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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

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

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CHRISTOPHER CODONER and KAREN CODONER,

Plaintiffs,

-against-

BOBBY'S BUS CO. INC. and MARIE A. RICHARD,

Defendants.

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Index No.: 16437/09
Motion Date: 4/21/10
Motion Cal. No: 7
Motion Seq. No: 1

The following papers numbered 1 to 14 read on this motion by defendants Bobby's Bus Co., Inc., and Marie A. Richard for an order: (a) pursuant to CPLR § 2221(d), granting leave to reargue this Court's January 8, 2010 Decision and Order granting plaintiffs' motion for a default judgment against defendants, pursuant to CPLR § 3215(a), on the ground that the Court overlooked or misapprehended matters of fact and/or of law; and upon granting leave to reargue, (b) pursuant to CPLR §2004, extending defendants' time to serve a Verified Answer, and/or §3012(d), compelling plaintiffs to accept defendants' Verified Answer; or, in the alternative, (c) pursuant to CPLR §5015(a), vacating the January 8, 2010 Decision and Order granting a default judgment, and permitting defendants to serve a Verified Answer.

	PAPERS NUMBERED
Order to Show Cause-Affidavits-Exhibits-Memorandum of Law	1 - 6
Affirmation in Opposition-Exhibits	7 - 8
Reply Affirmation-Exhibits	9 - 11
Sur-Reply-Exhibits	12 - 14

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

This is a negligence action to recover damages for personal injuries allegedly sustained by plaintiff Christopher Codoner ("plaintiff"), as a result of motor vehicle accident on January 30, 2009, at the intersection of Crooke Avenue and St. Pauls Place, in Brooklyn, New York, in which the vehicle owned by defendant Bobby's Bus Co., Inc. ("Bobby Bus Co."), and operated by defendant Marie A. Richard ("Richard"), allegedly failed to stop at a stop sign, and hit plaintiff's vehicle. This action was commenced by filing on or about June 19, 2009; defendant Bobby Bus Co. was served by service upon the Secretary of State on July 3, 2009, and the additional mailing was made on

August 6, 2008; defendant Richard also was served on July 3, 2009, by service upon a person of suitable age and discretion at her dwelling place. By Decision and Order dated January 8, 2010, plaintiffs' motion for a default judgment was granted, and defendants' request for an extension of time to answer was not considered, upon the reasoning:

> Defendants' extension request is based solely upon a legal argument asserted in the affirmation of defendants' attorney in opposition to plaintiff's motion for a default judgment and summary judgment. CPLR § 3012(d) sets forth the procedure for such an application, providing in pertinent part:
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> > Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.
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> Pursuant to that provision, a "defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action, when [] moving to extend the time to answer or to compel the acceptance of an untimely answer [see, Juseinoski v. Board of Educ. of City of N.Y., 15 A.D.3d 353, 356, 790 N.Y.S.2d 162 (2nd Dept.2005); Ennis v. Lema, 305 A.D.2d 632, 633, 760 N.Y.S.2d 197(2nd Dept.2003)." Lipp v. Port Authority of New York and New Jersey, 34 A.D.3d 649 (2nd Dept. 2006); see, Jamieson v. Roman, 36 A.D.3d 861(2nd Dept. 2007).
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> Here, defendants did not cross move for an extension of time to answer. See, Grinage v. City of New York, supra ["in the absence of a cross motion for such relief. . ., the Supreme Court erred in granting . . . leave to serve a late answer"]; Hosten v. Oladapo, 44 A.D.3d 1006 (2nd Dept. 2007) [The court erred in deeming the defendant's answer timely filed and served in the absence of a cross motion for this relief and without the necessary showing of a reasonable excuse for the default and a meritorious defense.]; Giovanelli v. Rivera, 23 A.D.3d 616 (2nd Dept. 2005)["Supreme Court should not have extended his time to serve an answer in the absence of a cross motion for such relief"]; Blam v. Netcher, 17 A.D.3d 495 (2nd Dept. 2005)[in the absence of a cross motion the Supreme Court should not have considered the defendant's informal request for an extension of time to answer]. In the absence of a cross motion to extend, this Court declines to extend defendants' time to answer.

It is upon the foregoing that defendants now move, inter alia, for leave to reargue the January 8, 2010 Decision and Order, contending that, notwithstanding the cases relied upon by the Court in reaching its conclusion, the court has discretion to extend a defendant's time to answer even in the absence of a cross motion.

An application for leave to reargue, pursuant to CPLR § 2221(d), "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." See, Everhart v. County of Nassau, 65 A.D.3d 1277; Cruz v. Masada Auto Sales, Ltd., 41 A.D.3d 417 (2nd Dept. 2007); Collins v. Stone, 8 A.D.3d 321 (2nd Dept. 2004); Delgrosso v. 1325 Ltd. Partnership, 306 A.D.2d 241 (2nd Dept. 2003). The purpose of a motion for leave to reargue "[] is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." Foley v. Roche, 68 A.D.2d 558, 567 (2nd Dept. 1979). It is also not an opportunity for an unsuccessful party to present arguments not originally presented. Giovanniello v. Carolina Wholesale Office Mach. Co., Inc., 29 A.D.3d 737 (2nd Dept. 2006); Pryor v. Commonwealth Land Title Ins. Co., 17 A.D.3d 434 (2nd Dept. 2005). Amato v. Lord & Taylor, Inc., 10 A.D.3d 374 (2nd Dept. 2004). It is within the court's discretion to grant leave to reargue when it appears that the court may have "overlooked certain facts and misapplied the law in its initial order." Dunitz v J.L.M. Consulting Corp., 22 A.D.3d 455, 456 (2nd Dept. 2005); Marini v Lombardo, 17 A.D.3d 545 (2nd Dept. 2005). Based upon the argument asserted, this Court finds no basis upon which to grant the motion to reargue, as defendants failed to establish a misapprehension of the facts or the law by this Court. Arguendo, even if this Court granted reargument, which it has not, it would still adhere to its original decision regarding this issue, as a review of the decisional law cited in the prior decision in no way establishes that the grant of leave to file a late answer in the absence of a cross motion is discretionary. Thus, the branch of motion, pursuant to CPLR § 2221(d), granting leave to reargue this Court's January 8, 2010 Decision and Order which granted plaintiffs a default judgment against defendants, and upon granting leave to reargue, extending defendants' time to serve a verified answer, and/or compelling plaintiffs to accept defendants' verified answer, is denied. Notwithstanding, that branch of the motion seeking, in the alternative, pursuant to CPLR §5015(a), vacatur of the underlying decision and permitting defendants to interpose an answer, stands on a different footing.

In support of that branch of the motion, defendants contend that it did not receive a copy of the pleadings, and was not aware of this action until is receive plaintiffs' underlying motion papers for default. Defendants further contend that in addition to a reasonable excuse for its default, it has a meritorious defense, despite plaintiffs' contentions to the contrary, as defendant Richard, in her affidavit, alleges that she stopped at the stop sign twice before entering the subject intersection. Defendants assert that their proposed answer does not raise any jurisdictional issues or affirmative defenses, and plaintiffs would not be prejudiced by their 34 day delay in answering. Lastly, defendants contend that this Court, in its underlying decision, properly determined that they proffered both a reasonable excuse and meritorious defense. Thus, defendants assert that they are entitled to vacatur of their default.

Pursuant to CPLR § 5015(a), "the court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of: (1) excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry." CPLR 5015 (a)(1) permits a court to vacate a default where the [movant] demonstrates both a reasonable excuse for the default and the existence of a potentially meritorious cause of action or defense. See, 330 Wythe Ave. Associates, LLC v. ABR Const., Inc.,55 A.D.3d 599 (2nd Dept. 2008); Hodges v. Sidial, 48 A.D.3d 633 (2nd Dept. 2008); see, also, Mutual Marine Office, Inc. v. Joy Const. Corp., 39 A.D.3d 417(1st Dept. 2007); Energy Brands, Inc. v. Utica Mut. Ins. Co., 38 A.D.3d 591 (2nd Dept. 2007); Ortega v. Bisogno & Meyerson, 38 A.D.3d 510 (2nd Dept. 2007); Gironda v. Katzen, 19 A.D.3d 644 (2nd Dept. 2005). The determination of what constitutes a reasonable excuse is left to the sound discretion of the court. See, Grinage v. City of New York, 45 A.D.3d 729 (2nd Dept. 2007); Mjahdi v. Maguire, 21 A.D.3d 1067 (2nd Dept. 2005); Abrams v. City of New York, 13 A.D.3d 566 (2d Dept. 2004); Scarlett v. McCarthy, 2 A.D.3d 623 (2nd Dept. 2003); see, also, Gironda v. Katzen, 19 A.D.3d 644 (2nd Dept. 2005); Liotti v. Peace, 15 A.D.3d 452 (2nd Dept. 2005). "In making that discretionary determination, the court should consider relevant factors, such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits (citations omitted)." Moore v. Day, 55 A.D.3d 803 (2nd Dept. 2008); see, White v. Incorporated Village of Hempstead, 41 A.D.3d 709 (2nd Dept. 2007).

From the outset, defendants correctly assert that this Court made a finding in its underlying decision that defendants' allegations were sufficient to absolve their default. This Court stated, in pertinent part, the following:

> Defendant Bobby Bus Co. alleges that it did not receive a copy of the summons and complaint until its receipt of the instant motion for a default judgment; Robin Burke, defendant Bobby Bus Co.'s company claims handler, whose office is located at 145-40 155th Street, Jamaica, New York, alleges that she never received the summons and complaint allegedly served by the Secretary of State. Defendant Richards, in her affidavit, alleges that although she previously lived at 117 Ruxton Street, Uniondale, New York, she moved to Brooklyn, New York, and knows no one by the name of "Kristy Richard." She also alleges that:
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> > While traveling on Crooke Avenue, I brought my vehicle to a stop at a stop sign located at the intersection with St. Paul's Place. After coming to a complete stop, I looked both ways and slowly proceeded forward. I then came to a second stop and looked both ways again. While at a stop at the stop

> sign, I observed two parked vehicles and a vehicle located approximately 1 to 2 and ½ blocks away at the intersection. Since the intersection was clear, I slowly proceeded into the intersection at 10-15 miles per hour. The accident happened approximately 10 seconds after I observed the vehicle at the intersection. I did not observe the vehicle again prior to the accident. Plaintiff's vehicle came out of nowhere.

Based upon these allegations, defendants argue that they are entitled to an extension of time to answer.

At first blush, defendants allegations would appear to be sufficient to prevent the entry of a default judgment against them. However, even if this Court would contemplate exercising its discretion and set aside defendants' default in answering [see, Calderon v. 163 Ocean Tenants Corp., 27 A.D.3d 410, 411 (2nd Dept. 2006)], what is lacking is a basis for an extension of time to answer.

Thus, the proper inference to be drawn from the aforementioned is that defendants made a proper showing that would have likely lead to the denial of plaintiffs' underlying motion for default, but for the fact that defendants failed to cross-move for an extension of time to answer the complaint. And now that defendants have moved to vacate their default, the allegations asserted here, which are the same ones asserted in the first instance, are no less compelling to this Court. Thus, this Court finds that defendants have made a proper showing, in the first instance on the underlying default motion, as well as on the current application, entitling them to vacatur.

In any event, the determination whether to vacate a default is generally left to the sound discretion of the motion court, and will not be disturbed if the record supports such determination. White v. Incorporated Village of Hempstead, 41 A.D.3d 709 (2nd Dept. 2007); Calderon v. 163 Ocean Tenants Corp., 27 A.D.3d 410, 411 (2nd Dept. 2006). Moreover, where there is no evidence of willfulness, deliberate default, or prejudice to plaintiff, public policy and the interest of justice are best served by permitting resolution of a matter on its merits. See, Montgomery v. Cranes, Inc., 50 A.D.3d 981 (2nd Dept. 2008); Finkelstein v. Sunshine, 47 A.D.3d 882 (2nd Dept. 2008); White v. Incorporated Village of Hempstead, 41 A.D.3d 709 (2nd Dept. 2007); Nickell v. Pathmark Stores, Inc., 44 A.D.3d 631 (2nd Dept. 2007); Jolkovsky v. Legeman, 32 A.D.3d 418 (2nd Dept. 2006); Krieger v. Cohan, 18 A.D.3d 823 (2nd Dept.2005); Phillips v Goord, 16 A.D.3d 422 (2nd Dept. 2005).

Accordingly, that branch of the motion for vacatur of defendants' default is granted and all judgments and orders flowing from such default, hereby are vacated and set aside. Defendants shall serve an answer upon plaintiffs within twenty (20) days of service of a copy of this order with notice of entry. The parties are further directed to appear for a Preliminary Conference in the Preliminary Conference Part, courtroom 314, on August 3, 2010, at 11:30a.m., at which time all discovery concerns shall be addressed.

Dated: June 30, 2010

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J.S.C.