**To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties**

**SUPREME COURT OF THE STATE of NEW YORK**
**COUNTY OF PUTNAM**

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JOHN BARDES and LORELEI BARDES,

Plaintiffs,

-against -

GALLO PINTADO and HABITAT REVIVAL, LLC,

Defendants.

----------X

**DECISION & ORDER**

Index No. 465-2009

Sequence No. 3

**LUBELL, J.**

The following papers were considered in connection with this motion by defendants for an Order pursuant to CPLR 5015(a)(1) vacating the default judgment entered against the defendants dated June 10, 2011 together with such other and further relief as to this Court may seem just and proper:

| **PAPERS** | **NUMBERED** |
|---|---|
| Motion/Affirmation/Exhibits A-L | 1[1] |
| Affirmation in Opposition/Exhibits 1-3 | 2[2] |
| Reply Affirmation/Exhibit A | 3 |

This personal injury action arises out of a motor vehicle accident which took place on July 1, 2008, on the premises owned and operated by the defendant Habitat Revival, LLC. (the "Premises"; "Habitat"). While performing maintenance work on a lawn equipment trailer parked at the Premises, plaintiff John Bardes was injured when he was struck by a Ford pick-up truck owned by Habitat and being operated by defendant Gallo Pintado ("Pintado"). Upon being thrown to the ground, Pintado ran over plaintiff's right leg with the pick-up truck and, again, upon attempting to maneuver the vehicle away from plaintiff. As a

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[1] Under the penalty of having papers rejected in the future, defense counsel is admonished not to provide the Court with bound double-sided exhibits since such are virtually impossible to efficiently handle.

[2] Plaintiff's counsel is admonished that this Court requires the use of exhibit tabs. The failure to so in the future is at the risk of having such papers rejected by the Court.

result, plaintiff sustained a significant "crush" injury to his right lower extremity (as is more fully set forth in the Court's May 20, 2011 written determination following the April 14, 2011 assessment of damages proceedings).

In response to service of the summons and complaint, defendants interposed an answer dated June 9, 2009 through the law office of Kornfeld, Rew, Newman & Simeone ("KRN&S"). KRN&S had been retained by Farm Family Casualty Insurance Company ("Farm Family Casualty") on defendants' behalf notwithstanding Farm Family Casualty's July 7, 2008 disclaimer of coverage letter citing the workers' compensation exclusion clause of the underlying policy of insurance. KRN&S would continue to represent defendants' partially through depositions which were abruptly halted when plaintiff threatened to assault defense counsel in words not here needing repetition.

Thereafter, Farm Family Casualty retained counsel to commence a declaratory judgment action to litigate its disclaimer (see, Farm Family Casualty Insurance Company v. Habitat Revival, LLC et al. [Putnam County Index 3793-2009]). By Decision & Order of September 15, 2010, the Court (Nicolai, J.) granted Farm Family Casualty's motion for summary judgment declaring that it neither had a duty to defend nor indemnify the defendants upon the finding that plaintiff and defendant Pintado were employees of Habitat and that the policy excluded injuries to employees caused by other employees.

Correspondingly, KRN&S moved in this action to be relieved. By Decision & Order of November 15, 2010, the Court (Nicolai, J.) granted said motion and directed defendants to retain new counsel by December 10, 2010, on which date the case was put on the Court's calendar for a Trial Readiness Conference. There is no reasons for this Court to believe that defendants, self-represented or otherwise, appeared before the Court on said date and/or at that time or any other time requested an adjournment in person or in writing for an extension of time to retain new counsel.

On January 20, 2011, the Court (Nicolai, J.) granted plaintiffs' motion for summary judgment, as unopposed. The assessment of damages took place before this Court on April 14, 2011. Neither defendant appeared through counsel or otherwise, nor is there any reason to believe that either defendant requested an opportunity to retain counsel regarding same.

Based upon the unchallenged testimony of plaintiff and his wife, the submitted evidence including medical records and tax returns, the Affirmation of Michael J. Grace, Esq., and the Affirmation of Michael I. Weintraub, M.D. and his accompanying

records and report, the Court issued its May 20, 2011 written determination wherein, plaintiff was awarded compensatory damages for past pain and suffering from the date of the accident to the date of the hearing in the amount of $150,000.00 and for future pain and suffering in the amount of $500,000.00 ($250,000.00 of which was payable as a lump sum and the remainder payable as an annuity contract with a present value to be calculated by the Clerk with the discount rate of 3.5%), compensatory damages to plaintiff Lorelei Bardes for loss of consortium in the amount of $25,000.00 and future loss of consortium in the amount of $75,000.00, and compensatory damages to plaintiff John Bardes for past lost earnings in the amount of $100,000.00 and future loss of earnings in the amount of $37,500 per year for the next 8 years or $300,000.00. Judgment was entered against defendants accordingly on June 10, 2011.

Subsequent to all of this, on January 31, 2012, the Appellate Division, Second Department, reversed the Court's (Nicolai, J.) Decision & Order of September 15, 2010 (see Farm Family Cas. Ins. Co. v. Habitat Revival, LLC, 91 AD3d 903 [2d Dept 2012]) and, correspondingly, remitted the matter for the entry of a judgment, *inter alia*, declaring that the Family Farm Casualty is obligated to defend and indemnify Habitat and Pintado in this action. This motion follows.

At the outset, the Court rejects plaintiffs' procedural objection to defendants' use of CPLR §5015(a)(1) as the vehicle through which to effectuate the relief requested. This is so whether the motion specifically targeted at the June 10, 2011 judgment, as entered, or the Court's (Nicolai, J.) September 15, 2010 determination upon the unopposed summary judgment motion which was granted upon defendants' default.

Section 5015(a)(1) may be used where, as here, a party seeks to vacate an "order entered upon his or her default in opposing a motion" (see Political Mktg., Intern., Inc. v. Jaliman, 67 AD3d 661, 661 [2d Dept 2009] citing CPLR 5015[a][1]; Waste Mgt. of N.Y., Inc. v. Bedford-Stuyvesant Restoration Corp., 13 A.D.3d 362, 785 N.Y.S.2d 543; Greenpoint Sav. Bank v. Hill, 228 A.D.2d 412, 643 N.Y.S.2d 424). There is certainly no argument that it is upon this default that the assessment of damages was ultimately conducted, damages assessed, and judgment entered.

However, as with any section 5015(a)(1) application, movant "must demonstrate both a reasonable excuse for the default and a meritorious defense to the action" (Political Mktg., Intern., Inc. v Jaliman, supra). "The movant must further demonstrate that the default was not willful and [is] without prejudice to the opposing

party" (Asterino v. Asterino & Assoc. Inc., 275 AD2d 517, 519 [3d Dept 2000] citing Wilcox v. U-Haul Co., 256 A.D.2d 973, 974, 681 N.Y.S.2d 909).

Contrary to defendants' position as advanced through re-appearing, KRN&S defendants have not established a reasonable excuse for their default. While KRN&S's absence in this action as measured from their successful application to be relived (Nicolai, J.) through their reappearance following the Appellate Division's decision of January 31, 2012, may constitute a reasonable excuse for KRN&S's lack of involvement during said period, such does not *ipso facto* establish a reasonable excuse for defendants' default in connection with proceedings which were otherwise left to move forward, including the motion for summary judgment. The Court must properly focus on whether movants have met their burden of establishing a reasonable excuse for their default.

In that regard, the Court notes that no excuse is proffered on behalf of defendant Habitat and defendant Pintado simply advances the unsupported and conclusory statement, "After [KRN&S] was released [sic] as counsel by the order of Judge Nicolai I was unable to afford legal representation."

In contrast to the movant in Asterino v. Asterino & Assoc. Inc. (275 AD2d 517 [3d Dept 2000]), Pintado fails to set forth any account of what efforts he made, let alone "a detailed account of [any] difficulties encountered in retaining an attorney to represent [him] . . . and [any] apparent misconceptions that [may have] occurred during that process (Asterino v. Asterino & Assoc. Inc., supra at 519; see also Busone v. Bellevue Maternity Hosp., 266 AD2d 665, 668 [3d Dept 1999][reasonable excuse for failure to timely respond to defendant's summary judgment motion shown where there existed an inability to expeditiously retain new counsel after more than nine years with the same attorney in a complex medical malpractice action, by an out-of-state plaintiff who made repeated attempts to retain new counsel and faced genuine difficulties including, but not limited to, lack of funds to retain a medical expert to review case]).

There is absolutely no showing as to what efforts, if any, defendants made to retain counsel and what resources, if any, were available to defendants at the time for that purpose. Nor is there any indication that either outgoing counsel (KRN&S) or defendants ever made an application to stay the action to allow defendants additional time to retain new counsel beyond the seemingly sua sponte stay granted by the Court (Nicolai, J.) in its November 5, 2010 determination. Nor is there any indication that either defendants or anyone on their behalf applied to this Court or to

the Appellate Division for a stay pending the determination of the appeal relieving KRN&S.

Upon the limited showing currently before the Court, the Court does not find that defendants have established a reasonable excuse for their default and that their default was not wilful.

Having failed in this material regard, the Court denies defendants' motion.

Issues raised for the first time by way of reply papers are not properly before the Court and, as such, have not been considered.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
April 18, 2012

S/ _____
**HON. LEWIS J. LUBELL, J.S.C.**

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