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| Education Resources Inst., Inc. v Hawkins |
| 2015 NY Slip Op 32610(U) |
| January 5, 2015 |
| Supreme Court, Bronx County |
| Docket Number: 305765/2009 |
| Judge: Alison Y. Tuitt |
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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

THE EDUCATION RESOURCES INSTITUTE, INC.

INDEX NUMBER: 305765/2009

Plaintiff,

-against-

Present:

HON. ALISON Y. TUITT

Justice

FREDERICK HAWKINS,

Defendant.

The following papers numbered 1-3,

Read on this Plaintiff's Motion to Vacate Default

On Calendar of 7/7/14

Notice of Motion-Exhibits, Affirmation 1

Affidavit in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, plaintiff's motion to vacate the default judgment is denied for the reasons set forth herein.

At the outset, it should be noted that a "Defendant's Sur-Reply Affidavit in Opposition" submitted by defendant is not considered by the Court as it was submitted without permission of the Court. The CPLR does not provide for sur-reply papers, however denominated.

By Order dated December 16, 2013, this Court granted defendant's motion to dismiss the action, on default, for plaintiff's counsel's failure to appear for oral argument of the motion as is required by this Court. Plaintiff now moves pursuant to CPLR §5015 to vacate the Order dismissing the case. Counsel Susan Schneiderman states in her affirmation that she was appearing as "of counsel" for plaintiff's counsel on the motion and had several other matters in the Bronx County Courthouse that morning. She states that when she

arrived at the subject Courtroom, it had not yet opened so she signed in on the calendar outside the Courtroom with her name and phone number. Ms. Schneiderman further states that she then proceeded to take care of several other matters in the Courthouse and was surprised when she returned to the Courtroom to learn that the case was called in her absence, and defendant's motion was granted on default.

Ms. Schneiderman states that the subject motion involves defendant's attempt to have the case dismissed for plaintiff's alleged failure to timely file a Note of Issue. She claims it is evident from the submissions that plaintiff did not intend to abandon the case or the motion and argues that plaintiff submitted documentary proof that the Note of Issue was timely served and timely transmitted to the Clerk for processing. Plaintiff "postulates" that the Note of Issue was mislaid by the postal service of the Court. Finally, counsel argues that plaintiff has diligently pursued its claims against defendant since the commencement of the action in 2009.

Plaintiff now moves this Court pursuant to C.P.L.R. §5015 seeking to vacate the default Order and seeking a denial of defendants' motion to change venue to Queens County. Section 5015 pertains to vacatur of an Order rendered on default. Relief from a default judgment rests within the sound discretion of the motion court. Frenchy's Bar & Grill v. United Intern. Ins. Co., 675 N.Y.S.2d 31 (1st Dept. 1998). The standards governing such a motion are a reasonable excuse for the default, the timeliness of the motion to vacate the default, and the existence of a meritorious cause of action. Id.; Adefioye v. Volunteers of America, Inc., 634 N.Y.S.2d 696 (1st Dept. 1995).

In order to prevail on a motion to vacate a prior order pursuant to C.P.L.R. §5015, the movant must make a showing of a meritorious action. See, Adefioye, (Holding that a party seeking to vacate a default must not only show that there was a reasonable excuse for the default but must demonstrate that he or she has a meritorious cause of action by submitting an affidavit of merit by someone with personal knowledge of the facts). See also, Marks v. Vigo, 756 N.Y.S.2d 568 (1st Dept. 2003); Tejada v. 750 Gerard Properties Corp., 707 N.Y.S.2d 174(1st Dept 2000); Isaacs v. 455 West 34, 717 N.Y.S.2d 531 (1st Dept. 2000) (Defendant's motions for vacatur were properly denied since defendant failed to show that it possessed a meritorious defense. Defendant never offered the affidavit of a knowledgeable fact witness to substantiate its claim); Wynyard v. Antique Co. of New York, Inc., 668 N.Y.S.2d 617 (1st Dept.,1998)(The court properly exercised its discretion in denying the motion to vacate the order entered on default since petitioners failed to satisfy their burden by

submitting an affidavit by someone with personal knowledge of the material facts).

For purposes of determining whether a party may obtain relief from judgment or order on basis of an excusable default, the assessment of the sufficiency of the proffered excuse and the adequacy of merit rests within the sound discretion of the court. Carroll v. Nostra Realty Corp., 864 N.Y.S.2d 10 (1st Dept. 2008) (Plaintiffs failed to demonstrate a meritorious cause of action against realty corporation as would allow vacation of dismissal).

Plaintiff's motion to vacate the default must be denied. While law office failure may constitute a reasonable excuse for the default, that alone is not sufficient to justify the vacating of a default judgment. Here, plaintiff fails to set forth the existence of a meritorious cause of action, by way of an affidavit of merit from someone with knowledge of plaintiff's claims. There is no mention of a meritorious cause of action in plaintiff's moving papers or the exhibits annexed to the moving papers.

Any attempt to set forth a meritorious defense in the reply papers, which was not done here, cannot be considered by the Court. The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion." Merchants Bank of New York v. Gold Lane Corp., 814 N.Y.S.2d 99 (1st Dept. 2006) quoting Dannasch v. Bifulco, 585 N.Y.S.2d 360 (1st Dept. 1992). It is well-settled law that reply papers may not be considered for the purpose of showing a prima facie entitlement to grant of a motion. Batista v. Santiago, 807 N.Y.S.2d 340 (1st Dept. 2006). See also, Schulte Roth & Zabel v. Kassover, 812 N.Y.S.2d 874 (1st Dept. 2006)(Defendant's attempt to remedy the deficiency by submitting his affidavit for the first time in reply was improper); Leeds v. Lenox Hill Hospital, 775 N.Y.S.2d 260 (1st Dept. 2004)(Argument raised for the first time in reply papers should not be considered); Ritt by Ritt v. Lenox Hill Hospital, 582 N.Y.S.2d 712 (1st Dept. 1992)(Defendant not entitled to summary judgment where it did not make prima facie showing of entitlement to judgment as a matter of law until it filed reply affidavit).

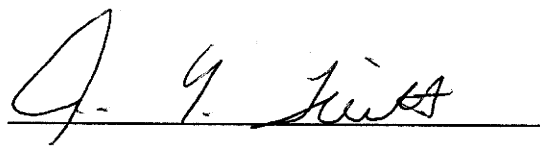
The Court will also note that despite plaintiff's counsel's assertion that plaintiff has diligently pursued its claims against this defendant since the commencement of this action is belied by the procedural history of this matter. Therefore, blame should not only lie with the "of counsel" attorney who was to appear for the oral argument of defendant's motion to dismiss. The Court notes that defendant's arguments with respect to the delays in this case, although not pertinent to the issue of vacatur that is presently before the Court, have

merit. The procedural history of this case indicates that, contrary to plaintiff's position, plaintiff has been less than diligent in prosecuting this action.

Accordingly, plaintiff's motion to vacate the default is denied for the reasons stated.

This constitutes the decision and order of this Court.

Dated: 1/5/15



Hon. Alison Y. Tuitt