

**Brown v Janitorial Supplies Plus 1 Inc.**

2020 NY Slip Op 32778(U)

August 19, 2020

Supreme Court, Kings County

Docket Number: 506832/2017

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 19<sup>th</sup> day of August, 2020.

PRESENT:

HON. CARL J. LANDICINO,

Justice.

-----X

ANDY LENARD BROWN,

*Plaintiff,*

Index No. 506832/2017

- against -

DECISION AND ORDER

JANITORIAL SUPPLIES PLUS 1 INC., PRESTIGE and ASSOCIATES, LLC, JONATHAN MALINAS, and/or any other related entities or individuals,

*Defendants,*

Motion Sequence # 5

-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered (NYSCEF)</u>
Notice of Motion and	
Affidavits (Affirmations) Annexed .....	<u>48-58</u>
Opposing Affidavits (Affirmations) .....	<u>60-85</u>

After a review of the papers and oral argument the Court finds as follows:

This is a claim, pursuant to New York Labor Law 652 and 191, to recover unpaid overtime and other wages allegedly owed to the Plaintiff from Defendants, Janitorial Supplies Plus 1 Inc., Prestige Associates LLC, and Jonathan Malinas (hereinafter collectively referred to as the "Defendants"). The Plaintiff obtained a default judgment against all of the Defendants on January 10, 2019.

The Defendants now move (motion sequence #5) for an order, pursuant to CPLR 5015, vacating this default judgment. The Defendants claim that their failure to act promptly was due to the extensive settlement negotiations that the Defendants' counsel engaged in with the Plaintiff's

former counsel. The Defendants believe that this is a reasonable excuse for delay and that the Plaintiff has not been prejudiced by the delay. The Defendants also claim to have a meritorious defense to the Plaintiff's claim, contending that the Plaintiff is not entitled to the claimed wages and overtime, because janitors are exempt from the cited provisions of the New York Labor Law.

The Plaintiff opposes the motion arguing that the Defendants have not shown a reasonable excuse for their default, the Plaintiff was prejudiced by this delay, and the Defendants' defense is not meritorious.

CPLR 5015(a)(1) empowers the Court to relieve a party from a judgment or order if it is shown that (i) the motion was made within 1 year of entry of the order, and there is (ii) an excusable default, and (iii) a potentially meritorious opposition to the motion. *Pennymac Loan Servs., LLC v. Rillen*, 183 A.D.3d 833, 833 122 N.Y.S.3d 537, 537 [2d Dept 2020]. Here, the motion was made approximately eight months after service of notice of entry of the January 10, 2019, Order on default, dated January 14, 2019. It is accordingly timely.

Defendant Jonathan Malinas in his affidavit, states that he is the principal and owner of both Janitorial Supplies Plus 1 Inc. and Prestige Associates LLC. He concedes that the Defendants were served with the Plaintiff's Summons and Complaint. Mr. Malinas states that he consulted with attorneys regarding the matter. Thereafter, Mr. Malinas states that he chose to pursue settlement negotiations with Ms. Resnick, the Plaintiff's attorney. He also stated that he chose not to retain counsel and not engage in court proceedings based on Ms. Resnick's assurance that she would not advance this action, pending the negotiations. Mr. Malinas concedes that these negotiations failed. Mr. Malinas states that he secured legal representation in April of 2019. This was approximately four months after the order granting the default judgment was entered against him. As stated above the motion was made some eight (8) months after that entry.

Mr. Malinas' account is not sufficiently detailed for the Court to find that the Defendants' default is excusable. He has not detailed why he failed to engage in the court's process. He also has not outlined when the negotiations apparently broke down. In addition, he does not justify his position, in light of a number of notices (e-mails) he received indicating a default would and was entered. Mr. Malinas was apparently reminded, by email, the day before the default judgment appearance was scheduled that he should attend court for the scheduled hearing (see Plaintiff's Exhibit "F," Email Correspondence between Plaintiff's Counsel and Mr. Malinas). He has not denied receipt of these communications. There is no apparent reasonable reliance upon ongoing negotiations as a result. Mr. Malinas still failed to respond to the Complaint. Moreover he never sought an extension of time to serve his answer. "[A] party in jeopardy of defaulting for nonappearance in an action may request an extension of time to file its answer upon good cause shown (see CPLR 2004). Failure to move pursuant to CPLR 2004 for an extension of time to file an answer may eviscerate the grounds for a reasonable excuse." *Viviane Etienne Med. Care, P.C. v. Alea N. Am. Ins. Co.*, 29 Misc.3d 136(A), 918 N.Y.S.2d 401, 401 [2d Dept 2010].

As such his "purported reliance upon alleged settlement negotiations is entirely unsubstantiated and does not constitute a reasonable excuse." *Maspeth Fed. Sav. & Loan Assn. v. McGown*, 77 A.D.3d 889 [2d Dept, 2010]. There have certainly been cases that accept ongoing settlement negotiations as a reasonable excuse, however these cases rely on conduct indicating an intent to deceive. *See Performance Constr. Corp. v. Huntington Bldg., LLC*, 68 AD 3d 737 [2d 2009]. This is no indication of such deception, as more specifically referenced above. In fact the papers reflect otherwise. Accordingly, there has been no reasonable excuse for the default.

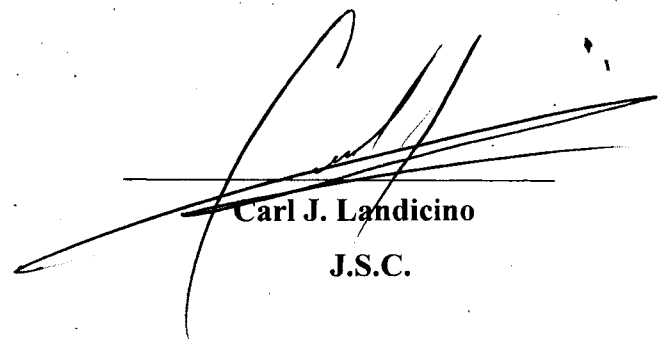
Where there is no excusable default, it is unnecessary to consider whether there is a meritorious defense. *Wright v. Brooklyn Renaissance Funding Co., LLC*, 174 A.D.3d 676, 102 N.Y.S.3d 433 [2d Dept 2019] and *Summitbridge Credit Investments, LLC v. Wallace*, 128 A.D.3d 676, 677, 9 N.Y.S.3d 320 [2d Dept 2015]. Consequently, the Defendants' motion (motion sequence #5) is denied.

It is hereby ordered.

The Defendants' motion (motion sequence #5) is denied.

This constitutes the Decision and Order of the Court.

ENTER:



**Carl J. Landicino**  
**J.S.C.**

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KINGS COUNTY CLERK