Mtn. Seq. # 2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

NAKIA NEELY,

Plaintiff,

- against -

SCOTT A. FELICETTI, THE FELICETTI LAW FIRM, P.C. and JOHN DOES 1-25,

Defendants.

Index No.: 29170/2017

DECISION and ORDER

	PAPERS NUMBERED
Defendants' Order to Show Cause, Affirmation in Support, Affidavits in Support, Exhibits	1, 2, 3, 4
Defendants' Affirmation in Further Support, Affidavit in Support	5, 6
Plaintiff's Affirmation in Opposition	7

Upon the enumerated papers, Defendants' motion seeking to vacate the default judgment is denied in accordance with the annexed decision and order.

Dated: **1/23/2019**

Hon. **LUCINDO SUAREZ, J.S.C.**
LUCINDO SUAREZ, J.S.C.

Check one:
□ Case Disposed in Entirety
■ Case Still Active

Motion is:
□ Granted □ GIP
■ Denied □ Other

Check if appropriate:
□ Schedule Appearance □ Settle Order
□ Fiduciary Appointment □ Submit Order
□ Referee Appointment

SUPREME COURT OF THE STATE OF NEW YORK
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NAKIA NEELY,

Index No.: 29170/2017

Plaintiff,

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DECISION and ORDER

SCOTT A. FELICETTI, THE FELICETTI LAW FIRM, P.C. and JOHN DOES 1-25,

Defendants.

PRESENT: Hon. Lucindo Suarez

The issue in Defendants' motion is whether the default judgment rendered against them should be vacated under CPLR §5015(a)(1). The court finds that Defendants are not entitled to a vacatur of the default judgment as they do not proffer a reasonable excuse for their default.

A movant seeking to vacate a default pursuant to CPLR §5015(a)(1) must proffer both a reasonable excuse for the default and a meritorious defense. *See Block 2829 Realty Corp. v. Community Preserv. Corp.*, 148 A.D.3d 567, 50 N.Y.S.3d 61 (1st Dep't 2017). The decision to grant or deny a motion to vacate a default rests in the sound discretion of the court. *Matter of Dayon G. v. Tina T.*, 163 A.D.3d 461, 82 N.Y.S.3d 387 (1st Dep't 2018).

Defendants contend that the default judgment should be vacated due to law office failure, and their purported efforts in attempting to settle this matter. Defendants allege that upon properly being served with the summons and verified complaint in October 2017, they sent same via e-mail transmission to their counsel Howard Benjamin with the directive to resolve the matter. Mr. Benjamin averred that he did not receive said e-mail. He further averred that it was

not until five months hence in March 2018, that he received an e-mail from the Defendants with the summons and complaint, again with the directive to resolve the matter.

Mr. Benjamin then undertook the legal stratagem to attempt to engage in settlement negotiations in lieu of either obtaining Plaintiff's consent to file a late answer or to file an application with the court seeking leave to file same. Further, despite Defendants admitting that they were served with Plaintiff's application for default they inexplicably failed to interpose opposition to same.

Moreover, considering that Defendants were represented by counsel and they themselves are attorneys, undercuts their arguments that their failure not to file a timely answer or at a minimum file opposition to Plaintiff's application for default was not willful and their bare and unsubstantiated assertions of law office failure are insufficient to establish a reasonable excuse for the default. *See Fernandez v. Santos,* 161 A.D.3d 473, 76 N.Y.S.3d 147 (1st Dep't 2018).

Additionally, the caselaw Defendants cite to support its application for vacatur is misplaced. The instant facts are not similar to *Cheri Rest Inc.* where the court found reasonable excuse, namely, inadvertent law office failure due to scheduling error. *See Cheri Rest. Inc. v. Eoche,* 144 A.D.3d 578, 42 N.Y.S.3d 113 (1st Dep't 2016). The affirmation and affidavits in support do not purport that their failure to file a timely answer or file opposition to Plaintiff's default judgment was inadvertent. In fact, Defendants and its counsel were aware of the pending lawsuit and it appears they took the informed tactical decision not to file an answer or file opposition to Plaintiff's application for default and instead chose to negotiate a settlement.

Likewise, this matter is not analogous to *Manne* or *Zwicker* because the procedural posture in both of those cases differ from the case at bar. *See Manne v. Berkowits Sch. of Electrolysis,* Inc., 165 A.D.3d 531, 84 N.Y.S.3d 349 (1st Dep't 2018); s*ee also Zwicker v.*

Emigrant Mtge. Co., Inc., 91 A.D.3d 443, 936 N.Y.S.2d 158 (1st Dep't 2012). Those cases involve the denial of an application for a default judgment before the issuance of same whereas the application here is seeking to vacate a default judgment under CPLR §5015(a)(1) after the default judgment was already issued by the court. Furthermore, what distinguishes this matter from *Manne* and *Zwicker* was that the Defendants in those cases interposed opposition to Plaintiff's application for default whereas in the instant case there was no excuse proffered explaining Defendants failure to interpose opposition to Plaintiff's motion for default.[1]

Accordingly, it is

ORDERED, that Defendants' motion seeking a vacatur of the default judgment rendered against them is denied.

This constitutes the decision and order of the court.

Dated: January 23, 2019

Lucindo Suarez, J.S.C.

LUCINDO SUAREZ, J.S.C.

[1] The court does not reach the second prong of meritorious defense under CPLR §5015(a)(1) as Defendants failed to establish a reasonable excuse for their failure to timely file an answer.