

**I.H. v Hernandez**

2019 NY Slip Op 31314(U)

April 23, 2019

Supreme Court, Kings County

Docket Number: 523147-2018

Judge: Richard J. Montelione

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART DJMP

-----X  
I.H., an infant by his mother and natural guardian,  
JOCELYN ARIZA and JOCELYN ARIZA individually,

Decision and Order

Plaintiffs,

Index No. 523147-2018

-against-

Cal. No. 23, 24

Mot. Seq. 1, 2

Date: 3/19/2019

INDALECIO HERNANDEZ and MARIA E.  
HERNANDEZ,

Defendants.

-----X  
The following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	<u>Numbered</u>
Plaintiffs' Notice of Motion for Default Judgment dated January 9, 2019; Attorney Affirmation of Reuven S. Frankel, affirmed on January 9, 2019; Exhibit 1-2.....	1
Defendants' Notice of Cross-Motion dated February 7, 2019; Attorney Affirmation of Timothy J. Staines, Esq., affirmed on February 7, 2019; Exhibit A.....	2
Plaintiffs' Attorney Affirmation in Opposition to Cross-Motion of Reuven S. Frankel, Esq., affirmed on March 14, 2019.....	3
Defendants' Attorney Affirmation in Reply of Timothy J. Staines, Esq., affirmed on March 18, 2019; Exhibits A-B.....	4

Appearances: Plaintiffs are represented by Frankel Law Firm, by Reuven S. Frankel, Esq., 100 Church Street-Suite 800, New York, NY 10007 (212-888-5100; rfrankel@frankellawfirm.com); Defendants are represented by Raimond & Staines LLC by Timothy J. Staines, Esq., 305 Broadway-7<sup>th</sup> Floor, New York, NY 10007 (212-884-9636; tim@raimondstaines.com).

Hon. Richard J. Montelione

Plaintiff's infant's action is based upon alleged poisoning from lead-based paint. The plaintiff mother is claiming derivative damages. Plaintiffs move for default asserting proper service of the summons and complaint under CPLR 308.

The defendants oppose the motion and cross-move under CPLR 3012(d) for leave to serve a late answer.

There is no dispute that the complaint was filed on November 15, 2018 and the defendants were served on or about November 24, 2018. The defendant Indalecio Hernandez states that they retained prior counsel, “when they first received the complaint.” The time to answer was approximately December 31, 2018. The defendants’ prior counsel filed a notice of appearance on January 14, 2019 but inexplicably failed to timely file an answer. The defendants subsequently retained their current counsel on January 29, 2019 who filed an untimely answer on the same day. There was never a substitution of counsel filed.

The infant child was approximately 2 years old at the time the parties entered into a lease agreement and moved into the apartment rented to them by the defendants in January 2018.

The Court in *Ferraro Foods, Inc. v Guyon, Inc.*, 165 AD3d 628, 630-631[2d Dept 2018]), provided a standard for vacating defaults:

‘A party seeking to vacate a default in appearing or answering pursuant to CPLR 5015(a)(1), and thereupon to serve a late answer, must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action’ (*Deutsche Bank Natl. Trust Co. v Saketos*, 158 AD3d 610, 72 N.Y.S.3d 167, quoting *Hamilton Pub. Relations v Scientivity, LLC*, 129 AD3d 1025, 1025, 12 N.Y.S.3d 234). ‘Where a delay or default results from law office failure, a court may exercise its discretion to excuse that delay or default’ (*JP Morgan*

*Chase Bank, N.A. v Russo*, 121 AD3d 1048, 1049, 996 N.Y.S.2d 68; *see* CPLR 2005). A claim of law office failure should be supported by a ‘detailed and credible’ explanation of the default (*Henry v Kuveke*, 9 AD3d 476, 479, 781 N.Y.S.2d 114; *see Pursoo v Ngala-El*, 89 AD3d 712, 931 N.Y.S.2d 914; *Uddaraju v City of New York*, 1 AD3d 140, 766 N.Y.S.2d 207). ‘[M]ere neglect’ (*JP Morgan Chase Bank, N.A. v Russo*, 121 AD3d at 1049) or ‘[b]are allegations of incompetence on the part of prior counsel’ (*Huggins v Parkset Supply, Ltd.*, 24 AD3d 610, 611, 807 N.Y.S.2d 112 [internal quotation marks omitted]) are insufficient to establish a reasonable excuse (*see Whitestone Constr. Corp. v Nova Cas. Co.*, 129 AD3d 832, 12 N.Y.S.3d 144; *Wei Hong Hu v Sadiqi*, 83 AD3d 820, 921 N.Y.S.2d 133; *Campbell-Jarvis v Alves*, 68 AD3d 701, 889 N.Y.S.2d 257; *Spatz v Bajramoski*, 214 AD2d 436, 624 N.Y.S.2d 606).

Here, there is no excuse offered by defendants’ prior counsel and no “credible and detailed” explanation as to the default due to prior counsel; however, the instant motion is similar to the facts in *Sarcona v J & J Air Container Sta., Inc.*, 111 AD3d 914 [2d Dept 2013]), where the appellate court affirmed the trial court’s discretion in vacated the default because there was no evidence that the defendants were aware of their attorneys’ default and where a motion was brought promptly to vacate the default. There is no pattern of delays or abuse which would result in the denial of the cross-motion. *See Joseph v GMAC Leasing Corp.*, 44 AD3d 905 [2d Dept 2007]). There is no evidence that defendants ever intended to abandon this litigation.

Regarding a meritorious defense, the court in *Rodriguez v KPV Realty LLC*,

2011 NY Slip Op 30288[U], [Sup Ct, NY County 2011], laid out the standards under NYC Administrative Code 27-2056.8:

...(T)he standards to establish liability for lead paint in a New York building are: (1) the building was constructed prior to 1960; (2) the landlord had actual and/or constructive notice of the presence of a child of six years of age or under; (3) that the defendants failed to take reasonable measures to alleviate lead contamination upon which it had notice; and (4) the lead paint condition complained of was the proximate cause of the claimed poisoning. *Juarez by Juarez v. Wavecrest Management Team Ltd.*, 88 N.Y.2d 628, 672 N.E.2d 135, 649 N.Y.S.2d 115 (1996); *Ortiz ex rel. Ortiz v. Joremi Enterprises, Inc.*, 22 Misc.3d 1135[A], 881 N.Y.S.2d 365, 2009 NY Slip Op 50454[U] (N.Y.Sup. 2009).

The plaintiffs contend that defendants have not and cannot state meritorious defenses because under NYC Administrative Code 27-2056.8 the subject apartment had to be completely abated of lead paint and that defendants do not deny constructive notice given that a child resided on the premises. However, defenses of causation, lack of damages and mitigation of damages, are potentially meritorious even if plaintiff ultimately prevails on all defenses. (*See, Marinoff v Natty Realty Corp.*, 17 AD3d 412, 413 [2d Dept 2005], “[it] was not necessary for the defendant to establish the validity of its defense as a matter of law in order to obtain vacatur of its default in answering. The defendant carried the burden of demonstrating a potentially meritorious defense [*see Eugene Di Lorenzo, Inc. v Dutton Lbr. Co., supra; Carnazza v Shoprite of Staten Is.*, 12 AD3d 393, 783

NYS2d 834 [2004]; *Becker v University Physicians of Brooklyn*, 307 AD2d 243, 762 NYS2d 277 [2003]]).

The affidavit of defendant stating that defendants retained prior counsel at the time they “first received the complaint” indicates they acted quickly. The current attorney filed an answer, albeit late, on January 29, 2019, the same date his firm was retained. Notwithstanding the lack of a detailed affidavit from prior counsel, the present counsel acted expeditiously (*see and Cf. Sarcona v J & J Air Container Sta., Inc.*, Supra.) and the court finds that the defendants did not intend to abandon this action. Regarding the failure to file a substitution of counsel form as required under CPLR 321 (b) (it is not known whether or not one exist, but defendants state they hired new counsel), the court will not nullify the cross-motion brought by defendants’ current counsel. (*Cf. Diamadopolis v Balfour*, 152 AD2d 532 [2d Dept 1989]).

Based on the foregoing, defendants’ cross-motion to vacate their default is GRANTED, the proposed answer is deemed served, and the plaintiffs’ motion is DENIED as moot. It is ORDERED that defendants serve and file with the court a substitution of counsel no later than 20 days from the date of this order. If defendants fail to do so, plaintiff may seek default judgment through a settled order on 10-day notice.

This constitutes the decision and order of the Court.

A copy of this order must be served on all sides within ten (10) days of the notice of entry.

Dated: Brooklyn, NY

  
RICHARD J. MONTELIONE, A.J.S.C.

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KINGS COUNTY CLERK  
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