

**KGK Jewelry LLC v Accurate Grading Quality
Assur., Inc.**

2014 NY Slip Op 31501(U)

June 10, 2014

Sup Ct, NY County

Docket Number: 652908/13

Judge: Melvin L. Schweitzer

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This opinion is uncorrected and not selected for official publication.

was adequately doing so. This turned out not to be true. It was not until after the entry of this court's order holding the defendants in default that the Yeko defendants fully realized and understood that attorney Engel had done nothing to properly defend them. Indeed, attorney Engel who is also a party to this litigation has interests adverse to those of the Yeko defendants which further resulted in their having been misled. Misrepresentations or misconduct by a party's attorney which lead to that party's default constitute a reasonable excuse for the vacatur of the default under the CPLR.

The CPLR also requires that the defaulting party must demonstrate a meritorious defense. The court finds that Mr. Yeko, in his sworn affidavit (¶¶ 50-53) has made specific allegations of fact pertaining to a pattern and practice known as "diamond grade bumping" in which a specific quality diamond with a huge markup built into its price would have that markup disguised by representations which falsely enhanced the qualities of that diamond commensurate with the price markup. The specificity of Mr. Yeko's sworn allegations of grade and price bumping, if proven to a trier of fact, would make the allegations in the federal complaint that was distributed by attorney Engel true. Truth being an absolute defense to a complaint for defamation, the court finds that Mr. Yeko's sworn allegations, together with his sworn representation that the Yeko defendants have documentary evidence which will prove this pattern, satisfies the requirement that the defaulting party also must show a reasonably meritorious defense.

For purposes of this motion, the court also accepts Mr. Yeko's sworn account that he was told by attorney Engel that the only reason for his distributing a copy of the federal complaint along with the letter to approximately 70 retailers was to persuade them to preserve evidence for

the federal lawsuit, and that Mr. Yeko believed attorney Engel was adhering to proper legal procedure in doing what he did.

The court, in determining that the default should be vacated in the interest of justice, nevertheless is of the view that plaintiffs should not be made to bear the entire burden of the legal fees and costs in pursuing the Order and Default Judgment against the Yeko defendants. Accordingly, the court hereby orders the Yeko defendants to reimburse plaintiffs for their legal expenses in connection with two of the motions herein: First, the motion made for reargument and reconsideration of the default judgment brought by the Yeko defendants – a motion brought on notwithstanding that the Yeko defendants did not appear at all on plaintiffs' motion for the default; and second, the plaintiffs' legal expenses in connection with the current motion. As plaintiffs point out in their opposition to this motion, they have taken all the right steps in pursuing and enforcing the default order and they should not be penalized for the Yeko defendants poor choice of counsel that has generated this line of motion practice which now results in the default judgment being vacated.

Accordingly, it is

ORDERED that the default judgment against the Yeko defendants is hereby vacated; and it is further

ORDERED that the Yeko defendants shall serve and file their answer or otherwise move with respect to the complaint within 30 days of this Decision and Order; and it is further

ORDERED that plaintiffs shall submit for the court's review and final determination as to an allowed amount, within 30 days of this decision, their invoices with regard to the two motions

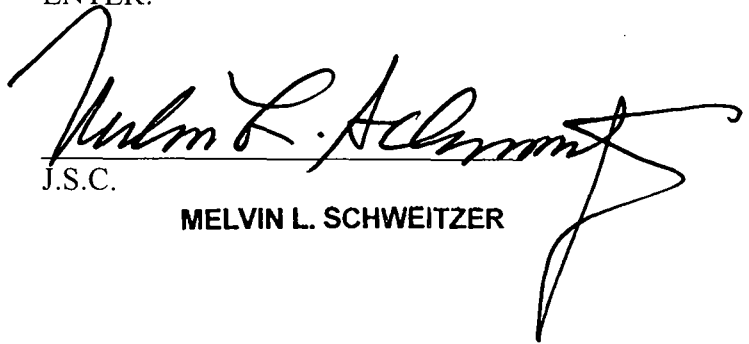
for which they shall receive reimbursement from the Yeko defendants pursuant to this Decision and Order; and it is further

ORDERED that defendants Adam E. Engel, Esq. and Adam E. Engel Associates, LLC are severed from this action, the judgment against them of liability on default granted by Order filed November 18, 2013 remains in effect, and the reference in that Order of the issue of damages therefrom shall continue; and it is further

ORDERED that a copy of this Order shall be served upon the Clerk of the Reference Part (Rm. 119), and upon the Special Referee, the Honorable Ira Gammerman.

Dated: June 10, 2014

ENTER:



J.S.C.
MELVIN L. SCHWEITZER