a panic attack, the psychologist does not opine that Ehrman was suffering panic attacks (although Ehrman so opines).

Additionally and tellingly, the psychologist does not base many of the conclusory assertions on his own observations or findings or treatment, or on Ehrman's actual medical record. Rather, the psychologist prefaces and conditions his remarks on a repetition of what Ehrman told him. And, even that retelling does not support and omits many of the assertions Ehrman sets forth in Ehrman's own affidavits.

To the extent the psychologist's affidavit sets forth an opinion of Ehrman's condition, and even assuming that the condition of July 2003 has been shown to have existed at the time of the default in the proceeding in November 2004 (and no such showing has been made), it is that: Ehrman experienced "stress", and was engaged in "denial" and "suppression"; Ehrman was referred to him because he had significant trouble "coping"; Ehrman's self-esteem was

“abnormally tied” to the success of the funds he managed; Ehrman told him he had “great difficulty sleeping”. No detail is provided as to the number of counselling sessions; Ehrman was not on medication for his mental condition or illness; there was no hospitalization for the condition. Nor has respondent shown support for the psychologist’s assertions of Ehrman’s condition at the time of the arbitration hearing and the confirmation proceeding, as they are merely based on recent “conversations” with Ehrman. It is only the recent conversations which form the basis for the psychologist’s conclusory assertions that Ehrman suffered anxiety and feelings of depression because of the lawsuits subsequent to the cessation of counselling in July 2003, and, notably, the psychologist does not provide a diagnosis of clinical depression or anxiety. Nor has there been any showing that Ehrman’s condition and feelings were different from those that may be experienced by other litigants so as to provide a reasonable excuse for Ehrman’s failure to appear in this proceeding.

Accordingly, Ehrman has failed to meet the first prong—he has not shown that a mental condition or illness that constitutes a reasonable explanation for his failure to appear. He has not shown that his default was a result of a debilitating psychological condition or illness that prevented him from appearing in this proceeding (and his non-appearance at the arbitration hearing).

Nor, contrary to respondent’s arguments, can support for this argument be found in case law. While respondent’s papers contain certain language found in various cases, an analysis of the actual showing made in those cases as contrasted to the showing—or lack thereof-- herein demonstrates that the cases and their reasoning are not applicable.

Thus, even assuming that respondent sufficiently supports his factual assertions—and he

does not—these assertions are far different from the factual showings made where courts have granted motions to vacate a judgment, or ordered a hearing, based on a failure to appear as a result of a diagnosed psychological illnesses, hospitalization(s), treatment and the surrounding circumstances therein.

For example, in Parker v. Parker, 66 A.D.2d 328, the stipulation and default judgment of divorce was vacated where the defendant wife showed: she had a history of mental illness known to plaintiff; a psychiatrist testified that she was diagnosed as a paranoid schizophrenic, was repeatedly hospitalized due to her mental illness and was treated with tranquilizers and electric shock therapy; she was found to be still suffering from mental illness and she continued out-patient treatment and medication. Moreover, plaintiff failed to defeat defendant's showing that she did not understand the import of what she was signing when she signed the one-sided stipulation in the office of the husband's attorney without someone present to protect her interests.

Similarly, in Sarfaty v. Sarfaty, 83 A.D.2d 748, the Appellate Division reversed the trial court's denial of the wife's motion to vacate her default in the divorce proceeding, where she showed that the judgment was obtained although her husband and his attorney knew that she was a patient in a mental health center of a general hospital following her attempted suicide and under continuous care of a psychiatrist following her discharge. Indeed, the court noted that plaintiff had the burden to bring the defendant wife's mental condition to the court's attention so that suitable inquiry could be made whether a guardian ad litem should have been appointed to protect her interests, prior to entry of the default judgment. Id., at 749.

In another matrimonial action, D'Alleva v. D'Alleva, 127 A.D.2d 732, 734, the court first

noted that there exists a liberal policy in vacating defaults in matrimonial, and that the general rule in opening defaults in other civil actions is not applied so rigorously. The court then found that as there was evidence that defendant was suffering from depressive neurosis and emotional stress and was allegedly misled by plaintiff into failing to appear, an evidentiary hearing was appropriate.

A hearing also was found appropriate where the son sought to vacate his default so as to allow him to file late objections to the probate of his mother's will, as he showed by affidavits that he was hospitalized for three months because of acute clinical depression and was thereafter under continuous doctor care and treatment. Here, too, the court further noted that the diagnosed condition would render him incapable of attending to his legal affairs for the applicable continuous period and might require the appointment of a guardian ad litem. Estate of Bacon, 169 Misc.2d 858.

Similarly, in State of New York v. Kama, 267 A.D.2d 225, because defendant demonstrated that he was diagnosed as suffering from bipolar affective disorder, was hospitalized for acute symptoms on 10 separate occasions in an approximate 18 month period, and was hospitalized within a month after service of the summons and two other occasions before the entry of judgment, the court vacated the judgment in the interest of justice and noted that inquiry was needed into the appointment of a guardian.

While the burden might be met in other circumstances involving a less severe mental illness or condition and not as extensive a history, respondent's showing here does not demonstrate the existence of such a circumstance. Rather, respondent's showing is similar to cases where courts have denied vacatur as the party failed to support the assertion that the default

was a result of a mental condition or illness at the time of the default or that the default resulted from the condition and a lack of understanding. See, for example, Neuman v. Greenblatt, 260 A.D.2d 616 (conclusory allegations that defendant defaulted in his defense because of “mental and physical stress” and “financial strain” from defending factually-related criminal charges are insufficient); Burks v. Weiss, 137 A.D.2d 646 ( Appellate Division rejected defendant's assertions that his default was not willful as it was a result of his alleged clinical depression leading to his lack of understanding of the significance of the proceedings); Zolov v. Donovan, 138 A.D.2d 484 (reversing trial court's vacatur of default as defendant failed to substantiate his claims that his repeated neglect of the legal process was because plaintiff's action caused him severe emotional and psychological problems ).

Moreover, respondent's factual assertions regarding his alleged non-appearance and lack of representation in the arbitration and his alleged inability to conduct his affairs fly in the face of the record in this proceeding and the arbitration, and petitioner's showing. Nor has there been any showing that a hearing or further inquiry is appropriate.

Even assuming that respondent has met his burden and demonstrated a reasonable explanation for his default and his lengthy failure to move to vacate the default—and the court does not so find—respondent has failed to meet the second prong: he has failed to demonstrate the existence of a meritorious defense.

While respondent now argues that he has several defenses to the underlying arbitration, respondent does not even assert, much less show, any viable defense to this proceeding to confirm the arbitration award. Nor does he assert, much less show, any valid basis to vacate the arbitration award. And, even assuming that the court can now examine his asserted defenses

to the arbitration, respondent has failed to demonstrate why those defenses constitute a sufficient basis to vacate an arbitration award that was made based upon evidence presented and testimony taken.

The Cross-Motion

While noting that petitioner has made valid arguments for the imposition of sanctions, the court in the exercise of its discretion declines to impose sanctions upon respondent or his counsel, with leave to renew under the appropriate circumstances. At this time, the court, under these circumstances, has afforded respondent and counsel all favorable inferences for a good faith basis for the bringing of and proceeding with the motion. The court also denies, with leave to renew under the appropriate circumstances, that part of the cross-motion seeking to compel respondent's counsel to accept service of the subpoena; petitioner has not shown at this time that respondent is evading service or that this relief is now needed.

Accordingly, it is

ORDERED that respondent William Ehrman's motion pursuant to CPLR 5015(a) is denied; and it is further

ORDERED that petitioner's cross-motion is denied.

Dated: New York, New York  
January 3, 2006

Copies mailed

**FILED**  
JAN - 6 2006  
COUNTY CLERK  
NEW YORK

FAVIOLA A. SOTO, J.S.C.