Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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BEVERLY WILLIAMS,

Plaintiff,

Index No: 3341/03
Motion Date: 7/25/07
Motion Cal. No: 38
Motion Seq. No: 2

-against-

ALL TYPE LEASING CORP., and NATHANIEL BRANTLEY,

Defendants.

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The following papers numbered 1 to 11 read on this motion for an order granting plaintiff Beverly Williams leave to reargue and/or renew her prior motion dated September 16, 2006, seeking to vacate plaintiff's prior default to defendant's motion to dismiss on the grounds that an excusable default exists and other grounds as found in CPLR § 5015; and upon reargument and/or renewal, vacate plaintiff's default, reinstate the case and permit plaintiff the opportunity to file a new note of issue, so this matter may be placed on the trial calendar and determined on the merits.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Affirmation in Opposition-Exhibits.....	6 - 8
Reply Affirmation.....	9 - 11

Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

This is an action for personal injuries allegedly sustained by plaintiff Beverly Williams as a result of a motor vehicle accident that occurred on August 21, 2002, on the Van Wyck Expressway at or near the intersection with Hillside Avenue, Queens, New York, when plaintiff's vehicle was struck in the rear by the vehicle owned by defendant All Type Leasing Corp. and operated by defendant Nathaniel Brantley ("defendants"). By decision of this Court dated February 20, 2007, plaintiff's motion was denied for an order vacating this Court's August 29, 2005 order dismissing the complaint, permitting plaintiff to interpose opposition to the underlying motion, denying the motion and permitting plaintiff to file a note of issue. In denying the motion, this Court stated:

> Here, as the notice of entry was served on September 12, 2005, the instant application is untimely. Arguendo, even if the motion to vacate was made within one year of notice of entry, an application to vacate an order of default may be granted "if the movant can establish that the default was excusable and the existence of a meritorious claim." Baldini v. New York City Employees Retirement System, 254 A.D.2d 128 (1st Dept. 1998). Further, the Court in its discretion, may excuse a default resulting from law office failure. Ray Realty Fulton, Inc. v. Kwang Hee Lee, 7 A.D.3d 772 (2nd Dept. 2004). In the instant matter, notwithstanding plaintiff's contentions to the contrary, upon the facts presented in this application, this Court finds that plaintiff has failed to met her burden to vacate her default.

Plaintiff moves to reargue and or renew that motion, and upon reargument or renewal, an order vacating plaintiff's default, reinstating the case and permitting plaintiff to file a new note of issue.

Section 2221(d)(2) and (3) of the CPLR provides, in pertinent part, that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." See, Delgrosso v. 1325 Ltd. Partnership, 306 A.D.2d 241 (2nd Dept. 2003). Here, plaintiff argues that the Court erred when it determined that the motion was untimely, contending that in determining that the motion was untimely the Court failed to take into account the five day extension provided by CPLR Rule 2103(b). Counsel for plaintiff is correct.

CPLR Rule 2103(b)(2), in pertinent part, provides that "service upon an attorney shall be made:

> 2. by mailing the paper to the attorney at the address designated by that attorney for that purpose. . . ; service by mail shall be complete upon mailing; where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period

" 'Mailing' means the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state" (CPLR 2103[f] [1])." Kresch v. Saul, 29 A.D.3d 863 (2d Dept. 2006)[internal quotes omitted]. By Notice of Entry dated September 12, 2005, defendant noticed plaintiff of the entry of the August 29, 2005 order dismissing the complaint pursuant to section 3126 of the CPLR. As a motion is made when a notice of motion is served, plaintiff's motion to vacate the August 29, 2005 default judgment dismissing the complaint was made when

it was served on September 17, 2006, on defendant's attorney (Rivera v. Glen Oaks Village Owners, Inc., 29 A.D.3d 560 (2nd Dept. 2006). Plaintiff's subsequent motion to vacate the default, assuming defendant's service by mail of the August 29, 2005 order on September 12, 2005, or some date thereafter, thus fell within the one year period set forth in CPLR 5015. Accordingly, that portion of the February 20, 2007 order finding the motion to be untimely was based upon a misapplication of the law and thus was erroneous. See, Kresch v. Saul, supra, and cases cited therein; see, also, Sport-O-Rama Health & Fitness Center, Inc. v. Centennial Leasing Corp., 100 A.D.2d 584 (2nd Dept. 1984).

A motion seeking to vacate a default is required to demonstrate both a reasonable excuse for the default and a meritorious cause of action or defense. Valure v. Century 21 Grand, 35 A.D.3d 591 (2nd Dept. 2006); Bowman v. Kusnick, 35 A.D.3d 643 (2nd Dept. 2006); Betty v. City of New York12 A.D.3d 472, (2nd Dept. 2004). Plaintiff demonstrated that the Court's prior determination that was based "upon the facts presented in [that] application," misapprehended those facts, which, upon review, do establish both a reasonable excuse based upon law office failure and a meritorious cause of action.

CPLR 2005 gives the court the discretion to excuse delay or default resulting from law office failure when relief is sought pursuant to CPLR 5015(a)(1). Due to no fault of plaintiff, the law firm representing her virtually ceased to exist upon the death of one named partner, and the subsequent disbarment of the other. Notwithstanding the ongoing involvement of plaintiff's present counsel in prior preliminary proceedings, including examinations before trial, there is every indication that no opposition was submitted to defendants' motion for a default judgment due to the upheaval in the office of plaintiff's then attorneys of record, Cheda & Sheehan, arising from the sole surviving partner, Sheehan, who was suspended from the practice of law on August 15, 2005, and was ultimately disbarred on February 14, 2006. According to the affirmation of plaintiff's present attorney, she "was contacted by the Grievance Committee in Brooklyn to render assistance to the floundering clients until such time as an official appointment was made to have an attorney oversee the remains of the practice." A court may, in its discretion, relieve a party of a default caused by law office failure in the interest of justice (Caputo v. Peton, 13 A.D.3d 474 (2nd Dept. 2004); Shmarkatyuk v. Chouchereba, 291 A.D.2d 487 (2nd Dept. 2002), and to excuse delay or default resulting from law office failure in instances in which the proffered excuse is nonconclusory and substantiated. See, Piton v. Cribb, 38 A.D.3d 741 (2nd Dept. 2007); Conserve Elec., Inc. v. Tulger Contracting Corp., 36 A.D.3d 747 (2nd Dept. 2007); Costello v. Reilly, 36 A.D.3d 581 (2d Dept. 2007). Under the circumstances of this case, contrary to the initial ruling of this Court, plaintiff's law office failure excuse was reasonable. See, White v. Incorporated Village of Hempstead, 41 A.D.3d 709 (2nd Dept. 2007). "Where, as here, there is no evidence of willfulness, deliberate default, or prejudice to the defendants, the interest of justice is best served by permitting the case to be decided on its merits." Beizer v. Funk, 5 A.D.3d 619 (2nd Dept. 2004). Moreover, that plaintiff allegedly was injured in a rear-end collision, with the injuries being substantiated by the medical affirmation submitted on this motion, are more than sufficient to establish that plaintiff has a meritorious cause of action. Bowman v. Kusnick, 35 A.D.3d 643 (2nd Dept. 2006); Hoffman v. Kessler, 28 A.D.3d 71 (2nd Dept. 2006).

Accordingly, inasmuch as plaintiff has set forth a sufficient basis for the grant of leave to reargue, the motion is granted. Upon reargument, the court vacates its August 29, 2005 order granting a default judgment in defendants' favor and dismissing the action. Plaintiff's motion to vacate the default judgment is granted and, inasmuch as discovery is complete, plaintiff shall file a note of issue, if necessary, within thirty (30) days of service of a copy of this order with notice of entry.

Dated: September 12, 2007

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J.S.C.