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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY _____

____ AND _____

Plaintiffs,

v.

Index No.: _____

AND
VARIOUS JANE AND JOHN DOES _____,

Defendants,

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION TO VACATE DEFAULT JUDGMENT PURSUANT TO CPLR 5015 (a)(1)**

Attorney for Plaintiffs



Plaintiffs submit this memorandum of law in support of their motion pursuant to CPLR 5015 (a)(1) to vacate a default judgment.

I. PRELIMINARY STATEMENT

This case has all the hallmarks of a case where it would be more than appropriate for the Court to grant a motion to vacate a default judgment against the Plaintiffs. This is an action which alleges a series of ongoing blatant violation of Plaintiffs' rights and the infliction directly and indirectly of physical and mental damage to them. One Defendant [REDACTED] ("[REDACTED]") moved to dismiss while the other Defendants had answered the complaint. For reasons explained below and in the accompanying Affirmation of [REDACTED] Pursuant to CPLR 5015 (a)(1) in Support of Plaintiffs' Motion to Vacate Default Judgment ("[REDACTED] Affirmation"), the motion was not answered and action the Court appears to have held Plaintiff in default as to all Defendants. However, this is an where the failure to respond was inadvertent and not the fault of Plaintiffs' counsel, non-moving Defendants were given the benefit of Plaintiffs' counsel's non-response to the motion, where Defendants' counsel had promised Plaintiffs' counsel he would keep him apprised of filings, and where counsel for the parties came to an agreement to dismiss the moving Defendant and permit the case to go forward against the other Defendants on the merits and to vacate the default.

Perhaps most importantly, this is a case with serious allegations against Defendants in that their conduct is alleged to have resulted in both Plaintiffs [REDACTED] and where at least one Defendant, [REDACTED] one of the Plaintiffs. Clearly, under the circumstances, these Plaintiffs should have their day in Court.

II. STATEMENT OF FACTS

This action commenced on or about [REDACTED] alleging claims against the Defendants for

strict liability and negligence; assault and battery; nuisance; personal injury, property damage; and loss of consortium.

Affirmation ¶ 1. The claims stem from a series of acts by Defendants, as described more fully in the Complaint (DOC. NO.), including Defendants engaging in work on a residence adjacent to Plaintiffs' residence consisting of, among other things, over using and other equipment resulting in grossly excessive noise penetrating Plaintiffs' residence at the each work day for almost a year, physical damages and illness caused to Plaintiffs' home and personal illness suffered by them because of the activities, the physical damage included both Plaintiffs suffering and Plaintiff former detective, being by Defendants when he stood up for his rights to confront Defendants about the

Affirmation ¶ 2

On , Defendants , and filed an answer and asserted certain affirmative defenses. DOC. NO. .

Affirmation ¶ 3

On , Plaintiffs and Defendant ("") entered into a stipulation extending 's time to answer, move or otherwise appear with respect to the Complaint until . DOC. NO. . Affirmation ¶ 5.

On or about , 2020, one defendant , filed a motion to dismiss the complaint against it pursuant to under CPLR §§ 3211(a)(1), 3211(a)(7), and/or 3211(c). DOC. NOS. . None of the other defendants who had been served with process were parties to that motion to dismiss. The return date of the motion dismiss was

Affirmation ¶ 4. The grounds of the motion were that was only a mortgagee and thus was not in the position of control that would have been necessary for

to find liability against it for the conduct alleged. *Id.*

Plaintiffs' counsel was not aware that the motion to dismiss had been filed until after a default judgment was granted to all defendants on [REDACTED]. [REDACTED] Affirmation ¶ [REDACTED]. The reasons he was not aware that a motion had been filed was that there had been [REDACTED] where his [REDACTED] is located and neither he nor the Court were served a hard copy of Defendant [REDACTED]'s papers. *Id.*

Plaintiffs' counsel was also relying on the promise of [REDACTED] and the other Defendants' counsel, [REDACTED] to keep him abreast of filings since both [REDACTED] and [REDACTED] were working from home due to COVID-19 and [REDACTED] had no efile staff available at that time. [REDACTED] Affirmation ¶ [REDACTED]. However, [REDACTED] did not notify [REDACTED] until after the default judgment motion was granted. *Id.*

On [REDACTED], counsel for all parties had a conference with [REDACTED] in which [REDACTED] indicated that since the judgment had not even been entered yet and his opinion did not even appear on efile or elaw, he would certainly grant a motion to vacate. [REDACTED] Affirmation ¶ [REDACTED]. At the same conference, [REDACTED] promised he would only litigate on the merits of the motion by defendant [REDACTED]. *Id.*

On or around [REDACTED], [REDACTED] and [REDACTED] reached an agreement that [REDACTED] would request a Preliminary Conference and purchase a Request for Judicial Intervention. [REDACTED] Affirmation ¶ [REDACTED].

On [REDACTED], Plaintiffs' filed a request for a preliminary conference. [REDACTED] Affirmation ¶ [REDACTED]. Counsel also agreed that [REDACTED] would be dismissed from the action on consent and with prejudice but that the case against the remaining defendants would proceed on consent. Counsel also agreed to conduct discovery forthwith. *Id.* On [REDACTED], [REDACTED]

sent an email to [REDACTED] reflecting the agreement that [REDACTED] had reached with [REDACTED] on [REDACTED]. [REDACTED] Affirmation ¶ [REDACTED].

On [REDACTED], Plaintiffs' counsel sent an email to [REDACTED] reflecting the agreement that he had reached with [REDACTED] regarding dismissal of [REDACTED] and continuation of the action against the other Defendants. [REDACTED] Affirmation ¶ [REDACTED]. A copy of that email is attached as Exhibit [REDACTED] to the [REDACTED] Affirmation. [REDACTED] indicated that as of this time, it does not appear that a judgment is on file. [REDACTED] Affirmation ¶ [REDACTED].

[REDACTED]'s intent was to move to vacate the default as soon as possible as soon as the judgment was entered and that although the judgment has still not been entered, he decided it was prudent to move to vacate and not wait any longer for the judgment to be entered. [REDACTED] Affirmation ¶ [REDACTED].

Plaintiffs' counsel attested to his belief that this action has underlying merit because one of the Plaintiffs was physically assaulted by Defendants, that both of the Plaintiffs suffered [REDACTED] as a result of the noise and vibration caused by Defendants' unreasonable [REDACTED] and because of the damage done to the property of the Plaintiffs as a result of Defendants' unreasonable [REDACTED]. [REDACTED] Affirmation ¶ [REDACTED]. Although [REDACTED] expressed the belief that Plaintiffs had a meritorious claim against movant [REDACTED] because it is believed [REDACTED] had an ownership interest and could exert control over the property where the [REDACTED] was being conducted [REDACTED] because the parties had agreed to dismiss [REDACTED] that issue if now moot. *Id.*

**III. THE COURT SHOULD GRANT THE MOTION TO VACATE
DEFAULT JUDGMENT AND PERMIT THE ACTION TO CONTINUE
AGAINST ALL DEFENDANTS EXCEPT [REDACTED]**

**A. This Action is Unusual in that the Parties Have Agreed to Dismiss the
Only Moving Party and Have Agreed that the Action Should**



Continue Against the Other Defendants

Before considering the application of the general rule, which is discussed below, regarding vacating defaults, it should be kept in mind that the typical case applying the standard involves a situation where the party in default has failed to respond to a motion made by only one Defendant. Although Defendants other than [REDACTED] never moved to dismiss, nonetheless, it appears that a default judgment has been granted in their favor.

While it is correct that, for reasons explained in the [REDACTED] Affirmation, the Plaintiffs did not respond to the moving party, [REDACTED], that party and the Plaintiffs have agreed that [REDACTED] should be dismissed. This motion only involves the question as to whether the default awarded by the Court to the non-moving parties should be vacated. Importantly, the parties have agreed among themselves that to the extent there was a default granted to the non-moving parties it should be vacated and the action should continue on the merits as to Plaintiffs and the non-moving Defendants. Accordingly, it is logical to believe that even though the Plaintiffs clearly satisfy the standard for vacating a default set forth below, because of the unusual facts, those standards would seem to be stricter standards than Plaintiffs would need to satisfy in this action. Plaintiffs suggest that the consent to vacate the default and the fact that the default was granted to non-moving Defendants, would be reason alone to vacate the default.

B. Plaintiffs Satisfy the Requirements of CPLR 5015(a)(1) Regarding the Vacating of a Default

The general rule is that pursuant to CPLR 5015(a)(1), "a party seeking to vacate a judgment on the basis of excusable default must demonstrate both a reasonable excuse and a meritorious defense" *Benson Park Assoc., LLC V Herman*, 73 A.D.3d 464, 465, 899 N.Y.S.2d 614 (1st Dept 2010); see also *Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co.*, 67 N.Y.2d 138, 141, 501 N.Y.S.2d 8 (1986); *Goldman v Cotter*, 10 A.D.3d 289, 781 N.Y.S.2d 28 (1st Dept 2004) The

determination of the sufficiency of the offered excuse rests within the sound discretion of the court. *Goldman v. Cotter*, 10 A.D.3d at 291, 781 N.Y.S. 3d at 31. In that case the [REDACTED] found it an abuse of discretion for lower court not to vacate default where excuse was failure of paralegal to file papers even though counsel waited four months to move to vacate default.

In considering a motion to vacate a default, the Court should also take into consideration the length of the delay, prejudice to the opposing party, and this State's public policy favoring resolution of matters on the merits. *Mejia v Ramos*, 113 A.D. 3d 429, 430, 979 N.Y.S.2d 281 (1st Dept 2014); accord *Harcztark v Drive Variety, Inc.*, 21 A.D.3d 876, 876-877, 800 N.Y.S.2d 613 (2d Dept 2005). Not only does New York have a policy towards deciding actions on their merits but it must be noted that the policy is a strong policy. *Santiago v Valentin*, 125 A.D.3d 459; 4 N.Y.S.3d 2 (1st Dept. 2015).

In *Valentin*, the First Department found that the denial of the motion to vacate the default was improvident because the “failure to respond to defendant's summary judgment motion was not willful, but was purely the result of a misunderstanding by his counsel.” 125 A.D. 3d at 459-60, 4 N.Y.S. 3d at 3.¹ In that case, the plaintiff failed to submit opposition to a motion due to a delay in receiving an updated medical report from plaintiff's treating physician. Plaintiff explained that after defendant denied his third request to stipulate to an adjournment, he believed the only recourse was to wait for a decision and order from the court, and thereafter, make a motion to vacate the default judgment. The [REDACTED] found that a reasonable excuse to vacate the default.

In *AFB Freight Sys. v Catalano*, 2015 N.Y. Misc. LEXIS 2875, at * 2-3 (Sup. Ct. N.Y. Co. April 5, 2015), where the failure to respond to the motion was due to a misunderstanding or

¹ The Appellate Division also considered that plaintiff had a potentially meritorious claim which Plaintiffs here also establish.

miscommunication among counsel, the court found it appropriate to vacate the default. The court also considered, as here, that movant had a potentially meritorious case. 2015 N.Y. Misc. LEXIS 2875, at * 3. In *Jemb Realty Corp. v New Cingular Wireless PCS, LLC*, 2020 N.Y. Misc. LEXIS 5590, at *4-5 (Sup. Ct. N.Y. Co. Sept. 3, 2020), the court found it appropriate to grant a plaintiff's failure to respond to a motion to dismiss because a staff member failed to timely sign a stipulation prior to submission of a motion which would have resulted in an adjournment. The court stated in words just as appropriate here, "given the absence of any evidence of willful or contumacious conduct on the plaintiff's part. (see *Alliance for Progress, Inc. v Blondell Realty Corp.*, 179 AD3d 629, 629, 114 N.Y.S.3d 656 (1st Dept 2020).

Certainly, the actions of Plaintiff's counsel here, where Plaintiff's counsel had not been aware of service because of [REDACTED] ([REDACTED] Affirmation ¶ [REDACTED]), and Defendants counsel had promised to keep Plaintiffs' counsel apprised of any new proceedings [REDACTED] [REDACTED] due to the COVID pandemic ([REDACTED] Affirmation ¶ [REDACTED]) and that Plaintiffs counsel took steps to remedy the default the next day after the default was marked on the calendar the issue was brought to the Court's attention ([REDACTED] Affirmation ¶ [REDACTED]), and the parties reaching an agreement to cure the default [REDACTED] later ([REDACTED] Affirmation ¶ [REDACTED]), measures up well with the other cases where defaults were vacated or where the Appellate Division found the denial of a motion to vacate a default was an abuse of discretion.

In considering the length of the delay, that points in Plaintiffs' favor. Counsel had a conference with [REDACTED] the day after the return date where Defendants' counsel indicated that he agreed to litigate the case on the merits and the Court seemed amenable to vacating the default so the action could be determined on the merits. The only thing holding up a formal motion being made was that the default judgment had not been entered. Accordingly, there was no undue

delay by Plaintiffs or their counsel.

There was no prejudice to the opposing party. In fact, there is no opposing party as counsel for Defendants has already agreed that the default should be vacated, and the action proceed on the merits and discovery begin henceforth. The underlying motion was one to dismiss [REDACTED] from the action. Whether [REDACTED] would have been successful in being dismissed from the action if it were decided on the merits, cannot be known because the parties agreed to the dismissal of [REDACTED]. Thus, [REDACTED] was not prejudiced because it sought to be dismissed from the case and it has accomplished that whether through default or by stipulation of the parties. The other Defendants never sought dismissal by motion. In fact, they answered the complaint. Thus, they have not been prejudiced because they would have understood that they were going to proceed and have their liability determined on the merits of Plaintiffs' claim and that is exactly what will happen if the default is vacated.

Finally, although it is not clear that the Plaintiffs would need to provide support for the merits of their case where the Defendants other than [REDACTED] never sought to be dismissed, clearly the [REDACTED] Affirmation ¶ [REDACTED], supports the potential finding for Plaintiffs on the merits.



CONCLUSION

For the reasons set forth above, it is respectfully requested that the Court vacate the default judgment against the Plaintiffs and permit the case to proceed forthwith on the merits.

Dated: [REDACTED] ____, 2020

Respectfully submitted,

Attorney for Plaintiffs