

**Kumar v Khouri**

2007 NY Slip Op 31817(U)

June 25, 2007

Supreme Court, Greene County

Docket Number: 0020291/2007

Judge: George B. Ceresia

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF GREENE

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MICHELE ANNA KUMAR, Individually  
and as Parent and Natural Guardian of  
NISHA KUMAR, an Infant,

Plaintiffs,

-against-

Index No.: 02-0291  
RJI No.: 19-04-1244

SABER KHOURI and GERTRUDE KHOURI,

Defendants.

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All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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Attorneys for Plaintiffs  
(Kimberly Boucher Furnish, Esq. of Counsel)  
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Attorneys for Defendant Saber Khouri  
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### **DECISION/ORDER**

George B. Ceresia, Jr., Justice

Plaintiffs commenced the instant action seeking recovery for injuries sustained when the infant plaintiff was bitten by defendant Saber Khouri's dog. Defendant Saber Khouri (hereinafter defendant) has moved for an order vacating the order which granted a default judgment on the issue of liability and allowing him to defend the action on the

merits. By order dated April 7, 2005 defendant's answer was stricken and a default judgment on the issue of liability granted based upon defendant's willful failure to comply with discovery demands and a demand for a bill of particulars. Such order appears to have been granted without opposition<sup>1</sup>. Initially, no action was taken on the order due to defendant's bankruptcy filing. The stay has now been lifted.

In general, in order to be relieved of a default judgment, a defendant must show a reasonable excuse for the default, that the default was not willful, a meritorious defense to the action and that the delay has not prejudiced the plaintiff (see Dodge v Commander, 18 AD3d 943, 945 [3d Dept 2005]; Aaron v Carter, Conboy, Case, Blackmore, Napierski & Maloney, 12 AD3d 753 [3d Dept 2004]). Defendant has not offered any excuse for his default in opposing the motion for a default judgment. Moreover, the order specifically states that it is based upon defendant's willful failure to comply with plaintiffs' demands. As such, defendant can not offer a reasonable excuse for failure to comply with the demands (see Bennett v Nardone, 276 AD2d 854, 855 [3d Dept 2000]; Robinson Saw Mill Works v Speilman, 265 AD2d 604, 606 [3d Dept 1999]).

In addition, defendant has failed to show the existence of a meritorious defense. The record indicates that the dog had bitten people before the incident with the infant plaintiff, establishing that defendant was aware of the dog's vicious propensities (see Bard v Jahnke, 6 NY3d 592 [2006]; Collier v Zambito, 1 NY3d 444 [2004]; Malpezzi v

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<sup>1</sup> Neither party has submitted a copy of the order, although a copy was found in the previous IAS Justice's file.

Ryan, 28 AD3d 1036 [3d Dept 2006]). Defendant has submitted an affidavit stating that the dog had been placed in a dog pen or cage and it was unknown how the dog got out. Such facts do not constitute a defense to liability as defendant is strictly liable for the injuries caused by his dog (see Coole-Mayhew v Timm, 18 AD3d 948, 949 [3d Dept 2005]). There is also no indication that the infant plaintiff released the dog, which might constitute contributory negligence (see Graham v Murphy, 135 AD2d 326, 329 [3d Dept 1988]). Defendant also appears to contend that plaintiffs have sued his deceased parents rather than himself. However, defendant has the same first and last name as his father, indicating that he was properly named and served and no jurisdictional defense was alleged in the answers served herein, thereby waiving any such defense.

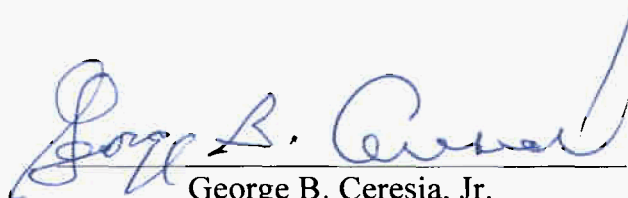
Defendant has therefore failed to establish either a reasonable excuse for the default or a meritorious defense.

Accordingly it is

**ORDERED** that defendant's motion to be relieved of his default is hereby denied.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for the plaintiffs, who are directed to enter this Decision/Order without notice and to serve defendant's counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York  
June 25, 2007



George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

Notice of Motion, undated; Affirmation of Ralph C. Lewis, Jr., Esq. dated February 23, 2007 with Exhibits A-D annexed; Affidavit of Saber Khouri sworn to March 9, 2007;

Affidavit of Kimberly Boucher Furnish, Esq. sworn to April 20, 2007 with Exhibits 1-3 annexed.