

**Spanish Christian Church, Inc. v City of New York**

2025 NY Slip Op 31043(U)

March 27, 2025

Supreme Court, New York County

Docket Number: Index No. 155791/2015

Judge: Lynn R. Kotler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

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INDEX NO. 155791/2015

THE SPANISH CHRISTIAN CHURCH, INC.,

MOTION DATE 02/04/2025

Plaintiff,

MOTION SEQ. NO. 003

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON
COMPANY OF NEW YORK, KAORU DEMLER
MURMATSU,

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49,
50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

This is one of several dozen cases (the "coordinated actions") arising out of a gas
explosion that took place on March 12, 2014, at buildings located at 1644 and 1646 Park
Avenue, in Manhattan. By an order dated January 6, 2016, the court appointed the Plaintiff's
Liaison Committee ("PLC") to act on behalf of the plaintiffs' counsel in the coordinated actions.
The court thereafter issued a case management order dated June 16, 2016 (the "CMO"), which
provided for the PLC to initiate, coordinate, and conduct all pretrial liability discovery on behalf
of and for the benefit of all plaintiffs in the coordinated actions. The CMO authorized the PLC to
collect reimbursement from counsel for all plaintiffs in the coordinated actions for disbursements
incurred by the PLC in prosecuting the case. Although the PLC requested that the CMO also
provide for payment of their legal fees, the court denied this request and included no such
provision in the CMO. Pursuant to the CMO, each plaintiff would retain responsibility to have
his or her own counsel to participate in damages discovery, mediation, settlement negotiations,
and trial on damages.

On June 6, 2024, after years of litigation, the PLC renewed its application for attorney's
fees, moving for an order awarding them an attorney's fee of 4% of the gross recovery, if any, in
each of the coordinated actions, payable to the PLC out of the contingency fees of the non-PLC

plaintiffs' attorneys (MOT SEQ 002). The PLC's notice of motion was separately filed under the index number for each of the coordinated actions. By decision and order dated August 6, 2024, the court granted the PLC's motion, finding that the proposed 4% fee was appropriate to compensate the PLC for their extensive work on behalf of all plaintiffs over the course of eight years of litigation. The motion was granted without opposition by the plaintiff herein, The Spanish Christian Church, Inc. ("SCC").

Three months later, in November 2024, SCC filed the present motion, pursuant to CPLR 5015(a)(1), to vacate so much of the court's prior order as awarded counsel fees to the PLC payable by SCC (more precisely, by SCC's counsel, Lever & Ecker, PLLC [the "Lever firm"], out of its share of SCC's recovery). SCC contends it failed to oppose the PLC's motion due to law office failure and maintains that it had a meritorious opposition to the prior motion. Specifically, SCC argues it should be exempt from paying fees to the PLC because, in addition to being the plaintiff in this action, it is also a defendant in certain of the other coordinated actions, such that compelling the Lever firm to pay counsel fees to the PLC would create a conflict of interest.

"A party seeking to vacate an order entered upon his or her default in opposing a motion must demonstrate a reasonable excuse for the default and a potentially meritorious opposition to the motion" (*U.S. Bank Nat'l Ass'n v 1009 Guyiti, LLC*, 186 AD3d 1562, 1563 [2nd Dept. 2020]; see *Forest Walnut LLC v Abizker*, 224 AD3d 408, 409 [1st Dept. 2024]). "The determination of the sufficiency of the proffered excuse and the statement of merits rests within the sound discretion of the court" (*Goldman v Cotter*, 10 AD3d 289, 291 [1st Dept. 2004]). Here, SCC proffers neither a reasonable excuse nor a potentially meritorious opposition.

SCC's claim of law office failure rests upon the affirmation of its counsel, David B. Lever, in which Lever admits that he received the PLC's notice of motion when it was separately e-filed under the index number for this action. Nevertheless, Lever states that he "did not closely review the . . . Notice of Motion and supporting Affirmation," and did not file opposition to the motion, because he was focused on finalizing the settlement of this action, and because he believed SCC was exempt from payment of the PLC's legal fees. Neither of these explanations constitute a reasonable excuse for the default in failing to oppose the PLC's motion.

Given his admission that he received notice of the PLC's motion, Lever's alleged focus on finalizing settlement does not excuse the neglect of his obligation to file an opposition (*see Pichardo-Garcia v Josephine's Spa Corp.*, 91 AD3d 413, 414 [1st Dept. 2012] ["[c]ounsel's overbooking of cases and inability to keep track of his appearances does not constitute a reasonable excuse"] [internal quotation marks omitted]; *Perez v New York City Hous. Auth.*, 47 AD3d 505, 505–06 [1st Dept. 2008] [same]; *see also Aetna Life Ins. Co. v UTA of KJ Inc.*, 203 AD3d 401, 401–02 [1st Dept. 2022]). Nor is the default excused by Lever's belief that the PLC's motion did not implicate his client because SCC is purportedly exempt from any payment of legal fees to the PLC, as no reasonable explanation is given as to how Lever came to this conclusion (*see Forest Walnut LLC v Abizker*, 224 AD3d 408, 409 [1st Dept. 2024]; *Luciano v Felix*, 185 AD3d 469, 470 [1st Dept. 2020]; *Agosto v W. Beef Retail, Inc.*, 175 AD3d 1192 [1st Dept. 2019]).

Lever asserts that he believed SCC was exempt from the payment of legal fees based on the fact that, in 2017, PLC counsel Robert Vilensky agreed to excuse SCC from payment of its share of the PLC's disbursements. Lever's reliance on this 2017 exemption to justify his belief that SCC was also exempt from any future payment of legal fees is neither credible nor reasonable. It is undisputed the discussions regarding the 2017 exemption were limited to disbursements and did not expressly extend to legal fees. Further, Lever claims he requested the 2017 exemption based on advice from ethics counsel that it would be an impermissible conflict of interest for Lever to contribute SCC funds to support the PLC given that SCC was also a defendant in certain of the other coordinated actions. However, Lever admitted in a contemporaneous email to his ethics counsel that Vilensky "does not believe there is a conflict here." Vilensky likewise avers, in the PLC representatives' joint affirmation in opposition to the present motion, that he did not discern any valid conflict of interest concerns but agreed to excuse SCC from the payment of disbursements as a courtesy, given the minimal amounts involved. Lever was thus aware that the 2017 exemption was not based on the PLC's agreement with his ethical concerns. As such, he had no reasonable basis to believe the PLC would extend the 2017 exemption to the payment of legal fees based on the same conflict-of-interest concerns Vilensky had already expressly rejected. Indeed, the PLC plainly was not treating SCC as exempt from the payment of legal fees, as it separately filed its motion under the index number

for this action, in which SCC is the sole plaintiff. It was thus incumbent upon Lever to respond to the PLC's motion and raise his conflict-of-interest arguments in opposition rather than unreasonably assuming that the motion did not implicate SCC.

As to SCC's purported meritorious opposition, it fails to demonstrate that requiring the Lever firm to contribute SCC funds to pay its share of the PLC's attorney's fees would create a conflict of interest. SCC, like the other plaintiffs in the coordinated actions, had claims against Con Edison, the City of New York, and Hallen Construction (the "Target Defendants"). To obtain a plaintiff's recovery, SCC, like the other plaintiffs in the coordinated actions, needed to show that these Target Defendants were liable for the gas explosion that caused its damages. The PLC coordinated the liability discovery against the Target Defendants, to the benefit of all plaintiffs in the coordinated actions, including SCC, as well as to the benefit of all non-PLC plaintiffs' counsel, including the Lever firm. SCC, which was able to reach a settlement with the Target Defendants, offers no cogent explanation as to why it should reap the benefits of the PLC's work without paying them for their efforts.

Nor does SCC explain why Lever would somehow become conflicted simply by following the court's order to pay the PLC its attorney's fees. Citing Rule 1.7(a)(1) of the New York Rules of Professional Conduct, SCC makes the conclusory assertion that requiring Lever to pay a portion of his contingency fee as compensation to the PLC for its efforts would place Lever's "independent judgment" in jeopardy. It fails, however, to explain why this would be so. Notably, Lever only represented SCC in its role as a plaintiff; SCC has separate counsel representing it in those coordinated actions in which it was sued as a defendant. As such, the PLC's efforts were entirely consonant with SCC's interests as a plaintiff, which was the only capacity in which Lever represented it.

SCC's contention that the PLC waived its entitlement to fees when it agreed to excuse SCC from the payment of disbursements is equally meritless. "A party asserting a waiver of rights has the burden of establishing that the purported waiver constituted an intentional, voluntary relinquishment of a known right" (*Russo v Rozenholc*, 130 AD3d 492, 496 [1st Dept. 2015]). "[W]aiver should not be found absent evidence from which a clear manifestation of intent to relinquish the right in question could be reasonably inferred . . . [and] a finding of

waiver cannot be based upon mere silence or oversight, or upon mistake, negligence, or thoughtlessness” (*Homapour v Harounian*, 200 AD3d 575, 576 [1st Dept. 2021] [internal quotation marks, citations, ellipses, and brackets omitted]). As already noted, it is undisputed that Lever and Vilensky did not discuss legal fees in 2017, only disbursements, and that, as Lever himself documented, Vilensky expressly rejected Lever’s conflict of interest concerns. Moreover, the PLC had no “known” right to legal fees at the time it excused SCC from payment of its disbursements. The court had denied the PLC’s request for a fee award in connection with the 2016 CMO and would not award the PLC any right to fees until August 2024, when it issued the order SCC now seeks to vacate. SCC thus presents no evidence demonstrating the PLC’s “explicit, unmistakable, and unambiguous” waiver of their right to legal fees (*id.*, quoting *MLB Constr. Servs., LLC v Dormitory Auth. of the State of N.Y.*, 194 AD3d 1140, 1141 [3<sup>rd</sup> Dept. 2021]).

Accordingly, upon the foregoing documents, it is

ORDERED that plaintiff’s motion to vacate is denied.

This constitutes the Decision and Order of the court

3/27/2025  
DATE

  
LYNN R. KOTLER, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: