

**Law Offs. of Paul Ajlouny & Assoc. P.C. v Flynn**

2020 NY Slip Op 34447(U)

November 12, 2020

Supreme Court, Nassau County

Docket Number: 604256/2017

Judge: Vito M. DeStefano

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,  
Justice

TRIAL/JAS, PART 7  
NASSAU COUNTY

LAW OFFICES OF PAUL AJLOUNY &  
ASSOCIATES P.C., and PAUL AJLOUNY,

Decision and Order

Plaintiffs,

MOTION SEQUENCE: 06  
INDEX NO.: 604256/2017

-against-

NEIL FLYNN and THE FLYNN FIRM, LLC,

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

- Order to Show Cause
- Affirmation in Support
- Affirmation in Support
- Affidavit in Support
- Affidavit in Support
- Emergency Affirmation
- Letter to Judge dated March 12, 2020
- Affidavit in Opposition
- Affirmation in Support
- Affidavit

In an action to recover damages for, *inter alia*, misappropriation, etc., Defendants move for an order:

[P]ursuant to CPLR 5015(a)(1), vacating and setting aside the default judgment entered in favor of plaintiffs and against defendants on November 27, 2017; and vacating and setting aside the Judgment filed on March 20, 2018, which was predicated on the default judgment entered in favor of plaintiff and against defendants; and vacating the Warrant of Commitment for Civil Contempt dated February 20, 2019 and entered in the Nassau County Clerk's Office on February 22, 2019; and vacating the Warrant of Commitment for Civil Contempt dated May 3, 2019 and entered in the Nassau County Clerk's Office on May 13, 2019 (collectively with the Warrant of Commitment for Civil Contempt dated February 20, 2019 and

entered in the Nassau County Clerk's Office on February 22, 2019, the "Contempt Orders"); and vacating any other enforcement documents which are predicated upon the aforementioned judgment; and why an Order should not be made pursuant to CPLR 3012(d) compelling plaintiffs to accept the Verified Answer filed on July 29, 2017 and pursuant to CPLR 3025(b) granting defendants leave to serve a Verified Amended Answer, or, in the alternative, pursuant to CPLR 3012(d) granting defendants an extension of time to serve a Verified Answer; and pursuant to CPLR §2201 staying all enforcement proceedings premised upon the default judgment entered in favor of plaintiff and against defendants in this action and staying all other proceedings in this action pending the determination of this motion.

### Background

In 2005, Defendant Neil Flynn and his family were involved in a car accident which resulted in serious injuries for the family and the death of his eldest daughter. At the time of the accident, Flynn was an associate at the Law Offices of Paul Ajlouny & Associates P.C. (the "Ajlouny Firm") where he continued as an associate until his resignation on April 28, 2017.

Following Flynn's departure from the Ajlouny Firm, Plaintiffs filed a complaint against the Defendants on May 12, 2017 alleging causes of action for misappropriation of confidential information, breach of the duty of loyalty, conversion, unfair competition, slander per se, and libel per se.

On June 13, 2017, Plaintiffs moved for a preliminary injunction and temporary restraining order ("TRO"). That same day, Flynn appeared in court, pro se, in opposition to the TRO. At that time Flynn had not yet answered the complaint, which had been served upon him approximately one month earlier.

Plaintiffs' motion, which was unopposed, was granted by the court in an order dated July 19, 2017.

On June 29, 2017, Plaintiffs moved for a default judgment against Defendants. One month later, on July 29, 2017 (prior to a decision on the default application but after the court granted Plaintiffs' motion for a preliminary injunction), Defendants served an answer, which was subsequently rejected by the Plaintiffs as "untimely and otherwise improper" (Supplemental Affidavit in Reply at ¶ 2).

On August 10, 2017, the Plaintiffs moved to hold Defendants in contempt of both the TRO and preliminary injunction.

On October 4, 2017, the court granted Plaintiffs' motion for a default judgment, except as to the defamation claims, about which the court requested supplemental briefings.

In an order dated November 27, 2017, the court granted the balance of Plaintiffs' default motion with respect to the defamation claims and set the matter down for an inquest on damages and a hearing on the Plaintiffs' contempt application.

The inquest and hearing, held on January 9, 2018, were followed by an order dated February 21, 2018 wherein the court awarded judgment in favor of the Plaintiffs and declined to hold Defendants in contempt in view of the judgment. The Defendants did not appear for the inquest. In its decision after the inquest, the court stated:

The court finds and concludes that defendant Flynn established a competing law firm while working for the plaintiff at plaintiff's firm, that he performed legal services for a competing law firm during his employment with the plaintiff firm, and unlawfully obtained and used client information of the plaintiffs and made disparaging statements against the plaintiffs in an effort to wrongfully take cases and clients from the plaintiffs, all of which constituted conversion, breach of fiduciary duty, defamation and unfair competition.

The plaintiffs suffered real and calculable losses as a result of defendant Flynn's conduct, which "poisoned" the relationships of plaintiffs with several clients having significant cases. In certain instances, in order to "re-retain" clients who were "taken" by defendant, the plaintiffs were compelled to reduce fees. Plaintiff Ajlouny also testified credibly as to the impact of the defendant's conduct on his personal and professional life (Ex. "21" to Affirmation in Opposition).

On March 2, 2018, Defendants moved to vacate their defaults. The motion was returned for correction.<sup>1</sup>

In July 2018, Plaintiffs moved again for an order holding Defendants in contempt for their alleged repeated violations of the court's prior orders.

In an order dated November 8, 2018, the court granted the Plaintiffs' unopposed motion for contempt with an opportunity for Defendants to purge the contempt by submitting to a deposition and providing responses to an outstanding subpoena. Defendants did not purge the contempt and a warrant was issued. Defendants were given a second opportunity to purge which again they failed to do, which led to a second warrant issued on May 3, 2019.

On July 23, 2019, Defendants filed the instant motion seeking, *inter alia*, to vacate their default and permission to file a late answer. The parties agreed to hold the motion in abeyance pending the completion of outstanding discovery.

---

<sup>1</sup> In October 2018, Defendants moved again to vacate their default. This motion was also returned for correction.

### The Court's Determination

In support of the motion, Defendants maintain:

At the time the action was commenced, and since, Flynn has had serious medical issues that have prevented him from properly defending himself and the Flynn Firm in this matter. These issues stem from the mental trauma and physical injuries sustained in 2005 when Flynn and his family were involved in a devastating motor vehicle accident. The Flynn's were in a limousine that was struck by a drunk driver traveling the wrong way on the Meadowbrook Parkway. The crash killed his eldest daughter, who was sleeping next to him, by beheading Flynn, who suffered serious physical injuries as a result of the crash, including a broken back, ribs and nose, herniated discs, a collapsed lung and damage to his heart, was forced to crawl over his daughter's body to get help. Flynn's wife, other daughter, and her parents, who were also limousine passengers, all suffered serious injuries as well. The limousine driver was killed.

Since the crash, and as a result, Flynn suffers from both Post-Traumatic Stress Disorder ("PTSD") and from Major Depressive Disorder ("MDD"). Stress exacerbates Flynn's condition, which then manifests itself in, among other things, avoidance. Since the beginning of this lawsuit and his arrest, Flynn's symptoms have increased. Within the past two months Flynn's treatment was changed, resulting in an improvement in his condition. However, throughout this case, Flynn's mental condition prevented him from timely responding to the Complaint, properly moving to vacate the default, answering the subpoenas or otherwise continually and properly defending himself and the firm in this action (Affirmation in Support at ¶¶ 7, 8).

In sum, Flynn claims that his serious mental issues arising out of the 2005 accident have prevented him from defending himself in this action which was commenced 12 years after the accident.

As Flynn has "recently been able to better control his medical issues, defendants are now seeking to dig out from the mess resulting from those issues" (Affirmation in Support at ¶ 13).

A defendant seeking to vacate a default judgment pursuant to CPLR 5015(a)(1) must demonstrate a reasonable excuse for his default and the existence of a potentially meritorious defense (*Farhadi v Qureshi*, 105 AD3d 990 [2d Dept 2013]). CPLR 5015(a)(1) provides that the motion must be made "within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party" (*Sussman v Jo-Sta Realty Corp.*, 99 AD3d 787 [2d Dept 2012]). Should the party seeking to vacate a judgment or order issued on default fail to move within the year prescribed, the court has the authority to entertain such motion, and if the circumstances warrant it, vacate the default in the interest of justice (*State of New York v Kama*, 267 AD2d 225 [2d Dept 1999] [the "Supreme Court has the inherent authority to vacate a

judgment in the interest of justice, even where the statutory one-year period under CPLR 5015(a)(1) has expired”). In such cases, however, the excuse for belatedly seeking to vacate a default judgment must be more compelling (Siegel, NY Prac § 108, at 187 [3d ed] [“but if the year has expired the excuse for the default had best be all the more compelling”).

Whether the excuse proffered and the merits asserted are legally sufficient rests within the sound discretion of the court (*Deutsche Bank National Trust Company v Saketos*, 158 AD3d 610 [2d Dept 2018] quoting *Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 889 [2d Dept 2010]). When a party fails to establish a reasonable excuse for the default, the court need not determine whether the party has established the merits of the claim or defense (*Lutz v Goldstone*, 31 AD3d 449 [2d Dept 2006]).

Defendants maintain that in light of their excusable default and meritorious defenses, this case “clearly is an instance in which the Court, in its discretionary power, can, and should, vacate the Judgment in the interests of justice” (Affirmation in Support at ¶ 34).

Here, Plaintiffs served Defendants with Notice of Entry of the Judgment on April 2, 2018. Defendants moved to vacate the default on July 23, 2019, approximately one year and four months after being served with notice of entry of the default. Thus, Defendants’ motion is untimely having not made within one year after being served with a copy of the judgment with notice of its entry (see *Dankenbrink v Dankenbrink*, 154 AD3d 809 [2d Dept 2017]).

Notwithstanding the fact that more than a year has passed, Defendants argue that, “in and of itself, is not a basis to deny this motion” because an “attorney’s mental illness, corroborated by an affidavit from his medical provider, constitutes a reasonable excuse” for the default (Affirmation in Support at ¶¶ 15, 18).

Defendants maintain that they have an excusable default based upon Flynn’s mental health. According to Rosemary O’Regan-Perretta, a psychologist who has been treating Flynn since 2005, and Julie Manis, a psychiatric mental health nurse practitioner who has been treating Flynn since April 29, 2019, Flynn suffers from both PTSD and MDD and his condition is exacerbated by stress which, in turn, causes disassociative symptoms, memory loss and avoidance. According to the psychologist, Flynn is deemed to be permanently partially disabled and has, at times, been completely disabled (O’Regan-Perretta Affidavit at ¶ 5). Both of Flynn’s medical providers state, with a reasonable degree of professional medical certainty, that Flynn was unable to timely serve an answer in this action, was unable to take corrective actions regarding the late service, and has not been able to provide the information requested in the subpoenas as a result of his medical condition (see Affidavits in Support).

In opposition, Plaintiffs argue:

First, Flynn’s claim that he is “almost completely unable to meet even the most basic responsibilities, especially those involving conflict such as this matter,” is belied by

the record. Flynn has not only actively participated in this litigation since he first appeared at the OSC hearing on June 13, 2017, but he has done so with vigor. Flynn has sent numerous letters to the Court containing false and defamatory statements about Plaintiffs and filed procedurally defective motions supported by voluminous exhibits including affidavits that Flynn obtained from witnesses during the time he claimed to be disabled. Flynn cannot credibly claim he was unable to defend himself in this action, when he has actively and aggressively pursued offensive litigation and related matters adverse to Plaintiffs . . . .

Nor were Flynn's submissions in this litigation even-keeled or measured submissions, designed to avoid "conflict," but instead inflammatory and filled with hyperbole that only exacerbated the parties' dispute. It is simply not credible for Flynn to claim that he was somehow unable to timely respond to the Complaint or seek an extension of time to do so, but at the same time, he was able to secure affidavits from multiple witnesses and submit substantive letters and lengthy motions to the Court.

Second, even if Defendants had not participated in this action at all (which is not the case), Flynn was clearly able to perform his work as an attorney. The Court need look no further than the actions identified supra at ¶ 56 and the chart attached as Exhibit 15, as well as Defendants' active participation in numerous other cases in the New York State court system, . . . .

Third, while Defendants note that mental illness can constitute a reasonable excuse for a default when supported by an affidavit from a medical provider, this is not such a case for the reasons stated throughout this affidavit (Affidavit in Opposition at ¶¶ 56-59 [internal citations omitted]).

Particularly instructive with respect to medical illness and its impact on the court's determination as to what constitutes reasonable excuse, is *Fremming v Niedzialowski* (93 AD3d 1336 [4<sup>th</sup> Dept 2012]) where the Court stated:

Although an attorney's illness may under certain circumstances constitute a reasonable excuse for a default (see *Weitzenberg v Nassau County Dept. of Recreation & Parks*, 29 AD3d 683, 684-685 [2006]<sup>2</sup>), that is not the case here. The fact that plaintiffs' former attorney suffered from depression and ADHD does not

---

<sup>2</sup> In *Weitzenberg v Nassau County Dept. of Recreation & Parks* (29 AD3d 683 [2d Dept 2006]), the defendants offered evidence that their former attorney was suffering from a mental illness that adversely affected his ability to function and caused the various defaults in this action. The court found that the attorney's mental illness, which was corroborated by an affidavit from his psychiatrist, constituted a reasonable excuse for the underlying defaults.

constitute a reasonable excuse for failing to submit papers in opposition to defendants' motion and for failing to appear in court on the return date thereof. Plaintiffs' former attorney had been practicing law under a psychiatrist's care for over eight years, and there is no indication in the record that his mental health issues had previously interfered with his ability to meet his responsibilities. Indeed, the claim of plaintiffs' former attorney that his mental health problems caused the default are belied by the fact that, during the same time frame, he participated in various other aspects of the litigation without apparent difficulty. Finally, we note that the court granted plaintiffs multiple adjournments with respect to the return date of defendants' motion, and made clear on the record that no further adjournments would be granted.

Here, the affidavits and documents submitted by the Defendants are insufficient to support their claim that they were unable to participate in the action due to mental illness and, thus, Defendants failed to demonstrate a reasonable excuse for the delay (*see Dankenbrink v Dankenbrink*, 154 AD3d at 809, *supra*; *Mathew v Mathew*, 137 AD3d 1086 [2d Dept 2016]). In this regard, the court notes Flynn's engagement in the practice of law in this matter as well as other matters since the accident in 2005.

In light of the determination that Defendants failed to demonstrate a reasonable excuse for their default, we need not reach the issue of whether they demonstrated the existence of a potentially meritorious defense (*see CPLR 5015(a)(1)*; *U.S. Bank, N.A v Essagh*, 178 AD3d 876 [2d Dept 2019]; *Castellotti v Castellotti*, 165 AD3d 926 [2d Dept 2018]).

### Conclusion

Based on the foregoing, it is hereby

Ordered that the Defendants' motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: November 12, 2020

**ENTERED**

**Dec 09 2020**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

  
Hon. Vito M. DeStefano, J.S.C.