

<b>Parisi v Ogunfowora</b>
2016 NY Slip Op 33032(U)
April 1, 2016
Supreme Court, Nassau County
Docket Number: 14696/13
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

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RICHARD PARISI, as the Attorney-in-Fact for  
JEAN PARISI,

Plaintiff,

- against -

OLUSEGUN OGUNFOWORA, M.D., POLINA KHANIN,  
M.D., FRANKLIN HOSPITAL, ORZAC CENTER FOR  
EXTENDED CARE & REHABILITATION, NORTH  
SHORE LONG ISLAND JEWISH HEALTH SYSTEM,  
INC., PARKER JEWISH INSTITUTE FOR HEALTH  
CARE AND REHABILITATION, LARISA  
KLEymoENOVA, M.D. and FICTITIOUS  
CORPORATIONS "A" THROUGH "C",

Defendants.

TRIAL/IAS PART 37  
NASSAU COUNTY

Index No.: 14696/13  
Motion Seq. No.: 02  
Motion Date: 03/23/16

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

	Papers Numbered
<u>Notice of Motion, Affirmation and Exhibits</u>	<u>1</u>

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

Defendant Olusegun Ogunfowora, M.D. ("Dr. Ogunfowora") moves, pursuant to CPLR §§ 317, 5015(a)(1) and 5015(a)(4), for an order vacating the October 9, 2014 Order for default judgment entered against him; and moves, pursuant to CPLR §§ 2004 and 3012(d), for an order compelling plaintiff and defendants to accept defendant Dr. Ogunfowora's Proposed Answer and initial discovery demands as served *nunc pro tunc*; and moves for an order compelling plaintiffs

to provide and/or disclose discovery pursuant to and in response to defendant Dr. Ogunfowora's initial discovery demands. No opposition was submitted to the motion.

Counsel for defendant Dr. Ogunfowora submits, "[p]er the Complaint, plaintiffs intended to serve Dr. Ogunfowora with the Summons & Complaint at '900 Franklin Avenue, Valley Stream, New York 11580' (i.e. at the place of business of co-defendant FRANKLIN HOSPITAL ('Franklin Hospital')).... However, the Affidavit of Service reflects that service of the Summons & Complaint on Dr. Ogunfowora was ultimately effectuated by delivering a copy of the Summons & Complaint to (non-party) Denise Ifill at Dr. Ogunfowora's actual place of business located at '215 Rockaway Avenue, Brooklyn, New York 11233,' and by mailing another copy to Dr. Ogunfowora at the same Brooklyn address.... Significantly, however, Dr. Ogunfowora never received the copies of the Summons & Complaint which were purportedly served in December 2013, nor was he even aware of the existence of the instant action. Accordingly, Dr. Ogunfowora did not appear in the action (*pro se* or by counsel) and the remaining parties proceeded with litigation/discovery.... In September 2014, plaintiffs filed a motion for Default Judgment against Dr. Ogunfowora. Significantly, however, Dr. Ogunfowora did not receive a copy of plaintiffs' Motion as (it is speculated now, based upon the service address listed on the Order with Notice of Entry) **plaintiffs mailed the motion to Dr. Ogunfowora at the wrong address**. Specifically, it is believed that plaintiffs mailed the motion to Dr. Ogunfowora at Franklin Hospital's business address (900 Franklin Avenue, Valley Stream, New York 11580), rather than Dr. Ogunfowora's actual place of business.... As Dr. Ogunfowora never received the motion, nor was aware of its submission (nor having received it), same was ultimately marked fully submitted without any opposition by him. Thereafter, this Court granted plaintiffs' motion and entered an Order for

Default Judgment on default against Dr. Ogunfowora dated October 9, 2014.... After the Order was entered by the County Clerk on October 12, 2014, plaintiffs 'served' a copy of the Order with Notice of Entry on October 17, 2014.... Significantly, however, Dr. Ogunfowora did not receive a copy of the Order with Notice of Entry, as same was *mailed to Dr. Ogunfowora at the wrong address*. Specifically, the Order with Notice of Entry was mailed to Dr. Ogunfowora at Franklin Hospital's business address (900 Franklin Avenue, Valley Stream, New York 11580), rather than his actual place of business.... As Dr. Ogunfowora did not receive the Order for Default Judgment (having been improperly served), he remained unaware of the instant action, and therefore, did not (and could not) appear. In February 2016, Dr. Ogunfowora learned of the instant action, for the first time, after co-defendant POLINA KHANINA, M.D. ('Dr. Khanina') notified the staff at their mutual medical office/group (Multiviz Health Services), that Dr. Ogunfowora was a named defendant in the action, and that he had yet to appear in the action." See Defendant Dr. Ogunfowora's Affirmation in Support Exhibits A-C.

Counsel for defendant Dr. Ogunfowora contends that "the Affidavit of Service reflects that service of the Summons & Complaint on Dr. Ogunfowora was effectuated by delivering a copy of the Summons & Complaint on (non-party) Denise Ifill at Dr. Ogunfowora's actual place of business located at '215 Rockaway Avenue, Brooklyn, New York 11233,' and thereafter by mailing a copy of the Summons & Complaint to Dr. Ogunfowora at the same Brooklyn address. Assuming the Affidavit of Service is accurate, Dr. Ogunfowora concedes that service of the Summons & Complaint was 'timely and proper' pursuant to CPLR §308(2). Notwithstanding same, it is respectfully requested that Dr. Ogunfowora's failure to timely appear in the action be excused, in the interest of justice and as to prevent significant prejudice, as Dr. Ogunfowora

attests that *he never received the Summons & Complaint served on him in December 2013 - likely due to an officer error/oversight that was in no way attributable to any fault of his own.*" See Defendant Dr. Ogunfowora's Affirmation in Support Exhibit E.

As previously indicated, no opposition was submitted to the motion.

While relief under CPLR § 5015(a) is available where a party can demonstrate a reasonable excuse for the default *and* a showing of a meritorious cause of action/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)), under CPLR § 5015(a)(4), a default must be vacated once a movant demonstrates lack of personal jurisdiction. See *Toyota Motor Credit Corporation v. Hardware Lam*, 93 A.D.3d 713, 939 N.Y.S.2d 869 (2d Dept. 2012); *Hossain v. Fab Cab Corp.*, 57 A.D.3d 484, 868 N.Y.S.2d 746 (2d Dept. 2008). A party who moves to vacate a judgment entered on default is relieved of any obligation to demonstrate a reasonable excuse for the default and a potentially meritorious defense when lack of personal jurisdiction is asserted as the ground for vacatur. See *Deutsche Bank Natl. Trust Co. v. Pestano*, 71 A.D.3d 1074, 899 N.Y.S.2d 269 (2d Dept. 2010); *Harkless v. Reid*, 23 A.D.3d 622, 806 N.Y.S.2d 214 (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); *Moore v. Day*, 55 A.D.3d 803, 866 N.Y.S.2d 303 (2d Dept. 2008); *Toll Brothers, Inc. v. Dorsch*, 91 A.D.3d 755, 936 N.Y.S.2d 576 (2d Dept. 2012).

Based upon the papers before the Court, defendant Dr. Ogunfowora's motion, pursuant to CPLR §§ 317, 5015(a)(1) and 5015(a)(4), for an order vacating the October 9, 2014 Order for default judgment entered against him; and, pursuant to CPLR §§ 2004 and 3012(d), for an order

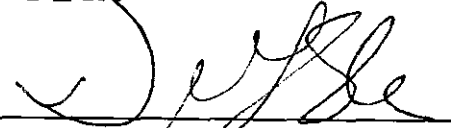
compelling plaintiff and defendants to accept defendant Dr. Ogunfowora's Proposed Answer and initial discovery demands as served *nunc pro tunc*; and for an order compelling plaintiffs to provide and/or disclose discovery pursuant and in response to defendant Dr. Ogunfowora's initial discovery demands is hereby **GRANTED**. And it is further

**ORDERED** that defendant Dr. Ogunfowora shall serve his Verified Answer, in the form annexed as Exhibit F to the instant motion, upon all of the parties herein by April 11, 2016. A copy of this Decision and Order shall be served with those papers. And it is further

**ORDERED** that all parties shall appear for a Pre-Trial Conference in Nassau County Supreme Court, Medical Malpractice Settlement Part, at 100 Supreme Court Drive, Mineola, New York, on April 12, 2016, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



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

Dated: Mineola, New York  
April 1, 2016

ENTERED

APR 12 2016

NASSAU COUNTY  
COUNTY CLERK'S OFFICE