

**Stoel Rives, LLP v Goldberg**

2007 NY Slip Op 30918(U)

April 12, 2007

Supreme Court, New York County

Docket Number: 0114092/2005

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

STOEL RIVES, LLP,

Plaintiff,

Index No.: 114092/05

- v -

Motion Date: 01/09/07

JOEL GOLDBERG,

Defendant.

Motion Seq. No.: 04

Motion Cal. No.: 116

The following papers, numbered 1 to 5 were read on this motion to vacate a default judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits  
Answering Affidavits - Exhibits  
Replying Affidavits - Exhibits

PAPERS NUMBERED

1
2, 3
4, 5

**FILED**

APR 25 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers,

Although defendant styles the current motion as one to reargue under CPLR 2221, the motion is in fact a motion to vacate the defendant's default under CPLR 3126 and therefore the court shall consider the current application under CPLR 5015 (a).

Defendant previously defaulted in answering in this action and plaintiff moved for the entry of a default judgment. Defendant then brought a motion to vacate that default and dismiss the complaint. Plaintiff also moved to amend the complaint. By a So-Ordered Stipulation dated June 6, 2006, the plaintiff's motion for a default judgment was denied, the

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

defendant's motion to vacate the default in answering was granted and the defendant's time to respond to the amended complaint was extended to July 31, 2006. The Order also granted plaintiff's motion to amend the complaint and permitted the plaintiff to issue discovery requests in aid of the amendment. The Order further directed that the defendant was to respond to the discovery requests by July 10, 2006, and a preliminary discovery conference was scheduled for July 18, 2006.

At the preliminary conference on July 18, 2006, defendant had not responded to the discovery requests as set forth in the court's June 6, 2006, Order. The court therefore issued an Interim Preliminary Conference Order on that date directing the defendant to respond to plaintiff's document demands by July 31, 2006, and interrogatories by August 15, 2006. Defendant's deposition was scheduled for September 5, 2006.

At a further discovery conference on August 21, 2006, the court issued an Order that held the defendant in default for the failure to comply with the court's prior orders directing responses to the plaintiff's interrogatories and directed the plaintiff to file a notice of inquest for the assessment of damages. On October 13, 2006, a Justice of this Court granted judgment to the plaintiff.

Defendant filed this motion on October 11, 2006. As per the above chronology, this is the second motion defendant has filed

seeking relief from a default in this action. Defendant asserts that he responded to the interrogatory requests on September 18, 2006, more than one month after the court held defendant in default. Defense counsel proffers the excuse that defendant no longer resides in the country and that any delay was due to this fact and not any willful disobedience on the part of defendant. Defendant also argues that he has a meritorious defense to the claims in this action in that he is not a general partner of Spirit Partners, L.P., and therefore has no liability upon the judgment plaintiff seeks to enforce.

The only documentary evidence submitted in support of defendant's claim of a meritorious defense is an unverified copy of a Certificate of Incorporation for Spirit Partners, L.P., that purports to state that Genesis Fund Management Corp. is the general partner thereof. Standing by itself, this document does not demonstrate a meritorious defense. However, although the defendant fails to submit any affidavit to demonstrate the merit of his defense and there is no verified pleading, the court finds that the verified interrogatory responses appended to the motion are sufficient to meet the defendant's burden because the response to interrogatory number 3 states that Genesis Fund Management Corp. is the general partner of Spirit.

The court shall therefore grant the motion and vacate the default although the court wishes to emphasize to the parties the

importance of complying with court directives and discovery orders. The fact that a party has voluntarily relocated outside this jurisdiction after the commencement of this litigation is no excuse for disobedience of court orders.

The court further notes that the defendant's failure to comply with the court's discovery orders has delayed this litigation and unnecessarily utilized court resources insofar as the plaintiff has proceeded to judgment before this court. The court shall in the exercise of its discretion therefore condition vacatur upon the payment of \$300 in costs by the defendant to the plaintiff to compensate the plaintiff for the costs incurred in motion practice and the inquest due to the defaults by the defendant. See Abrash v Lavender, 119 AD2d 785, 786 (2d Dept 1986) ("it was not an abuse of discretion to order vacatur of the judgment upon payment by the defendant of \$500 in costs to the plaintiffs").

Accordingly, it is

ORDERED that defendant's motion to vacate the default judgment as set forth in the court's Order of August 21, 2006, is hereby GRANTED; and it is further

ORDERED that any judgment entered pursuant to this Court's Order of August 21, 2006 shall be VACATED upon proof submitted by the defendant of PAYMENT to the plaintiff of \$500 in costs within 30 days of the entry of this Order; and it is further

ORDERED that upon the filing of such proof of the payment set forth in the prior paragraph with the Part Clerk of IAS Part 59, this action is directed to be RESTORED to the court's active, pre-note of issue calendar; and it is further

ORDERED that the parties are directed to attend a conference on May 22, 2007, at 9:30 A.M., in IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: April 12, 2007

ENTER:

Debra A. James  
DEBRA A. JAMES J.S.C.  
J.S.C.

**FILED**  
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