

**Toto v Israel**

2011 NY Slip Op 32658(U)

October 5, 2011

Sup Ct, Nassau County

Docket Number: 23129/10

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

JEAN ANN TOTO, as Administrator of the Estate of  
FRANK TOTO, and JEAN ANN TOTO, as  
Representative of the Heirs and Distributees of  
FRANK TOTO, deceased, and JEAN ANN TOTO,  
Individually,

Plaintiff,

- against -

A. ISRAEL, M.D.,

Defendant.

TRIAL/IAS PART 32  
NASSAU COUNTY

Index No.: 23129/10  
Motion Seq. No.: 02  
Motion Date: 08/18/11

**The following papers have been read on this motion:**

	Papers Numbered
Order to Show Cause, Affirmation, Affidavit and Exhibits	1
Affirmation in Opposition	2
Reply Affirmation	3

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

Defendant A. Israel, M.D. ("Dr. Israel") moves, pursuant to CPLR § 5015(a)(1), CPLR § 5015(a)(4) and CPLR § 317 for an order vacating and setting aside a Default Judgment of this Court entered on June 29, 2011; and moves, pursuant to CPLR § 3211(a)(8), for an order dismissing plaintiffs' Verified Complaint against him on the ground that plaintiffs failed to properly effectuate service of the Summons and Verified Complaint upon him in accordance with CPLR § 308; or, in the alternative, moves, for an order extending his time to appear in this action

and compelling plaintiffs' counsel to accept his Answer, attached to the instant motion, *nunc pro tunc*. Plaintiffs oppose the motion.

Defendant Dr. Israel's counsel submits that it currently represents defendants North Shore University Hospital at Manhasset ("NSUH"), Steven Blau, M.D. and Eric Gandras, M.D. in a separate action, brought by plaintiffs in this action, in the Nassau County Supreme Court under Index Number 17249/09. Said action involves claims that the aforementioned defendants negligently performed an outpatient liver biopsy on decedent Frank Toto on December 15, 2008, and thereafter improperly discharged decedent Frank Toto from the hospital on December 17, 2008, allegedly resulting in his subsequent death on December 18, 2008. During the course of discovery in the aforementioned case, plaintiffs demanded the identity and last known address for a former resident and potential non-party witness, Dr. A. Israel (now the defendant in the instant action). At a Certification Conference held on January 25, 2011, before the Honorable Thoms A. Adams, J.S.C., defendants were Court-Ordered to provide plaintiffs with the last known address for Dr. Israel. Following said Certification Conference, defendants' counsel's office was advised that the last known address on file at NSUH for former resident Dr. Israel was 320 Fairmont Avenue, Apt. 207, Jersey City, New Jersey 07306 and they provided this information to counsel for plaintiffs.

Counsel for defendant Dr. Israel further submits that, on or about July 8, 2011, plaintiffs served it with a copy of this Court's June 29, 2011 Decision and Order granting plaintiffs' Motion for Default Judgment against defendant Dr. Israel. Following receipt of said Order, counsel for defendant Dr. Israel contacted plaintiffs' counsel since plaintiffs' counsel never served them with a copy of the underlying motion and they were not aware that plaintiffs had

served any papers on Dr. Israel.

Counsel for defendant Dr. Israel argues that the instant action brought against defendant Dr. Israel is for alleged medical malpractice and wrongful death, where plaintiffs allege that decedent Frank Toto was prematurely discharged from NSUH. The allegations stem from the same care and treatment as those allegations raised in the case against the defendants in the initial Nassau County Supreme Court action, Index Number 17249/09. Counsel for defendant Dr. Israel states, “[a]lthough we represent the hospital and several attending physicians in an action stemming from the same treatment, and (*sic*) plaintiffs’ counsel never advised our offices that they had served this former resident with this new complaint nor that they were seeking a default judgment for his failure to answer. Following our receipt of the Default Judgment, this office contacted the insurance carrier as well as hospital risk management to advise of the Default Judgment; your affirmant’s firm was requested to represent this former resident in this new action. On July 18, 2011, this office contacted Dr. Israel directly, only to be advised by him that he was unaware that he was named a defendant in this action or that a Default Judgment had been obtained against him.”

In his Affidavit in Support of the instant motion, defendant Dr. Israel submits that he resides at 30 Woodrow Road, Staten Island, New York and that he was not residing at 320 Fairmont Avenue, Apt. 207, Jersey City, New Jersey 07306 on March 19, 2011, the date plaintiffs purported served him with the Summons and Verified Complaint in the instant action by affixing a copy of same to the door at that address. Defendant Dr. Israel provides copies of his Con Edison bill and his lease to confirm that he was residing in Staten Island in March 2011. Defendant Dr. Israel asserts that he was never served with a copy of the Summons and Verified Complaint in this

action. He adds that his mother resides at the Jersey City address, but that she was residing alone on March 19, 2011, and that she is a disabled, elderly native of Egypt who suffers from age-related memory loss, that she speaks Arabic and is not literate in the English language. Defendant Dr. Israel was never notified by his mother regarding any documents purportedly served at her address regarding the instant action.

Defendant Dr. Israel also argues that he has a meritorious defense to the instant action. He confirms that he was involved in the treatment of decedent Frank Toto at NSUH during his subject hospitalization, however, at that time, he was a first year resident (PGY1) at NSUH. Based upon defendant Dr. Israel's review of decedent Frank Toto's NSUH chart, defendant Dr. Israel attests that he did not depart from any standards of medical care. "More specifically, as a first year resident, Dr. Israel did not make any independent medical decisions regarding the care and treatment of patients, and he was always under the direct supervision of attending physicians and more senior residents."

Therefore, defendant Dr. Israel submits that he has both a reasonable excuse for the purported delay in serving an Answer and a meritorious defense to said action.

Defendant Dr. Israel further argues that plaintiffs' action against him should be dismissed because service was not effectuated pursuant to CPLR § 308. Defendant Dr. Israel contends that, "although plaintiffs' Affidavit of Service indicates that the process server tried to personally deliver the Summons and Complaint to the defendant at the same address on three separate occasions, plaintiffs make no showing that any due diligence was used to confirm this address as Dr. Israel's current residence or to actually locate Dr. Israel. In light of the fact that Dr. Israel did not reside there at the time, clearly no due diligence was exercised. Plaintiff therefore failed to properly serve defendant pursuant to CPLR § 308."

In opposition to the motion, plaintiffs' counsel submits, "[t]here are several claims giving rise to the instant action. The one relevant to this proceeding involves Dr. Israel's premature discharge of Mr. Toto that was contrary to proper and accepted medical practice. Initially, an action was commenced against Steven Blau, M.D., the attending, Eric Gandras, M.D., the interventional radiologist who performed the biopsy, and North Shore University Hospital. During the course of discovery through Dr. Blau's testimony, the last to be deposed, it became apparent that it was his opinion that Mr. Toto should not have been discharged, given the complete laboratory results. Dr. Blau testified in part that he was not given all the information by the resident. As Mr. Toto was discharged by Dr. Israel, it was necessary that an action be commenced against him."

Plaintiffs' counsel further contends that a courtesy copy of the Summons and Verified Complaint (that was served on defendant Dr. Israel at the address he provided to NSUH) was sent to the attorney for all of the defendants in the first action (now defendant Dr. Israel's attorney). Plaintiffs' counsel asserts, "[y]our affirmant was contacted by Louise Derevlany, Esq. of Heidell, Pittoni, who inquired why the Summons and Complaint was sent to them. I responded as a courtesy and counsel's response was that they would not be appearing for Dr. Israel."

Plaintiffs argue that defendant Dr. Israel's motion should be denied as he has failed to establish a reasonable excuse for his default and has failed to set forth a meritorious defense. With respect to defendant Dr. Israel's alleged reasonable excuse for his default, plaintiffs state that defendant Dr. Israel was served at the address provided by the defendant hospital and how could counsel for defendant Dr. Israel in good faith argue that the address defendant Dr. Israel was served at was incorrect when they were the ones who provided counsel for plaintiffs with same? Plaintiffs submit that defendant Dr. Israel was served at the address provided by him to the

hospital and, as such, he is responsible for same and it is submitted that service thereat was proper.

With respect to defendant Dr. Israel's argument that he has a meritorious defense, plaintiffs argue that defendant Dr. Israel's Affidavit in Support of his motion "merely makes conclusory allegations and is not sufficient to manifest the requisite meritorious defense to vacate." Plaintiffs add, "Dr. Israel, in signing the discharge order of Mr. Toto, made the decision to discharge the patient. It is his signature on the order that manifests the exercise of his medical judgment...It is submitted the premature discharge was a proximate cause of Mr. Toto's untimely death."

In reply to plaintiffs' opposition, counsel for defendant replies, "[d]efendant further wishes to point out that plaintiffs counsel inaccurately described the conversation he had with your affirmant's office regarding Dr. Israel's representation. As Mr. Rubin indicates, he did send us a 'courtesy copy' of the complaint in March, 2009. The copy we received did not include a cover letter, and the complaint did not include an Affidavit of Service. Therefore, at the time we received same, Dr. Israel had not been served. Following receipt of same, Louise A. Derevlany, Esq. from this office contacted Mr. Rubin to inquire why he had sent us a copy of the complaint. As we had no authority to accept service on behalf of this doctor, he responded that he *may* serve Dr. Israel and did not know if his office had made any effort to serve him. This office informed Mr. Rubin that *at that time* we had not received any request to represent Dr. Israel, and we asked Mr. Rubin to notify us if and when he actually served Dr. Israel. Mr. Rubin never notified us of same."

Relief under CPLR § 5015(a) is available where a defendant can demonstrate a reasonable excuse for the default *and* a showing of a meritorious defense (emphasis added). See *Eugene*

*DiLorenzo, Inc. v. A.C. Dutton Lumber Co., Inc.*, 67 N.Y.2d 138, 501 N.Y.S.2d 8 (1986); *Szilaski v. Aphrodite Const. Co., Inc.*, 247 A.D.2d 532, 669 N.Y.S.2d 297 (2d Dept. 1998). The requirements are not alternative requirements and both requirements must be met in order to vacate the default judgment.

The determination of whether the circumstances of a particular case constitute an excuse sufficient to support the vacatur of a default judgment is in the sound discretion of the Court. *See Hye-Young Chon v. Country-Wide Ins. Co.*, 22 A.D.3d 849, 803 N.Y.S.2d 699 (2d Dept. 2005); *Harcztark v. Drive Variety, Inc.*, 21 A.D.3d 876, 800 N.Y.S.2d 613 (2d Dept. 2005); *Bergdoll v. Pentecoste*, 17 A.D.3d 613, 794 N.Y.S.2d 78 (2d Dept. 2005).

The Court additionally notes that justice disfavors defaults and prefers that issues be resolved on the merits. *See Ahmad v. Aniolowisk*, 28 A.D.3d 692, 814 N.Y.S.2d 666 (2d Dept. 2006); *Eichen v. George B. Jr. Realty, Inc.*, 154 A.D.2d 428, 547 N.Y.S.2d 236 (2d Dept. 1989). *Matter of Murray v. Matusiak*, 247 A.D.2d 303, 609 N.Y.S.2d 278 (1<sup>st</sup> Dept. 1998).

When viewing the moving papers in their best light, the Court finds that defendant Dr. Israel has demonstrated both a reasonable excuse and a meritorious defense. The Court therefore exercises its discretion and determines that the circumstances presented in the instant motion by defendant Dr. Israel support the vacatur of the default judgment against him.

Accordingly, defendant Dr. Israel's motion, pursuant to CPLR § 5015(a)(1), CPLR § 5015(a)(4) and CPLR § 317 for an order vacating and setting aside a Default Judgment of this Court entered on June 29, 2011 is hereby **GRANTED**.

Defendant Dr. Israel's motion, pursuant to CPLR § 3211(a)(8), for an order dismissing plaintiffs' Verified Complaint against him on the ground that plaintiffs failed to properly effectuate service of the Summons and Verified Complaint upon him in accordance with CPLR §

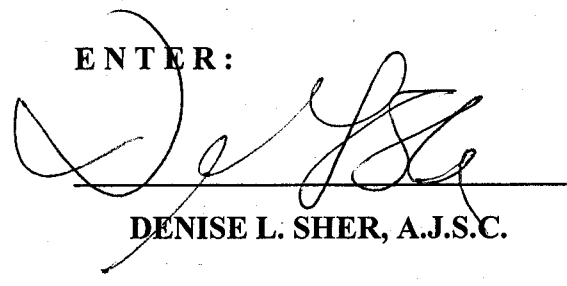
308 is hereby **DENIED**. However, the Court is hereby ordering plaintiffs' counsel to accept defendant Dr. Israel's Answer, attached to the instant motion as Exhibit J, *nunc pro tunc*.

Additionally, the stay that is currently in effect in the instant matter is hereby lifted and the Inquest that was ordered in this Court's previous Decision and Order is now moot.

It is further ordered that the parties shall appear for a Preliminary Conference on November 21, 2011, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

**ENTER:**

A handwritten signature in black ink, appearing to read 'Denise L. Sher', is written over a horizontal line. The signature is stylized and cursive.

**DENISE L. SHER, A.J.S.C.**

Dated: Mineola, New York  
October 5, 2011

**ENTERED**  
OCT 11 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE