[* 1]
SCANNED ON 3/6/2009

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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Davidoff Malito & Hutcher

- v -

Amba Sharma and Realm

INDEX NO. 100740/07

MOTION DATE 1/30/09

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

FILED
MAR 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of defendants' pursuant to CPLR § 2221 for leave to reargue the Court's prior decision of October 6, 2008 is granted; and it is further

ORDERED that the branch of defendants' pursuant to CPLR § 2221 for leave to renew the Court's prior decision of October 6, 2008 is granted; and it is further

ORDERED that the branches of defendants' motion for an order vacating his default, pursuant to CPLR 5015 and for leave to file a late answer, *nunc pro tunc*, and compel the acceptance of pleading untimely served, pursuant to CPLR § 3012 (d), and to vacate the Note of Issue is granted, and the Note of Issue shall be stricken; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the parties appear in Part 35 for a preliminary conference on March 31, 2009, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: 3/4/09

J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

DAVIDOFF MALITO & HUTCHER, LLP,

Plaintiff,

-against-

AMBA SHARMA and REALM, L.L.C.,

Defendants.

----------x

Index No. 100740-2007

Sequence #002

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover legal fees for services rendered, defendants Amba Sharma ("defendant") and Realm, LLC (collectively, "defendants"), move pursuant to CPLR § 2221 for leave to reargue and renew the Court's prior decision of October 6, 2008, to vacate their default, pursuant to CPLR 5015, for leave to file a late answer, *nunc pro tunc*, or compel the acceptance of pleading untimely served, pursuant to CPLR § 3012 (d), and to vacate the Note of Issue.

Factual Background

On July 21, 2004, the plaintiff and defendant entered into a retainer agreement for legal services to be performed by plaintiff for the defendant and defendant Realm, LLC ("Realm") (collectively, "defendants"). On July 5, 2006, plaintiff ceased representing defendants after defendant informed plaintiff that its legal services were no longer required. On July 12, 2006, plaintiff sent Defendants' invoiced bill (the "Invoiced Statement") for the legal services rendered by the Plaintiff, as calculated pursuant to plaintiff's hourly rates, pursuant to the Retainer Agreement. Having no response to the Invoiced Statement, on October 20, 2006, plaintiff served defendants with a demand notice and notice of the defendants' rights to fee arbitration. Defendants did not request a fee arbitration.

After plaintiff commenced this action, plaintiff effected personal service of the summons and complaint upon defendant on January 20, 2007, and upon Realm on January 30, 2007.

Defendants served an untimely answer by regular mail on or about June 20, 2007, more than four (4) months after it was due. On June 25, 2007, plaintiff rejected the Answer by serving defendants with plaintiff's Notice of Rejection. On July 9, 2007, plaintiff served its Reply to defendants' counterclaim, in which the plaintiff denied the allegations of defendants' counterclaim and asserted as an affirmative defense that the Answer was untimely and as a result, a nullity.

On June 30, 2008, plaintiff served a Notice of Motion seeking summary judgment, together with such other and further relief deemed just and proper (the "Motion"). Defendants submitted their opposition papers, which included the defendant's affidavit dated August 7, 2008. In response, plaintiff submitted a reply affirmation and affidavit. The Court granted plaintiff a default judgment based on the fact that defendants' late answer was untimely and a nullity and upon defendants' failure to offer a reasonable excuse for defendants' default.

Defendants' Motion

Defendant argues that the Court misapprehended matters of law when it granted plaintiff's motion due to the defendants' late filing of his answer, when the plaintiff never asked for such relief.

Defendant contends that plaintiff's Notice of Motion for June 24, 2008 requested relief pursuant to CPLR § 3212's summary judgment provisions. Pursuant to CPLR § 2214 (a), a notice of motion shall specify the supporting papers upon which the motion is based, the relief demanded and the grounds therefor. However, nowhere in the Notice of Motion was there a

request for relief based upon the late filing of the defendants' answer. While plaintiff's supporting documents did mention that the answer served was late, as the request for relief was not included in the Notice of Motion, neither defendant nor defendants' counsel believed that the court would act upon those allegations. Thus, although defendant responded to the allegations of a late filing, defendant gave "short shrift" on this issue. Plaintiff never requested a default judgment in its Notice of Motion, or that defendants' answer be stricken, based upon the late filing of the answer. Accordingly, defendant never attempted to adequately answer the allegations made in the plaintiff's papers in support of the plaintiff's motion for summary judgment as to why he filed a late answer. Granting relief that the movant never requested and defendant never knew he needed to argue against, the defendants' right to due process has been violated.

Defendants' papers in opposition concentrated upon the issue of summary judgment, which the plaintiff did request in his Notice of Motion. As there are issues of fact in this matter, which were enunciated in his papers in opposition, plaintiff is not entitled to summary judgment.

The Court also never demanded a hearing on the issue of whether the defendants' answer should be stricken and whether plaintiff should be granted a judgment based upon the defendants' default.

In light of the above, the following facts were not included in defendants' papers: defendant was traveling when the complaint was purportedly served and he does not recall receiving it at the time that the plaintiff claims that the summons and complaint were served. Once defendant returned to New York, he was bombarded with the responsibility of taking care of his brother, who was gravely ill at the time, that and required the defendant's complete

attention. When defendant finally had the mental wherewithal to respond to the Complaint, defendant spoke with plaintiff, who despite being attorneys, never informed defendant that he might need to respond to the summons and complaint with which he was served. Instead, the parties negotiated, in what defendant believed was good faith. It was only after defendant came to a point where he realized that negotiations would not be fruitful that he retained counsel to respond to the summons and complaint. As the court pointed out, defendant would have to demonstrate both a reasonable excuse for his late filing of the answer and a meritorious claim. The court further noted that it did not have to reach, and did not reach, the question of whether defendant demonstrated a meritorious claim because he did not demonstrate a reasonable excuse for his delay.

The law favors resolution of cases on the merits. Excusable neglect, or reasonable excuse for the late filing of the answer by defendant, which resulted in the Court finding defendant to be in default, is present herein. There was no willfulness in the late filing of the answer by defendant.

Since good-faith efforts to pursue settlement negotiations in a personal injury action with alleged tort-feasors' insurance carrier constituted reasonable excuse for delay in serving the complaint, defendant herein, who began and continued good faith negotiations with plaintiff in order to resolve this matter, is entitled to an extension of time to serve his answer. It was only when those negotiations broke down that defendant hired counsel and filed an answer.

As defendants' earlier opposition papers demonstrate, they have a meritorious defense to this action. The retainer agreement under which plaintiff seeks to recover, wherein plaintiff, a law firm, served as a lobbyist for a contingent fee, is in violation of New York Legislative Law §

l-K, which is a class A misdemeanor. An inquiry into the merits of this case is absolutely required if attorneys, as officers of the court and in their roles as attorneys, are violating the law and possibly committing criminal acts. Thus, the default judgment should be vacated and this matter should proceed to discovery.

Further, contrary to the statements made in plaintiff's note of issue that discovery has been waived, no such waiver has been given. No discovery has commenced in this matter. Accordingly, defendants' motion to vacate the note of issue must be granted.

Opposition

Defendants' motion to renew should be denied, in as much as defendants do not introduce any new facts that they did not know at the time they opposed plaintiff's motion. Further, defendants do not claim that any of the newly proffered alleged facts were recently discovered by the defendants. Nor have the defendants raised a valid excuse for their failure to raise the newly proffered alleged facts at the time of the original application.

Further, defendants have not offered a "reasonable justification" for defendants' failure to allege within their Opposition the defendants' newly proffered alleged facts. Defendants had adequate notice of the relief requested and granted by the Court, and did not suffer any prejudice due to any alleged lack of notice. The claim that plaintiff's motion was titled "summary judgment" and not "entry of default judgment" is a "red herring." As stated within paragraph thirty-nine (39) of plaintiff's Motion, plaintiff prayed for entry of a "judgment" against the defendants, based upon defendants' failure to offer a reasonable excuse for their default or a meritorious defense. Further, plaintiff's Motion also sought ". . . such other and further relief th[e] Court may deem just and proper" in the prayer for relief. Plaintiff's Motion sought

judgment and such other and further relief against defendants based on numerous grounds, including, defendants' failure to timely file an answer, that defendants' late answer was a nullity, and that defendants failed to move for an order extending their time to answer. Clearly, defendants had notice that a default judgment may be entered against them. The mere fact that defendants inadequately addressed their default is not an excuse to allow defendants to allege new facts.

Plaintiff argues that defendants' renewal motion should be denied since the newly proffered alleged facts do not support any change to the Court's prior determination and Order. Defendants' newly offered excuse based on defendant's alleged attempt to open a "dialogue" with plaintiff is not a valid excuse for defendants' default. Defendant's "dialogue" consisted of one telephone conversation with plaintiff that lasted less than one minute, and thus, could not have caused defendant to believe that he did not have to timely answer the Summons and Complaint, which clearly states the time by which the defendant needed to file the answer. Likewise, the defendants' newly proffered excuse for the default, based on his alleged involvement with his brother's alleged health is not a valid excuse. Defendants' vague and conclusory excuse of traveling is not a reasonable basis upon which to vacate the default, since the act of traveling would not have prevented him or his company, Realm, from answering the Summons and Complaint timely. Defendant was aware of the Complaint and that it should not be ignored. Thus, defendant has not offered any reasonable excuse for his failure to timely seek the Court's order vacating the defendants' default.

The application to reargue should be denied since defendants merely repeat the contentions they raised earlier. Defendants merely state that they "did not believe" that they had

to address all the facts stated. Defendants had notice of their default and that the plaintiff sought judgment against them, together with such other and further relief as the Court deemed just and proper.

Plaintiff also points out that defendants have not even attempted to raise any defense to plaintiff's cause of action for "account stated" and for "unjust enrichment for services provided," but merely alleged that the subject retainer agreement was an illegal contingent lobbying retainer agreement. In any event, plaintiff was never retained to "lobby" any entity. Plaintiff merely provided legal services to defendants, which included plaintiff's attempt to settle the existing zoning land use issues with the City of White Plains and to prepare for potential litigation against the City of White Plains concerning these issues involving defendants' property if they could not be settled. Nor was the Retainer Agreement a contingent retainer agreement.

Reply

Defendant adds that plaintiff has neither argued nor established the existence of prejudice should the default be vacated. Defendant insists that he had extensive conversations with plaintiff to resolve this action, and cites to cases in which illness has been deemed a reasonable excuse to vacate a default. And, procedural rules are relaxed for *pro se* litigants, which defendant was at the time he was attempting to settle the matter.

Further, as to his meritorious defense, defendant claims that plaintiff engaged elected and city officials in the City of White Plains, the Village of Scarsdale and the County of Westchester on his behalf in order to influence their decision making and legislative processes. This is lobbying by any definition and the plaintiff's own invoices, which were submitted as exhibits in both motions bear this out.

Analysis

Reargument and Renewal

The motion to reargue simply states that the Court overlooked or misapprehended the facts or the law. A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661 [1st Dept 1984]) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588; *Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27, 588 NYS2d 8 [1st Dept 1992], *lv. denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

To the extent it is argued that the Court misapprehended matters of law by granting plaintiff's motion on the basis of defendants' late filing of his answer, when the plaintiff never asked for such relief, in violation of CPLR 2214, the court grants plaintiff's motion to reargue.

In plaintiff's "Notice of Motion for Summary Judgment," plaintiff stated that it was seeking the following:

> an order pursuant to Civil Practice Law and Rules ("CPLR") §3212 granting the plaintiff summary judgment against the defendants for the relief demanded in the complaint and dismissing the defendants' answer with unsubstantiated affirmative defenses dated June

> 12, 2007 upon the grounds that no triable issues of fact exist together with such other and further relief as this court may deem just and proper.

The Court has discretion to grant "such other and further relief" that is not specially requested within a notice of motion. "A court may grant relief, pursuant to a general prayer for "such other, further, and different relief as this court may find to be just and proper" contained in the notice of motion or order to show cause, other than specifically asked for, to such extent as is warranted by the facts plainly appearing on the papers on both sides" (*Delgado v Carolee Sunderland*, 290 AD2d 40, 442 [2d Dept 2002], *rev. on other grounds*, 97 NY2d 420 [2002]; *see also*, *Lubov v Berman*, 260 AD2d 236, 687 NYS2d 628 [1st Dept 1999], *citing to HCE v 3000 Watermill Lane Realty Corp.*, 173 AD2d 774, 570 NYS2d 642 [2d Dept 1991]). In *HCE*, court explained

> The court may grant relief, pursuant to a general prayer contained in the notice of motion or order to show cause, other than that specifically asked for, to such extent as is warranted by the facts plainly appearing on the papers on both sides . . . It may do so if the relief granted is not too dramatically unlike the relief sought, and if the proof offered supports it and the court is satisfied that no one has been prejudiced by the formal omission to demand it specifically (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2214:5 at 84). (internal citations omitted).

Applying the above principles, plaintiff's argument that the Court improperly considered the late filing of defendants' answer as a basis to grant default judgment, lacks merit. Defendants' untimely answer was addressed in an entirely separate section of plaintiff's Motion, entitled in bold letters "DEFENDANT'S LATE ANSWER SHOULD BE TREATED AS A NULLITY AND JUDGMENT SHOULD BE ENTERED FOR THE PLAINTIFF." The Motion proceeds, for the next 12 paragraphs, numbered 28 through 39, to explain why judgment should be entered in favor of plaintiff, due to defendants' failure to file an answer pursuant to the time

constraints outlined in CPLR 3012. Plaintiff pointed out defendants' answer was untimely served, and moreover, that defendant never "moved" for leave to file a late answer or to compel plaintiff's acceptance of defendants' late answer. Finally, plaintiff argued that "Defendants have not offered any reasonable excuse for their failure to file a timely answer or a meritorious defense," and "as a result judgment should be entered for the Plaintiff."

Such allegations and arguments indicate that plaintiff was requesting that the Court enter judgment also on the ground of defendants' late notice. That this specific relief was not embodied in the notice of motion is inconsequential, under the circumstances, since the Notice of Motion (1) sought judgment in favor of plaintiff, albeit on grounds of summary judgment standards, and (2) sought relief the Court may deem just and proper. Therefore, it cannot be said that the Court misapplied CPLR 2214 in considering whether the grant judgment in favor of plaintiff based on defendants' untimely answer.

As to the branch of defendants' motion for renewal, such a motion, when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v Wolf*, 194 Misc 2d at 133, 751 NYS2d 707; D. Siegel New York Practice § 254 [3rd ed. 1999]). A motion to renew, "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*Beiny v Wynyard*, 132 AD2d 190, 522 NYS2d 511, *lv. dismissed* 71 NY2d 994, 529 NYS2d 277).

To the extent that defendant now seeks to supply with court with additional information to excuse his late answer, renewal is granted.

A motion to renew should not be granted based upon facts known to the moving party at the time of the prior motion, unless the moving party offers a reasonable excuse for not having submitted such facts on the prior motion (*Poag v Atkins*, 3 Misc 3d 1109 [Supreme Court New York County 2004]). However, this rule was not inflexible, and courts retained broad discretion to grant renewal, in the interest of justice, upon facts known to the moving party at the time of the prior motion (*Id.*). Effective July, 20, 1999, CPLR 2221 was amended (L 1999, ch 281) to provide a coherent structure for the treatment of motions for leave to renew and reargue (*Id.*) The amendment resulted in the addition of, among other things, a subsection honed on the motion for leave to renew (CPLR 2221[e]). This subsection provides, in pertinent part, that a motion for leave to renew:

> 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
> 3. shall contain reasonable justification for the failure to present such facts on the prior motion.
> (*Id.*)

While frequently invoking the general rule that leave to renew should be denied in the absence of a reasonable justification for the movant's failure to present the facts on the prior motion (*Poag v Atkins*, *supra*, *citing e.g. Loperena v Buona*, 309 AD2d 592, 765 NYS2d 355 [1st Dept 2003]; *Cuccia v City of New York*, 306 AD2d 2, 761 NYS2d 31 [1st Dept 2003]; *Solomon v Ryty Inc.*, 302 AD2d 275, 755 NYS2d 387 [1st Dept 2003]; *Burgos v City of New York*, 294 AD2d 177, 742 NYS2d 39 [1st Dept 2002]), the court has continued to apply the pre-amendment exception thereto permitting the exercise of discretion to grant a motion for leave to renew, based upon facts inexplicably omitted on the prior motion (*Poag v Atkins*, *supra*, citing

Trinidad v Lantigua, 2 AD3d 163, 767 NYS2d 618 [1st Dept 2003]; *Mejia v Nanni*, 307 AD2d 870, 763 NYS2d 611 [1st Dept 2003]; *Garner v Latimer*, 306 AD2d 209, 761 NYS2d 657 [1st Dept 2003]; *Daniels v City of New York*, 291 AD2d 260, 737 NYS2d 598 [1st Dept 2002]; see also Siegel's Prac Rev No 149, p 4 [2004]).

To excuse their default, defendants now add that the serious illness of defendant's brother caused him to delay seeking counsel, and that he was misled into believing that an answer was not required since plaintiff never informed defendant of such during the parties' negotiations. It is uncontested that defendant was aware of such factors at the time he submitted his previous opposition papers. However, while plaintiff's prior Motion sought judgment in its favor, its opposition papers failed to include these additional reasons. Defendants' proffered reason for failing to advise the Court of these additional facts is that defendants did not believe that the Court would entertain or grant judgment based on defendants' untimely answer. The record appears to support defendants' contention, wherein defendants' counsel stated:

> 12. Plaintiff s argument that their motion for summary judgment should be granted because of the Defendant's late filing of his answer and counterclaim is completely without merit.
> 13. The proper relief for a situation when a Defendant has not filed his answer in a timely manner is a motion for a default judgment. However, the Plaintiffs [sic] do not request this relief in their motion. Instead they are trying to bootstrap the late filing of the Defendants [sic] answer to the herein motion.
>
> * * * * *
>
> 15. Even if the Plaintiffs had filed motion for a default judgment and the default had been granted, the Defendant would have been able to vacate the default judgment as he had both a reasonable excuse for his failure to timely file an answer and a meritorious claim. Upon information and belief, the Defendant was served when he was traveling and he was unable to file a timely answer because he could not retain an attorney in a timely manner. . . .

Although defendant submitted an affidavit with his earlier opposition papers, his affidavit

is silent on the issue of his traveling, his brother's illness, or his negotiations with plaintiff.

Additional facts, which were known to the defendants, may be considered where there is a reasonable basis for failing to provide them to the court previously. Defendants' claim that it did not expect the Court to consider, let alone grant relief based on, plaintiff's request for judgment based on defendants' late answer is reasonable. It bears repeating that defendants' previous opposition stated: "The proper relief for a situation when a Defendant has not filed his answer in a timely manner is a motion for a default judgment. However, *the Plaintiffs do not request this relief in their motion*." That defendants were not under the impression that plaintiff was seeking default judgment is further buttressed by the fact that defendant's affidavit submitted in its earlier opposition focused solely on plaintiff's alleged illegal activity. Although the affirmation in support of plaintiff's Motion pointed out that defendants' answer was a nullity, warranting judgment in plaintiff's favor, it is not unreasonable for defendants to have considered plaintiff's Motion as one solely seeking summary judgment on the merits, in light of the Notice of Motion. Defendants' belief that plaintiff was not seeking a default judgment is a reasonable basis for defendants' failure to submit these additional facts to the Court on the prior motion, warranting renewal.

Default Judgment

When a defendant fails to appear in an action, the plaintiff may seek a default judgment pursuant to CPLR 3215 within one year after the default. To defeat a motion for a default judgment, defendants must establish both a reasonable excuse for defaulting as well as a meritorious defense to the action (*Stillman v City of New York*, 39 AD3d 301, 834 NYS2d 115 [1st Dept 2007]; *JP Morgan Chase Bank, N.A. v Bruno*, 57 AD3d 362, 869 NYS2d 451 [1st Dept

2008]).

Although the parties dispute the extent of the negotiations between them, plaintiff does not dispute that the parties attempted to negotiate a settlement of this matter. Therefore, coupled with defendant's absence from the jurisdiction at the time service of the pleadings were made and defendant's inability to address the Complaint due to his brother's illness, defendant presented a reasonable excuse for the delay in answering the Complaint (*see Finkelstein v East 65th Street Laundromat*, 215 AD2d 178, 626 NYS2d 148 [1st Dept 1995] [settlement negotiations between plaintiff and defendant landowner's insurer constitute a reasonable excuse for defendants' delay in answering (*Mendoza v Bi-County Paving*, 227 AD2d 302, 642 NYS2d 884 [1st Dept 1996] [factors causing delay, including settlement negotiations, made it prudent to delay service of an answer]). Further, plaintiff has not demonstrated any prejudice as a result of defendants' delay (*Pagan v Four Thirty Realty LLC*, 50 AD3d 265, 855 NYS2d 63 [1st Dept 2008] [affirming denial of motion for default judgment, where defendants demonstrated a reasonable excuse for their delay in answering the complaint, *prima facie* meritorious defenses to the complaint, and plaintiffs have not demonstrated that they suffered any prejudice as a result of the delay]).

In support of defendants' application to serve and file a late answer, defendants demonstrated a meritorious defense by tendering an affidavit supporting their claim that plaintiff acted as a lobbyist for a contingent fee, in violation of New York Legislative Law § 1-K, which is a crime.[1] According to defendant's affidavit, plaintiff specifically advised defendant of

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[1] § 1-k. Contingent retainer
(a) No client shall retain or employ any lobbyist for compensation, the rate or amount of which compensation in whole or part is contingent or dependent upon:
(1) (A) the passage or defeat of any legislative bill or the approval or veto of any legislation by the governor, (B) the terms, issuance, modification or rescission of a gubernatorial executive order, (C) the terms, approval or disapproval, or the implementation and administration of tribal-state compacts,

plaintiff's attempts to meet with certain politicians to obtain legislation that would result in the settlement of outstanding land use issues defendants had with the City of White Plains concerning defendants' real estate project. In particular, defendant attests that:

> . . . The retainer agreement I entered into with the Plaintiff was an agreement for them to lobby the City of White Plains to allow the use of the driveway to not be considered a business use.
>
> When I first met with Jeffrey Citrin, a partner at Davidoff, Malito & Hutcher, LLP, the Plaintiff's [sic] herein, I was told by Mr. Citrin that he knew the mayor of White Plains, Joseph Delfino very well. I was further informed that Mayor Delfino owed Mr. Citrin many favors because Mr. Citrin (in his capacity as the President of the Fenway Club in White Plaints [sic] had saved the City of White Plains and Mayor Delfino in particular much embarrassment in a lawsuit. The details of these events were not elaborated upon.
>
> I was further assured by Mr. Citrin that his partners were very well connected in both Albany and local government of White Plains and that they were able to lobby for the project.
>
> I explained to Mr. Citrin and he had agreed with me that this was not a case of legal merit but a matter of "who knows who."
>
> I was advised that the Plaintiff would charge me a lump sum fee for getting things done. I would be responsible for an initial retainer at the successful conclusion of their lobbying efforts the balance would be owing [sic].
>
> . . . Mr. Citrin claimed that he had one meeting with [] [M]ayor Delfino and that his partner had one with the City Attorney of White Plains. . . .
>
> Mr. Citrin later informed me that [M]ayor Delfino has asked him to wait until after the mayoral election and then everything will be done. Mr. Citrin further advised

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memoranda of understanding, or any other tribal-state agreements and any state actions related to class III gaming as provided in 25 U.S.C. 2701, or (D) the adoption or rejection of any code, rule or regulation having the force and effect of law or the outcome of any rate making proceeding by a state agency;

(2)(A) the passage or defeat of any local law, ordinance, regulation or resolution by any municipality or subdivision thereof, (B) the terms, issuance, modification or rescission of an executive order issued by the chief executive officer of a municipality, or (C) the adoption, rejection or implementation of any rule, resolution or regulation having the force and effect of a local law, ordinance or regulation or any rate making proceeding by any municipality or subdivision thereof;

(3) any determination by a state agency, either house of the state legislature, the unified court system, municipal agency or local legislative body with respect to a governmental procurement or a grant, loan or agreement involving the disbursement of public monies.

(b) No person shall accept such a retainer or employment. A violation of this section shall be a class A misdemeanor.

me that the [M]ayor has asked him not to start any lawsuit.

Upon Mr. Citrin's recommendation, we waited until after the mayoral elections. . .

.

After the election, which [M]ayor Delfino won, Mr. Citrin was able to set up a meeting with the [M]ayor Delfino, the City Planner and the City Commissioner. I was also present at this meeting, along with Mr. Citrin's partner.

The meeting was a complete dead-lock and after we left, Mr. Citrin explained that he felt that the mayor had changed his mind after being re-elected. Mr. Citrin then told me that he would start lobbying Albany through his contacts in the Governor's Office.

After the meeting with [M]ayor Delfino, I met County Executive Andy Spano at a charity fund raiser. After speaking with Mr. Spano about the project, he agreed to help. Mr. Citrin, his partner and I went to the office of Sal Carrerra, the County Executive's Director to discuss the position of the county.

* * * *

It was understood that the legal fees agreed upon in the retainer were only to be paid upon the successful conclusion of this endeavor.

Further, the Retainer Agreement indicates that plaintiff was to receive certain compensation upon successful completion of its services. Under such circumstances, the Retainer Agreement, upon which plaintiff's Complaint is based in part, arguably would be rendered null and void as an unenforceable contract. Further, defendants' verified answer indicates that plaintiff was paid $10,000 pursuant to the Retainer Agreement. An inquiry into the merits of plaintiff's complaint for legal fees due and owing, as well as defendants' defense, is warranted.

Thus, in light of the unintentional nature of the default, the reasonable nature of the excuse, and the strong judicial policy for resolving cases on their merits, defendants' motion for an order vacating his default, pursuant to CPLR 5015 and for leave to file a late answer, *nunc pro tunc*, and compel the acceptance of pleading untimely served, pursuant to CPLR § 3012 (d), and to vacate the Note of Issue is granted, and the Note of Issue shall be stricken.

As to the branch of plaintiff's prior Motion for summary judgment, which this Court did

not address in its prior order, such application is denied, without prejudice. Although defendants' answer is deemed timely by virtue of this decision, defendants' affidavit raised issues regarding his defense to this action, which should be explored through discovery.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of defendants' pursuant to CPLR § 2221 for leave to reargue the Court's prior decision of October 6, 2008 is granted; and it is further

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This constitutes the decision and order of the Court.

Dated: March 4, 2009

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD