

Zirrith v Rego
2022 NY Slip Op 35230(U)
August 16, 2022
Supreme Court, Suffolk County
Docket Number: Index No. 611844/2020
Judge: Martha L. Luft
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P R E S E N T:

DECISION AND ORDER

Mot. Seq. No.: 002 - MD
Orig. Return Date: 11/16/2021
Mot. Submit Date: 11/16/2021

Plaintiffs,

-against-

ANDREW REGO.

Defendant.

PLAINTIFFS' ATTORNEY

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16 Court Street, Suite 1200
Brooklyn, NY 11241

DEFENDANT'S ATTORNEY

Scott D. Middleton, Esq.
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Upon the e-filed documents numbered 36 through 60, it is

ORDERED that the motion by the defendant Andrew Rego for, *inter alia*, an order granting him leave to vacate a judgment entered by the Suffolk County Clerk on August 16, 2021 upon his default is denied.

The plaintiffs Janine Zirrieth and Chris Zirrieth commenced the instant action against the defendant Andrew Rego to recover damages for personal injuries sustained by Ms. Zirrieth as a result of an incident, which occurred on September 1, 2019. An affidavit of service establishes that the defendant was served with the summons and complaint and notice of commencement by e-filing pursuant to CPLR 308 (2) on November 13, 2020, that a copy of the summons and complaint were mailed to him at the same address on the same date, and this affidavit of service was filed with the Suffolk County Clerk on November 27, 2020.

By order dated March 15, 2021, this Court granted an unopposed motion by the plaintiffs for leave to enter a default judgment against the defendant as to liability, and set the matter down for an inquest on damages on May 17, 2021. On March 18, 2021, the plaintiffs mailed notice of this order's entry to the defendant via certified mail, return receipt requested, and they filed tracking information showing that these papers were delivered to the defendant on March 20, 2021. On May 11, 2021, the plaintiffs' counsel filed a request to adjourn the inquest with the

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New York State Courts Electronic Filing system (NYSCEF), as he had not yet received the necessary medical records to go forward, and counsel mailed a copy of this request to the defendant.

On June 28, 2021, an inquest was held before the undersigned, at which the defendant failed to appear. On July 26, 2021, this Court issued a decision after inquest, by which it awarded the plaintiff Janine Zirrith \$300,000.00 for past pain and suffering, \$100,000.00 for future pain and suffering, and \$1,217.88 in unpaid medical expenses, though the Court declined to award any damages to the plaintiff Chris Zirrith for loss of services. On August 16, 2021, the Suffolk County Clerk entered a judgment in favor of the plaintiff Janine Zirrith and against the defendant in the amount of \$401,217.88, with interest from June 28, 2021, along with costs and disbursements, for a total amount of \$402,574.68. On September 1, 2021 and October 1, 2021, the plaintiffs' counsel mailed notice of entry of the August 2021 judgment to the defendant. On October 22, 2021, counsel for the defendant, Colin Astarita, filed an answer to the complaint, and on October 25, 2021, he filed an amended answer, which was rejected by the plaintiff on November 1, 2021.

The defendant now moves, by new counsel and by order to show cause, for leave to vacate the August 2021 judgment entered upon his default, arguing, *inter alia*, that he has a reasonable excuse for his failure to appear in the action, as he gave the papers to his former counsel and believed that he had filed and served an answer to the complaint on his behalf. In addition, the defendant argues that he has a meritorious defense to the action, namely, that he did not intentionally injure the plaintiff Janine Zirrith. In the alternative, the defendant argues that the Court should vacate the August 2021 judgment in the interests of justice. In support, the defendant submits, among other things, an affirmation of Colin Astarita, his former counsel; copies of statements given by the parties and witnesses to the underlying incident to the Town of East Hampton Police Department in September 2019; a memorandum of law; and his own affidavit. The plaintiffs oppose the motion, arguing, among other things, that the defendant was properly served with the complaint, and thus, he has no reasonable excuse for failing to appear. In opposition, the plaintiffs submit several documents, including an affirmation of their attorney.

A defendant who seeks to vacate his or her default in answering the complaint must show both a reasonable excuse for the default and the existence of a potentially meritorious defense to the action (*see* CPLR 5015 [a][1]; *Atalaya Asset Income Fund II, L.P. v 219 Sagg Main, LLC*, 206 AD3d 870, 871, ___ NYS3d ___ [2d Dept 2022] [internal citations omitted]). Where, as here, a party asserts law office failure, he or she must provide a detailed and credible explanation of the default, as conclusory and unsubstantiated allegations of law office failure are not sufficient (*see 555 Prospect Associates, LLC v Greenwich Design & Development Group Corp.*, 154 AD3d 909, 62 NYS3d 530 [2d Dept 2017] [internal citations omitted]). Moreover, law office failure should not be excused where a default results not from an isolated, inadvertent mistake, but from repeated neglect (*see Glukhman v Bay 49th St. Condominium, LLC*, 100 AD3d 594, 595, 953 NYS2d 304 [2d Dept 2012] [internal citations omitted]). In addition to the

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grounds set forth in CPLR 5015 (a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice, though this discretion is reserved for unique or unusual circumstances that warrant such action (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68, 760 NYS2d 727 [2003]; *Cox v Marshall*, 161 AD3d 1140, 1142, 78 NYS3d 212 [2d Dept 2018] [internal citations omitted]).

Here, the defendant's submissions, namely, the affirmation of his former counsel Mr. Astarita and his own affidavit, fail to demonstrate a reasonable excuse for his failure to answer the complaint. By his affirmation, Mr. Astarita states, among other things, that his law firm was retained in September 2020 by the defendant to represent him in the underlying criminal matter, that the defendant gave him the papers pertaining to this action around the same time, and that he had delegated drafting and filing an answer to the complaint to an associate who was subsequently laid off. Mr. Astarita further affirms that he reviewed the answer drafted by his associate, but that this associate was laid off prior to filing and serving it, though he mistakenly believed that it had been filed. Mr. Astrarita states that his law firm suffered a downturn in business due to the ongoing global pandemic caused by Covid-19, that he contracted Covid-19 in January 2021, and due to the severity of illness and "brain fog" he suffered, he neglected to follow up with this matter and ensure that an answer had been filed. In addition, Mr. Astarita states that he is unfamiliar with electronic filing in civil Supreme Court matters, as he mainly practices in criminal court, so he was not aware that leave to enter a default judgment had been granted by the Court or that an inquest on damages had been scheduled or held.

The Court notes that the defendant was properly served with the summons and complaint, that he received notice of entry of the March 2021 order granting the plaintiffs leave to enter a default judgment against him, and that he received notice of the June 2021 inquest on damages. Most significantly, the Court notes that Mr. Astarita took no action on the defendant's behalf in this action until October 2021, more than eight months after the Court granted the plaintiffs leave to enter a default judgment, more than four months after an inquest on damages was held, and two months after a money judgment had been entered against the defendant, including failing to file a notice of appearance with NYSCEF so as to ensure he would receive notifications from the Court. Moreover, by his own affidavit, the defendant states that he mistakenly believed that Mr. Astarita had answered the complaint on his behalf, but he fails to explain how he could reasonably believe this to be in true, as every single notice of entry of this Court's orders were mailed to his residence, and not Mr. Astarita, and each of these orders clearly reflect that the defendant was self-represented.

Accordingly, the Court will not excuse the defendant's default based on his prior counsel's failure to take action on his behalf, as the undersigned finds that such default resulted from repeated neglect of the matter (*see 555 Prospect Associates, LLC v Greenwich Design & Development Group Corp.*, *supra*; *Glukhman v Bay 49th St. Condominium, LLC*, *supra*). As the defendant fails to proffer a reasonable excuse for his failure to answer the complaint, it is unnecessary to determine whether he demonstrated the existence of a potentially meritorious

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defense to the action (*see Bank of N.Y. Mellon v Daniels*, 180 AD3d 738, 739, 115 NYS3d 904 [2d Dept 2020] [internal citations omitted]). Moreover, the defendant has failed to present any unique or unusual circumstances to warrant the Court vacating the August 2021 judgment in the interests of substantial justice (*see Woodson v Mendon Leasing Corp.*, *supra*; *Cox v Marshall*, *supra*).

In light of the foregoing, the defendant's motion is denied.

E N T E R

Date: August 16, 2022
Riverhead, New York

Martha L. Luft
HON. MARTHA L. LUFT, A.J.S.C.

 Final Disposition

 X Non-Final Disposition