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

----------X

JOHN BARDES and LORELEI BARDES,

Plaintiffs,

-against -

GALLO PINTADO and HABITAT REVIVAL, LLC,

Defendants.

----------X

DECISION & ORDER

Index No. 465-2009

Sequence No. 4

LUBELL, J.

The following papers were considered in connection with this motion by defendants for an Order pursuant to CPLR 2221(e) for leave to renew defendants' motion for an Order pursuant to CPLR 5015(a)(1) vacating the default judgment entered against the defendants dated June 10, 2011 or, for an Order pursuant to CPLR 5015(a)(3) vacating the judgment upon the ground of fraud, misrepresentation or other misconduct, and for an Order vacating the judgment pursuant to the doctrine of equitable estoppel together with such other and further relief as to this Court may seem just and proper:

PAPERS	**NUMBERED**
Motion/Affirmation/Exhibits A-L	1
Affirmation in Opposition	2
Reply Affirmation	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 ("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 then being operated by defendant Gallo Pintado ("Pintado").

This motion follows, among other things, the Court's January 20, 2011 Decision & Order (Nicolai, J.), granting plaintiffs' unopposed motion for summary judgment, and proceedings upon and submissions received in connection with the assessment of damages held before this Court on April 14, 2011 (which neither defendant

attended) and the assessment thereafter rendered by the Court and the June 10, 2011 entry of judgment thereon.

Thereafter, by Decision & Order of April 18, 2012, the Court denied defendants' motion for an Order pursuant to CPLR 5015(a)(1) vacating the default judgment entered against them. Upon doing so, the Court concluded that defendants had not established a reasonable excuse for their default. More particularly, the Court stated:

> 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.

This motion follows.

I. Motion to Renew

Defendants' motion to renew is denied to the extent that defendants seek to place before the Court defendant Pintado's financial circumstances as they existed at the time of the underlying default. Defendants have failed to demonstrate that any of the facts upon which they now rely could not have been previously presented to the Court in connection with their earlier submissions. Even when recognizing the flexibility allowed to Courts with respect to renewal motions (see, Patterson v. Town of Hempstead, 104 AD2d 975 [2d Dept 1984], 976; Vitale v. La Cour, 96 AD2d 941 [2d Dept 1983]; Esa v. New York Prop. Ins. Underwriting Assn., 89 AD2d 865 [2d Dept 1982]), the motion is denied in the Court's discretion.

In any event, the proof now presented as to defendant Pintado's financial resources, even if accepted as complete and accurate, hardly addressees all of the deficiencies noted in the Court's Decision & Order of April 18, 2012 (see, supra), and the Court is not persuaded that there exists good cause for such neglect. Furthermore, defendant Habitat has not come forward with anything on its own behalf, such as would warrant renewal.

Before proceeding further, the Court must address whether Lang

v. Hanover Ins. Co. (3 NY3d 350, 352 [2004]) bars defendants from advancing the remaining aspects of their arguments. The Court decides the issue in the negative.

The Court "noted" in Lang v. Hanover Ins. Co., supra:

> [A]n insurance company that disclaims in a situation where coverage may be arguable is well advised to seek a declaratory judgment concerning the duty to defend or indemnify the purported insured. If it disclaims and declines to defend in the underlying lawsuit without doing so, it takes the risk that the injured party will obtain a judgment against the purported insured and then seek payment pursuant to Insurance Law §3420. Under those circumstances, having chosen not to participate in the underlying lawsuit, the insurance carrier may litigate only the validity of its disclaimer and cannot challenge the liability or damages determination underlying the judgment.

(Lang v. Hanover Ins. Co., supra at 356).

The action addressed in Lang v. Hanover Ins. Co., supra, is one pursuant to Insurance Law §3420.

> Section 3420 grants an injured party a right to sue the tortfeasor's insurer, but only under limited circumstances--the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days. Compliance with these requirements is a condition precedent to a direct action against the insurance company . . .

(Lang v. Hanover Ins. Co., supra at 354).

The action now before the Court is not one pursuant to Insurance Law §3420 by an injured party (John Bardes) against the insurance company (Farm Family Casualty) of an insured (Pintado/Habitat) against whom the injured party has a judgment. Rather, this is the action by the injured party (John Bardes) against the tortfeasors/insureds (Pintado and Habitat) in favor of whom it has been determined upon appeal are owed a duty of defense and indemnification by Farm Family Casualty.

In any event, legal counsel that had been provided to the insureds (Pintado and Habitat) by the insurance company (Farm Family Casualty) only withdrew from any further representation of the insureds in this action, the tort action, after having prevailed in a declaratory judgment action addressing their duty to defend and indemnify their insureds herein. Such is consistent with the Court's admonishment in Lang v. Hanover Ins. Co., supra. It is only by virtue of the reversal of that determination upon appeal, that Farm Family Casualty is now obliged to again provide counsel to its insureds as part of its duty to defend.

This Court does not interpret Lang v. Hanover Ins. Co., supra, as holding that the *defendants* herein must or should be precluded from challenging the merits of the underlying judgment, as herein sought to be challenged, because legal counsel that had been earlier provided by Farm Family Casualty (as part of Farm Family Casualty's duty to defend their insureds) withdrew from further representation of defendants in this action following a successful declaratory judgment action which was ultimately reversed upon appeal, but after judgment had been entered against defendants herein (see Farm Family Casualty Insurance Company v. Habitat Revival, LLC, John A. Bardes, Lorelei J. Bardes, and Gallo Pintado [Putnam County Index No. 3793-2009], revd Farm Family Cas. Ins. Co. v. Habitat Revival, LLC, 91 AD3d 903, 903 [2d Dept 2012]). Lang v. Hanover Ins. Co., supra, does not specifically so hold and this Court is not persuaded that it should be so extended.

As such, the Court will proceed with its determination.

II. Motion to vacate: fraud, misrepresentation or other misconduct

Defendants' motion for an ORDER pursuant to CPLR 5015(a)(3) vacating the judgment upon "fraud, misrepresentation or other misconduct" is principally based upon alleged "clearly existing misconduct" of plaintiffs' counsel in having represented the plaintiffs *and* defendants named in this action in their joint capacities as defendants and then appellants in the declaratory judgment action brought by Farm Family Casualty to determine whether Farm Family Casualty owed a duty to defend and indemnify defendants in this tort action. (See Farm Family Casualty Insurance Company v. Habitat Revival, LLC, John A. Bardes, Lorelei J. Bardes, and Gallo Pintado (Putnam County Index No. 3793-2009; Farm Family Cas. Ins. Co. v. Habitat Revival, LLC, 91 AD3d 903, 903 [2d Dept 2012]).

While the term "clearly" (such as in "[t]here clearly exists

misconduct. . .", and "[t]here clearly exists grounds for fraud . . . as plaintiffs have clearly . . . ") is readily used several times by movant, *clearly* a litigant cannot substitute the word "clearly" for omitted legal authority, be it statutory, case law, code, rule, regulation or otherwise. Since it is not the Court's role to fashion or assume the legal authority upon which a party relies, this aspect of defendants' motion is denied without prejudice to reapplication as hereinbelow indicated.

III. Equitable Estoppel

That aspect of defendants' motion and for an Order vacating the judgment on the ground of equitable estoppel is likewise denied, without prejudice, for want of a sufficiently articulated legal basis. Here, again, the Court notes that the term "clearly" is not a substitute for sound and supported legal argument, and it is not the Court's role to fill in the gaps and then make a determination one way or the other.

IV. Misconduct and Fraud Based on Documentary Evidence Submitted or Omitted at Inquest

(1) Pre-accident tax returns

Defendants have not persuaded the Court and the Court does not find that any failure on the part of plaintiffs in submitting to the Court pre-accident tax returns constitutes *misconduct* or *fraud* within the meaning of section 5015(a)(3) of the CPLR.

(2) Omitted Medical Proof

Defendants mere and generalized reference to plaintiff's post-accident and presumably pre-inquest medical records without more, such as the report or affirmation of a medical expert establishing plaintiff's alleged disability, does not properly place before the Court defendants' otherwise unsupported contention that plaintiffs committed fraud and misconduct upon the Court by failing to disclose that "plaintiff was disabled as a result of an unrelated surgery following the subject accident." [1]

Based upon the foregoing, it is hereby

ORDERED, that defendants' motion is denied for the reasons

[1] The Court makes note that defendants direct the Court's attention to the medical records merely as follows: "Proof of his surgery is set forth in the original motion papers which are attached hereto."

herein stated, without prejudice to reapplication by way of newly filed motion to the extent hereinabove permitted at **II**, supra, but only upon the condition that defendants fully support their positions by way of statue, case law, rule, regulation, code or otherwise, and that such a motion be filed with the Court so as to be received by August 20, 2012.

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

Dated: Carmel, New York
July 16, 2012

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

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