CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 30

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MIGUEL DELACRUZ and
EDITH MORALES,

Plaintiffs

-against-

RAUL CALDERON-CASTILLO and
MARIA SCUDERI

Defendants

_____X

DECISION & ORDER

INDEX NO.: TS 300085/13

HON. SABRINA B. KRAUS

PROCEDURAL HISTORY

This action was commenced by **MIGUEL DELACRUZ** and **EDITH MORALES** against **RAUL CALDERON-CASTILLO** (Castillo) and **MARIA SCUDERI** (Scuderi) seeking a judgment based on a car accident on October 25, 2010. Plaintiffs allege they sustained serious injuries as a result of Defendants' negligence in operating their vehicles. All parties are represented by counsel.

The action was commenced in Supreme Court, Bronx County under Index Number 308299/11. The summons and complaint were filed on September 16, 2011. Proof of service was filed in September 2011.

Castillo, filed a verified answer, counterclaim and cross-claim on June 12, 2012. The cross-claim against co-defendant Scuderi asserts that any damages suffered by Plaintiffs was as a result of Scuderi's negligence.

Scuderi, filed a verified answer and cross-claim, dated June 27, 2012. The cross-claim against co-defendant Castillo asserts that any damages suffered by Plaintiffs was as a result of Castillo's negligence.

A request for judicial intervention was filed on July 26, 2012, a preliminary conference order dated August 22, 2012, provided for discovery.

On February 15, 2013, Supreme Court (Douglas, J) issued an order transferring the action to Civil Court, pursuant to CPLR § 325(d).

On November 20, 2015, both Defendants independently moved for summary judgment. The motions were adjourned, at the request of counsel, presumably for an opportunity to serve opposition papers, to March 14, 2016. On March 14, 2016, Plaintiffs failed to appear or file written opposition to the motions, and the motions were submitted on default as to Plaintiffs. On May 10, 2016, the court (Saunders, J) consolidated and granted the motions, and dismissed the action. The court directed service of a copy of the order upon Plaintiffs with Notice of Entry within thirty days.

On June 6, 2016, Scuderi served Plaintiffs with a copy of the order with notice of entry.

Clearly Plaintiff's counsel became aware of the default, if not the dismissal, shortly after service of said notice of entry. This evidenced by a July 11, 2016 stipulation signed by Plaintiff's counsel and Scuderi's counsel which was:

> ... to allow the plaintiffs to submit an Affirmation in Opposition to Defendants' Motion for Summary Judgment on threshold that was previously submitted without opposition papers on March 14, 2016. Both sides agree that plaintiff's Affirmation in Opposition is to be served to the defendant by 7/12/16 and Defendant's to submit reply by 8/12/16, 2016(sic) so that defendants' motion can be decided on the merits of the case.

No opposition papers were ever filed with the court pursuant to said stipulation. The stipulation was never submitted to the court. The stipulation executed after the parties were aware of the dismissal is void.[1]

On August 3, 2016, Plaintiffs filed a motion to strike Defendants' answers for failure to appear for depositions. The parties appeared on the return date, confirmed that the action had been dismissed and Plaintiffs withdrew the motion.

Plaintiffs took no further action until nearly one year later, when on July 18, 2017, they moved for an order pursuant to CPLR § 5101(a)(1) vacating the dismissal only as to Castillo, restoring Castillo's motion on the issue of threshold and denying the motion in its entirety. The motion was adjourned for submission of opposition papers. On December 13, 2017, all parties appeared, the court heard brief oral argument and reserved decision.

PLAINTIFFS' MOTION IS DENIED AS PLAINTIFFS FAIL TO SHOW AN EXCUSABLE BASIS FOR WAITING OVER ONE YEAR AFTER LEARNING OF THE DISMISSAL TO MOVE TO VACATE THE UNDERLYING ORDER

CPLR § 5015 (a)(1) provides in pertinent part :

> ... the court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct[2], upon the ground of: excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry...

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[1] Additionally pursuant to CPLR §5015(b) a default may only be vacated by stipulation, if it's a default pursuant to CPLR§ 3215, all requests to vacate a default pursuant to CPLR 5015(a) must be by order to show cause.

[2] The language "with such notice as the court may direct" indicates that the motion must be brought by order to show cause, which was not done herein. While failure to bring on a motion to vacate by order to show cause has been held to be a jurisdictional defect (*See Smith v. Smith*, 291 A.D.2d 828, this issue was not raised by the Defendants and the court has elected to address the motion on the merits.

At the outset, the court notes that Plaintiffs motion is made over one year after service of notice of entry of the decision and order, and over one year after Plaintiffs were aware of the default. The motion is therefore untimely pursuant to the statute (*Prospect Park Management, LLC v Beatty* 73 AD3d 885; *Gainey v Anorzej* 25 AD3d 650).

While CPLR § 2005 provides that a ".... court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure" courts have noted that this does not mean that such a default is always excusable [*Forum Insurance Company v Judd* 191 AD2d 230 (*counsel's one year in moving to vacate an order resulting from a default in opposing a motion was neglect not excusable default*); *Pichardo–Garcia v. Josephine's Spa Corp*., 91 AD 3d 413 (*motion to vacate properly denied where plaintiff made no attempt to vacate the default until almost a year after being served with the notice of its entry*)].

Plaintiffs must show both a reasonable excuse for the underlying default and a reasonable excuse for its delay in seeking relief from the default. Whether there is a reasonable excuse for a default is a discretionary determination to be made by the court based on all relevant factors (*Gecaj v Gjonaj Realty & Management Corp.* 149 AD3d 600).

Mark Linder (Linder), counsel for Plaintiffs states that on November 20, 2015, an attorney from his office, Keith Mininson (KM), Esq., was assigned to Bronx County but failed to note the adjourn date of the motion to March 14, 2016. Linder states this is why Plaintiffs failed to appear on the date the motion was marked submitted on default. Defendant points out that the adjourn date was readily available on e-courts (see ex C to Castillo's opposition papers).

Linder acknowledges that his firm " became aware of the mistake" when they requested the adjourn date from KM. The moving papers do not specify when that occurred, but as noted above by July 2016, if not earlier, Plaintiffs acknowledge being aware of the default.

Linder fails to explain why Plaintiffs never attempted to submit opposition on August 12, 2016 (*Navarro v Plus Endopothetik* 105 AD3d 586) or why Plaintiffs chose instead to make a motion seeking to strike Defendants' answers.

Further, the proffered excuse that an Associate from Plaintiffs' firm forgot to write down the adjourn date of March 14, 2016, is insufficient, in that it only addresses that initial default, it does not explain the failure to move to vacate the dismissal after March 14, 2016.

No excuse is offered for the additional one year delay before Plaintiff s moved for the relief herein [*State Farm Mutual Automobile Insurance Co v Preferred Trucking Service Corp*. 981 NYS2d 889 (*motion to vacate denied where defense counsel offered no reason whatsoever for waiting almost nine months to move to vacate the order*); *Shouse v Lyons* 265 AD2d 901 (*motion to vacate denied where there was seven month delay in making the motion to vacate*); *Johnson-Roberts v Ira Judelson Bail Bonds* 140 AD3d 509*; Kolajo by Kolajo v City of New York* 248 AD2d 512].

Law office failure is a reasonable excuse where the delay is slight, the default was not intentional and there is no prejudice to the other side. Here the delay is over one year and, although the initial default may not have been intentional, Plaintiff has failed to explain why, after being on notice, they still waited a year to bring this motion.

Defendants have functioned under the premise that the action has been dismissed for over year, it would be extremely prejudicial to ask them to now defend against this action that is

premised on an accident which occurred over seven years ago. Plaintiffs' counsel has never even deposed Defendants.

Plaintiffs failure to act for over one year after learning of the default evinces willfulness and is not excusable (*Whittemore v Yeo* 99 AD3d 496; *Carmody v 208-210 East 31st Realty LLC* 135 AD3d 491; *Bekker v Fleischman* 35 AD3d 334).

Such a prolonged delay is not an isolated incident of law office failure but more akin to a pattern of neglect (*Singh v Budna* 53 Misc3d 150(A); *GMAC Mortgage LLC v Guccione* 127 AD3d 1136).

Generally, Plaintiffs must offer both a reasonable excuse for the default and potentially meritorious opposition to the motion [*Desuze v Johnson* 154 AD3d 736; *see also Navarro v. A. Trenkman Estate, Inc*., 279 A.D.2d 257 (*plaintiffs must establish an excusable default and a meritorious cause of action to vacate dismissal*)]. However, having failed to establish a reasonable excuse for their default, the court need not reach the merits of Plaintiffs' claim [*Wells Fargo Bank, N.A. v. Cervini*, 84 A.D.3d 789 (App Div 1st Dept 2011)].

Based on the forgoing, Plaintiffs' motion to vacate their default and restore the matter to the Court's calendar is denied.

This constitutes the decision and order of the court.

Dated: December 21, 2017
Bronx, New York

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Hon. Sabrina B. Kraus
J.C.C.

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