Present: HON. PETER J. KELLY
SURROGATE

SURROGATE'S COURT : QUEENS COUNTY
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Inn the Matter of the Application of Gaspar Skorpanic as Preliminary Executor of the Estate of

ROKO BUDESA, a/k/a ROY BUDESA,
Deceased,

File No. 2016-4208/B

Pursuant to SCPA § 2103 for the Discovery and Turnover of Property and the Issuance of Temporary Restraining Order
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Respondents Maria Elena Lopez and Beatriz Vargas a/k/a Tatiana Vargas move pursuant to CPLR § 5015 to vacate the court's decision dated January 19, 2017 which granted this SCPA § 2103 petition for turnover upon their default in appearing at a court ordered inquiry.

This petition by the preliminary executor, seeking turnover of the proceeds of several bank accounts, insurance and annuity contracts, was made returnable on December 15, 2016. Respondents signed a retainer agreement which was mailed to their attorney on December 13, 2016, however, it was not received until December 19, 2016. Counsel for respondents affirms that he spoke to petitioner's counsel prior to the hearing date to request an adjournment because he was awaiting return of his clients' executed retainer agreement. He contends that it was his understanding that the adjournment request would not be opposed.

Petitioner's counsel recalls their discussion differently and he affirms that he did not consent to the adjournment.

Upon the return date, the respondents failed to appear for their court ordered inquiry and no attorney had filed a notice pursuant to SCPA § 401 to appear on their behalf. The court issued a decision dated January 19, 2017 determining that the respondents were in default and granting the petition. Thereafter, respondents served this motion to vacate their default on February 3, 2017, prior to settlement of the decree.

CPLR § 5015 (a) provides that a party may be relieved from a default on the ground, among other things, of "excusable default." In order to vacate a decision based upon excusable default, the respondents are required to demonstrate a reasonable excuse for their default and a meritorious defense to the petition (CPLR § 5015 [a][1]; *Eugene Di Lorenzo Inc. v A.C. Dutton Lumber Co. Inc.*, 67 NY2d 138 [1986]; *New Century Mtge. Corp. v Adeyan-Ju*, 139 AD3d 683, 684 [2nd Dept. 2016; *PHH Mtge. Corp. v Muricy*, 135 AD3d 725, 727 [2nd Dept. 2016]). When exercising its discretion in determining what constitutes a reasonable excuse, the court should consider such relevant factors as the extent of the delay, the prejudice to the opposing party, the lack of wilfulness as well as the strong public policy in favor of resolving cases on their merits (*see Orwell Bldg. Corp. v Bessaha*, 5 AD3d 573, 574 [2nd Dept. 2004]).

As an excuse for the default, respondents claim they were in

Massachusetts that day caring for their ill mother and that their attorney had told them there was an agreement to adjourn the inquiry date. In fact, however, as counsel had failed to file a notice of appearance on behalf of respondents as per SCPA § 401, it is debatable whether they even had properly retained an attorney by the return date. It is undisputed, however, that they were of the belief that the matter was to be adjourned.

With regard to a potential meritorious defense, it is contended that a significant portion of the accounts listed in petitioner's turnover proceeding were transferred to respondents as inter-vivos gifts.

Based upon the proof submitted, the Court finds that respondents have demonstrated grounds to vacate their default in appearing on December 15, 2015 inasmuch as they believed the proceeding was to be adjourned, their default in appearing was not otherwise wilful, the motion to vacate was made in a timely manner after the default, they have an arguably meritorious defense to this petition, and there is a strong public policy favoring the resolution of cases on the merits (*see Harris v City of New York*, 121 AD3d 852, 853 [2nd Dept. 2014]; *Westchester Med. Ctr. v Hartford Cas. Ins. Co.*, 58 AD3d 832, 833 [2nd Dept 2009]; *Perez v Travco Ins. Co.*, 44 AD3d 738, 739 [2nd Dept. 2007]).

The default shall be vacated, however, upon condition that respondents pay petitioner's counsel a monetary sanction to offset the costs and attorney's fees incurred by petitioner in responding to this motion. CPLR § 5015 (a)

authorizes the court to relieve a party from a default "upon such terms as may be just" (*see Workman v Amato*, 231 AD2d 627 [2nd Dept. 1996]) and such terms may include the imposition of a monetary sanction (*see e.g. Wells v 109 South 8th LLC*, 17 AD3d 580 [2nd Dep't 2005]; *Folk v State*, 185 AD2d 267 [2nd Dept. 1992]; *Mannering v State Farm Fire & Cas. Co.*, 144 AD2d 654 [2nd Dept. 1988]; *see also e.g. Pegalis v Gibson*, 237 AD2d 420, 422 [2nd Dept. 1997]).

Accordingly, respondents' default shall be vacated upon payment of $1,500.00 within thirty (30) days after service upon them of a copy of this decision and order.

In the event this condition is complied with, respondents shall appear for an inquiry to be held in the Surrogate's Court, 88-11 Sutphin Boulevard, 7th Floor, on **May 8, 2017, 9:30 A.M.**

All further demands for relief in the motion not specifically addressed herein are denied.

This is the decision and order of this Court.

Dated: March 7, 2017

SURROGATE