SCAN

AMENDED SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

JILL VERCH and ERIC VERCH,

Plaintiff,

SUBMISSION DATE: 4/17/08
INDEX No.: 15067/06

-against-

PETER CHARLES ASSOCIATES, LTD., PETER CHARLES LOPIPERO, DIANE R. LOPIPERO, IMPERIAL MARBLE AND GRANITE, LLC, ISLAND STONE INC., JOHN SERINGER, CONSUMER WHAREHOUSE CENTER INC. and ULTRACRAFT CABINETRY a/k/a FRANKEL RANDOLPH GROUP, INC.

MOTION SEQUENCE
9, 13, 14

Defendants.

PETER CHARLES ASSOCIATES, LTD. and PETER CHARLES LOPIPERO,

Third Party Plaintiffs,

-against-

CARY SCOTT GOLDINGER,

Third Party Defendant.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	XXX
Answering Papers.....	XXX
Reply.....	XXX
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Motion [Sequence # 009] by Order to Show Cause, made by non-party, New Jersey corporation, Edward Frankel and Bob Randolph, Inc., for an Order, pursuant to CPLR 5015(a)(3) and (4) vacating

the default judgment entered February 8, 2007 as against defendant, Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc., in the underlying action;

Motion [Sequence #013] by Order to Show Cause by defendant, John Seringer ("Seringer"), for an Order: (1) pursuant to CPLR 2004, extending the time, *nunc pro tunc*, for his response to plaintiffs' discovery demands, designated in the Court's Order, dated January 2, 2008, for a period of 15 days until February 11, 2008, thereby deeming his response to same timely; (2) pursuant to CPLR 5015(a), relieving defendant from the terms of the January 2, 2008 Order; and (3) pursuant to 22 NYCRR §202.21(e), vacating the Note of Issue filed by the plaintiffs; and,

Motion [Sequence # 014] by Order to Show Cause by defendants, Peter Charles Associates, Ltd., Peter Charles Lopipero and Diane R. Lopipero (collectively referred to herein as the "Peter Charles Defendants"), for an Order: (1) pursuant to CPLR 5015(a), relieving them from the terms of the January 2, 2008 Order; and, (2) pursuant to 22 NYCRR §202.21(e), vacating the Note of Issue filed by plaintiffs dated January 30, 2008; the motions are determined as follows:

This action arises out of a contract between the plaintiffs, Jill and Eric Verch, and the Peter Charles Defendants and related entities/persons, also named defendants in this matter, under which defendants were to perform construction, design and renovation work for plaintiffs at their residence located at 120 Ivy Lane, Lido Beach, New York 11561. Plaintiffs allege that the work was not

properly performed, resulting in economic loss and further damages. Plaintiffs claim that they sustained damages in an amount not less than $250,000 resulting from the defendants' breach of contract, delay in performance, defective and negligent workmanship, use of unlicensed contractors, subcontractors and workers, breach of express and implied warranties, fraud, defective design, and negligent misrepresentation in the renovation of the plaintiffs' premises.

Plaintiffs commenced this action on or about November 2, 2006. Issue was thereafter joined by the Peter Charles Defendants, Imperial Marble and Granite, LLC, Island Stone, Inc. and Consumers Warehouse Center, Inc., through the service of Verified Answers. Defendants Seringer and Ultracraft Cabinetry defaulted.

On December 13, 2006, plaintiffs moved for an Order seeking a default judgment against Seringer and Ultracraft Cabinetry. The default judgment motion was unopposed by Ultracraft Cabinetry. Seringer, however, opposed the motion and asked this Court to "excuse" its default. This Court, by Short Form Order dated February 8, 2007, in its discretion, vacated the default judgment against Seringer, but granted default judgment against Ultracraft Cabinetry.

On February 7, 2007, plaintiffs served their First Set of Interrogatories and their First Request for the Production of Documents. Apparently as a result of being unable to proceed with any meaningful prosecution of the action and in light of each defendants' blatant refusal to comply with discovery throughout

this litigation, by Notice of Motion dated March 15, 2007, plaintiffs moved, pursuant to CPLR 3124, to compel the defendants to comply with the outstanding discovery, including interrogatories and document demands.

Thereafter, by Notice of Motion dated April 3, 2007, plaintiffs moved, *inter alia*, pursuant to CPLR 3211(b), for an Order dismissing the affirmative defenses raised by various defendants, including those interposed by Seringer. The Peter Charles Defendants cross moved, pursuant to CPLR 3211(a)(7), dismissing the plaintiffs' causes of action against them. Notably, Seringer did not participate in the motion practice or any conferences resulting therefrom.

By Decision and Order dated July 20, 2007, this Court ordered: the Peter Charles Defendants, as well as Imperial Marble and Granite, LLC., Island Stone, Inc., John Seringer, and Consumers Warehouse Center, Inc. to respond to Plaintiffs' First Set of Interrogatories and Plaintiffs' First Request for Production of Documents within 30 days after service of a copy of the Order with Notice of Entry; and, granted that portion of plaintiffs' motion seeking to dismiss each and every one of Seringer's affirmative defenses.

Seringer and the Peter Charles Defendants refused and failed to comply with the July 20, 2007 Order. Thus, plaintiffs, on September 20, 2007, made another discovery motion seeking the penalties of CPLR 3126 and the striking of defendants' answers.

The Peter Charles Defendants and Seringer failed to oppose

plaintiffs' motion to strike. However, the Court, in its discretion under CPLR 3124 and 3126, in an Order issued on January 2, 2008, held, as follows:

> It is hereby ordered that the defendants shall reply to the demands for Interrogatories and Documents within 20 days from the date of entry of the instant Order. The failure to respond *will* result in the striking of the defaulting parties answer and plaintiff shall be permitted to file a Note of Issue for an Inquest against the non-complying parties.

The January 2, 2008 Order was entered on January 7, 2008 (*Aff in Opp to Seringer's Motion*, Ex. A). Seinger again failed to provide the outstanding discovery. Plaintiffs filed a Note of Issue on January 30, 2008.

Upon the instant applications, the moving defendants herein seek to vacate the default judgments entered as against them. CPLR § 5015(a)(1) permits the court to vacate a default judgment where there has been an "excusable default" by the party seeking vacatur (CPLR § 5015[a][1]). A party seeking to vacate a default judgment bears the burden of demonstrating ***both*** a justifiable excuse for the default and a meritorious defense (*Newton v. The Nutty Irishman*, 38 AD3d 630 [2nd Dept. 2007]; *Zino v. Joab Taxi, Inc.*, 20 AD3d 521 [2nd Dept. 2005]). A motion to vacate a default is one addressed to the sound discretion of the Court (*Abrams v. City of New York*, 13 AD3d 566 [2nd Dept. 2004]; *Giordano v. Patel*, 177 AD2d 468 [2nd Dept. 1991]). Generally, the determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the court. In making its determination, this Court is guided by relevant factors such as the extent of delay, prejudice or lack of

prejudice to the opposing party, whether there has been a willfulness, and the strong public policy is favor of resolving cases on the merits (*Orwell Bldg. Corp. v. Bessaha*, 5 AD3d 573 [2nd Dept. 2004]).

For the sake of clarity, this Court will address each applicant's motion separately and in turn.

Ultracraft Cabinetry Motion
[Motion Sequence #009]

Pursuant to CPLR 5015(a), a motion to vacate may be made by "any interested person," including a non-party. The Court of Appeals has clarified that "[t]o seek relief from a judgment or order, all that is necessary is that some legitimate interest of the moving party will be served and that judicial assistance will avoid injustice" (*Oppenheimer v. Westcott*, 47 NY2d 595 [1979] *citing* 5 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 5015.15, p. 50-252). This motion is brought by "Edward Frankel and Bob Randolph, Inc.," a non-party, New Jersey corporation engaged in the business of being "manufacturer's representative of kitchen cabinetry for domestic use" (*Aff in Support of Motion*, ¶3). The movant corporation seeks an Order vacating the default judgment against "Ultracraft Cabinetry *a/k/a Frankel-Randolph Group, Inc*" named by the plaintiffs as a defendant. There is no doubt that the "a/k/a" portion of the named defendant is an entity that has a virtually identical name to the movant corporation. Thus, the movant, Edward Frankel and Bob Randolph, Inc., clearly has an interest in protecting itself from plaintiff's attempts to execute

on the default judgment against Ultracraft Cabinetry which plaintiffs' baldly assert is "also known as" Frankel-Randolph Group, Inc. Plaintiff has not demonstrated to this Court the basis for naming the "a/k/a" for Ultracraft Cabinetry, an entity which the movant acknowledges is in existence. Plaintiff has not shown that the defendant named "Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc." in fact exists. Thus, this Court finds that, the movant corporation, Edward Frankel and Bob Randolph, Inc., which clearly has a legitimate interest in vacating the default judgment entered against the "a/k/a" is clearly an "interested party" within the meaning of CPLR 5015(a).

Turning to the merits of its application, the movant, Edward Frankel and Bob Randolph, Inc., submits that it has never been named in the instant lawsuit and was never properly served with a Summons and Complaint. Further, the movant corporation submits that they have a good and meritorious defense to the plaintiffs' claims; specifically, that it is in the business of *representing* manufacturers of kitchen cabinetry and thus at no time did it come into possession of the cabinetry itself. The movant corporation submits that it in no way contributed to the complaints alleged by the plaintiffs which were with respect to manufacturer's defects and/or workmanship in the installation of the kitchen in question, neither of which involved Edward Frankel and Bob Randolph, Inc.

This Court must address and dispose of the jurisdiction grounds first followed by the opening of the default (*Mayers v. Cadman Towers Inc.*, 89 AD2d 844 [2nd Dept. 1982]). This is because

if jurisdiction is lacking, this Court has no jurisdiction to do anything but vacate the judgment and dismiss the action.

The movant is a New Jersey Corporation (*see Affidavit of Bob Randolph*, ¶1; *see also Motion*, Ex. C [Annual Report Filing Form]). CPLR 302, New York's Long Arm Statute, is intended to bring into New York those non-domiciliary defendants who have contacts with the state, albeit not at the continuous or systematic level that would bring them under CPLR 301's general jurisdiction umbrella. One of the critical components of CPLR 302, however, is that the cause of action arise out of the acts that establish the jurisdictional basis. In this case, plaintiffs have failed to establish, or even allege, a relationship between the acts of the movant corporation and plaintiffs' causes of action. Accordingly jurisdiction against the movant cannot be sustained in this case. Thus, the motion by non-party Edward Frankel and Bob Randolph Inc. for an Order vacating the default judgment against the "a/k/a Frankel-Randolph Group Inc" is granted and to the extent that there is a case against the movant, plaintiffs' action as against the movant is dismissed against it. Having found that jurisdiction against the movant does not exist, this Court need not address the discretionary grounds under CPLR 5015(a)(1). Further, as this Court has found that there is no action asserted against the movant, there is no need to "dismiss" plaintiffs' action.

Seringer Motion
[Motion Sequence #013]

In addition to moving to vacate the default judgment entered

against him, defendant John Seringer, also seeks to extend the time, *nunc pro tunc*, for his response to plaintiffs' discovery demands, for a period of 15 days, until February 11, 2008, thereby deeming his response as having been timely made.

The Order that is the subject of this application concerns plaintiffs' First Set of Interrogatories and First Request for the Production of Documents. Said requests for discovery is dated February 7, 2007 and plaintiffs' motion to compel said discovery was granted on July 20, 2007. After extensive motion practice, on January 2, 2008, this Court directed the defendants to respond to plaintiffs' demand within twenty days "from the date of entry of the instant Order." This Order was entered on January 7, 2008. Thus, defendants's responses to plaintiffs' demands were due on January 27, 2008 which incidentally fell on a Sunday allowing the responses to be served by January 28, 2008. Pursuant to the January 2, 2008 Order, the plaintiffs were permitted to file a Note of Issue for an Inquest in the event that the defendants failed to respond to plaintiffs' demands. Accordingly, on January 30, 2008, plaintiffs filed their Note of Issue and on February 6, 2008, plaintiffs served their Note of Issue for an Inquest to determine the amount of damages against Seringer.

Defendant, Seringer, submits that on February 8, 2008 (2 days after plaintiffs served their Note of Issue on Seringer), it provided its Response to plaintiffs' demands. By letter dated February 11, 2008, counsel for plaintiff rejected Seringer's response as untimely. Defendant Seringer thereafter sent a reply

letter, dated February 13, 2008, in which he requested plaintiff's counsel to accept the discovery responses.

In support of its instant application, defendant Seringer urges this Court, "to extend the time fixed by any statute rule or order upon such terms as may be just and upon good cause shown" - namely, law office failure (CPLR 2004). Counsel for defendant states that "[i]n this particular instance, our office had been undergoing enormous burdens on its staff in dealing with the influx of cases of various types. After receiving the Court's Order, your affirmant had inadvertently failed to record this particular deadline on its calender and the deadline was, unfortunately, not met in accordance with the Court's directive" (*Aff in Support of Motion*, ¶10).

A party can move to vacate a default if it is excusable and there is a meritorious claim or defense (CPLR 5015[a][1]). The court may consider law office failure as an excuse (CPLR 2005; *Putney v Pearlman*, 203AD2d 333 [2nd Dept. 1994]; *Vierya v Briggs & Stratton Corp.*, 166 AD2d 645 [2nd Dept. 1990]). However, "a pattern of willful default and neglect" should not be excused (*Gannon v Johnson Scale Co.*, 189 AD2d 1052 [3rd Dept. 1993]; *Chery v Anthony*, 156 AD2d 414, 416 [2nd Dept. 1989]).

In this case, it is plainly clear that Seringer's response to plaintiffs' discovery demands is over one year late with the initial request having been made by the plaintiffs on February 7, 2007. In his application for relief from the Court's Order dated

January 2, 2008, Seringer fails to explain his total failure to respond at all to the plaintiffs' demand for the production of documents. Furthermore, since the commencement of this action over two years ago, it is plainly clear that Seringer has disregarded not only the January 2, 2008 Order of this Court, but all previous discovery Orders as well. In addition, at the outset, Seringer defaulted in answering the complaint. This was "excused" however upon plaintiffs' motion for a default judgment, and Seringer's service of his answer. Seringer thereafter repeatedly ignored Court ordered discovery and conferences and failed to participate in any of the extensive motion practice before this Court. The January 2, 2008 Order of this Court was issued as a result of the plaintiffs' motion, pursuant to CPLR 3126, seeking to strike the pleadings of, *inter alia*, defendant Seringer. The Order was unconditional in stating, in pertinent part that:

> [T]he defendants shall reply to the demands for Interrogatories and Documents within 20 days from the date of entry of the instant Order. The failure to respond *will* result in the striking of the defaulting parties answer and plaintiff shall be permitted to file a Note of Issue for an inquest against the non-complying parties.

This Order of the Court was again violated herein. Notably, defendant, Seringer, failed to move, pursuant to CPLR 2004, for an extension of the subject time either prior to or after its expiration under CPLR 2004.

As the Court of Appeals has made clear, "if the credibility of court order and the integrity of our judicial systems are to be maintained, a litigant cannot ignore court orders with impunity"

(*Kihl v. Pfeffer*, 94 NY2d 118 [1999]). However, the preference within the court system is to decide cases on their merits (*Lichtman v. Sears, Roebuck & Co.*, 236 AD2d 373 [2nd Dept 1997]; *Davies v. Contel of New York*, 155 AD2d 809 [3rd Dept. 1989]).

In this case, while this Court is not entirely persuaded that Seringer's conduct was not willful and intentional (*cf.*, *Perellie v. Crimson's Rest.*, 108 AD2d 903, 904), it cannot be overlooked that defendant has served its responses, albeit belatedly, to plaintiffs' discovery demands. Moreover, in the absence of any true prejudice to the plaintiffs or other parties, this Court finds that defendants have shown a good cause for extension of time for his response to plaintiffs' discovery demands as set forth in the January 2, 2008 Order (*Judith S. v. Howard S.*, 46 AD3d 318 [1st Dept. 2007]). Defendant's motion, pursuant to CPLR 2004 extending the time to serve his response to plaintiffs' discovery demands by 15 days is therefore granted.

Having proffered an acceptable excuse for the default, this Court must next examine whether defendant, Seringer has a meritorious defense or claim. While courts now have discretion to consider law office failure as an excuse for default (CPLR 2005, 3012 [d]), the Court of Appeals has held that the defaulting party is still required to supply an affidavit of merits and a reasonable excuse for the delay (*Fidelity & Deposit Co. of Maryland v. Arthur Andersen & Co.*, 60 NY2d 693 [1983]; *Stolowitz v. Mt. Sinai Hosp.*, 60 NY2d 685 [1983]; *Canter v. Mulnick*, 60 NY2d 689 [1983]).

Defendant, in order to satisfy the Court that he has a meritorious defense is required to produce an "affidavit of merit" by one with first-hand knowledge of the facts (*Benadon v. Antonio*, 10 AD2d 40 [1st Dept., 1960]). It is not necessary that such affidavit be labeled as an "affidavit of merits;" rather, the party seeking to vacate the default judgment, must present in admissible form facts which demonstrate a meritorious defense (*Pyatigorsky v. Derbaremdiker*, 11 Misc.3d 1086(A) [Sup. Ct. Kings 2006]).

With respect to the showing of a meritorious defense to the action, a verified answer may constitute a sufficient statement of merit for purposes of vacating a default (CPLR 105[t]; *Salch v. Paratore*, 60 NY2d 851, 853 [1983]; *Buderwitz v. Cunningham*, 101 AD2d 821, 822 [2nd Dept. 1984]). In this case, this Court finds that defendant's verified answer to the complaint, which contains general denials and asserts ten affirmative defenses and two cross claims, constitutes a sufficient statement of merits (*Buderwitz v. Cunningham*, supra at 822). Thus, this Court deems this to be a sufficient statement of merit by Seringer (*Leogrande by Leogrande v. Glass*, 106 AD2d 431 [2nd Dept. 1984]). Accordingly, defendant's motion, pursuant to CPLR 5015(a), relieving him from the terms of this Court's Order dated January 2, 2008 is granted.

Under these circumstances, while Seringer's motion, pursuant to 22 NYCRR §202.21(e) vacating the Note of Issue filed by the plaintiffs would ordinarily be granted, in the absence of any indication that there remains any outstanding discovery, Seringer's

motion to vacate the Note of Issue is denied.

Peter Charles Defendants' Motion
[Motion Sequence #014]

The Peter Charles Defendants also move, for an Order, relieving them from the terms of this Court's unconditional January 2, 2008 Order which directed the defendants to respond to plaintiffs discovery demands within 20 days therefrom. Like defendant Seringer's motion, the Peter Charles defendants also seek to vacate the Note of Issue filed by the plaintiffs on January 30, 2008.

In support of their motion, counsel for the Peter Charles Defendants submits that "[t]he 'non-compliance' of my clients with this Court's order of January 2, 2008 was a result of a confusing set of circumstances which may very well include 'law office failure' or 'legal malpractice' on the part of Altschul & Goldstein, my client's prior counsel" (*Aff in Support of Motion*, ¶2). Counsel also maintains that "[i]n point of fact there was compliance with this Court's order of July 20, 2007 and the order of January 2, 2008 should not have been directed at [the Peter Charles Defendants]" (*Id*).

In support of their motion, defendants submit a copy of their responses to plaintiffs' discovery demands which was served, pursuant to this Court's Order dated July 20, 2007, on September 14, 2007. It is undisputed by counsel for the remaining parties herein that they, in fact, received the September 14, 2007 Peter

Charles Defendants' responses to plaintiffs' discovery demands . Defendants submit that while it served its responses on September 14, six days later on September 20, 2007, plaintiffs moved, pursuant to CPLR 3126 to strike their (among others) pleadings. Counsel submits that "for some unknown reason", his client's prior counsel for whom he has been substituted, did not submit any opposition papers to this motion to strike and thus the unconditional order of January 2, 2008 was issued. Notably, the Peter Charles Defendants' current counsel, Thomas A. Williams, Esq., was substituted as attorneys for the Peter Charles Defendants on February 28, 2008.

Under these circumstances, and keeping in mind the preference of this Court to decide cases on the merits, this Court finds that in this case, not only have the Peter Charles Defendants proffered an acceptable excuse (namely, law office failure) but they have also provided a meritorious defense. The defendants complied with this Court's July 20, 2007 Order and thus there was no basis for the motion to strike the pleadings. As stated above, with respect to the showing of a meritorious defense to the action, an affidavit of merit is required, the sufficiency of which is a matter generally left to the discretion of Court (*Leogrande by Leogrande v. Glass*, supra). As with defendant Seringer, the Peter Charles Defendants' Verified Answer constitutes a sufficient statement of merit for purposes of vacating their default (CPLR 105[t]; *Salch v. Paratore*, 60 NY2d 851, 853 [1983]; *Buderwitz v. Cunningham*, supra).

The Peter Charles Defendants' answer contains general denials and asserts an affirmative defenses and one cross claims. This is a sufficient substitute for an "affidavit of merits" required to vacate the default entered as against them (*Buderwitz v. Cunningham*, supra at 822).

Accordingly, defendants' motion, pursuant to CPLR 5015(a), relieving him from the terms of this Court's Order dated January 2, 2008 is granted.

As with Seringer's motion, while the Peter Charles Defendants' motion, pursuant to 22 NYCRR §202.21(e) vacating the Note of Issue filed by the plaintiffs would ordinarily be granted, in the absence of any indication that there remains any outstanding discovery, defendants' motion to vacate the Note of Issue is denied.

This decision constitutes the order of the court.

Dated: MAY 22 2008

Kenneth A. Davis, J.S.C.