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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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SAM WYLY,

Petitioner,

INDEX NO.104553/05

-against-

MILBERG WEISS BERSHAD & SCHULMAN LLP, STULL, STULL & BRODY and SCHIFFRIN & BARROWAY,

Respondents.

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JOAN A. MADDEN, J.:

Respondents move for an order pursuant to CPLR 2001 and CPLR 5015, vacating the decision of this Court dated August 5, 2005, which granted, on default, petitioner's special proceeding for an order directing the respondent law firms to turnover to petitioner, certain client files; and upon vacatur, respondents seek permission to answer the petition. Petitioner opposes the motion.

As explained by petitioner, this proceeding relates to two consolidated securities class actions in the United States District Court for Eastern District of New York, in which Computer Associates International was the defendant. Petitioner Wyly was one of the class action plaintiffs, and the respondents in this proceeding are the law firms which represented the plaintiff class in federal court. According to petitioner, a global settlement of the class actions was reached in December 2003. Petitioner alleges that in September 2004, it was publically disclosed that while negotiating the settlement, Computer Associates and certain of its officers and directors, and its former general counsel, had withheld 23 boxes of documents and had

coached witnesses to lie about the conspiracy to overstate earnings. On October 18, 2004, petitioner wrote to the respondent law firms, requesting that they file a motion pursuant to Federal Rule 60(b) to relieve the settlement class from the final judgment approving the settlement. By letter dated November 24, 2004, respondents replied that they did "not intend to move pursuant to Rule 60(b) to reopen the judgment." Thereafter, petitioner chose to proceed independently, and filed a motion in the Eastern District of New York, for relief pursuant to Federal Rule 60(b). In connection with that motion, petitioner requested that the respondent law firms provide him with discovery materials, and other files and documents that the law firms had collected for the benefit of the class action plaintiffs.

According to petitioner, after unsuccessful efforts to obtain the requested documents from respondents, petitioner commenced this special proceeding on April 1, 2005. The petition seeks "an order directing Respondents to turn over their files relating to the Class Actions, including, but not limited to: (1) all documents produced or provided to Respondents by defendants in the Class Actions; (2) all indices of such productions; (3) all privilege logs related to such productions; (4) all documents produced by third parties in the Class Actions, including, but not limited to, all documents provided by Computer Associates' auditors; and (5) all e-mails, attorney's notes, internal memoranda, document requests, indices, privilege logs, drafts and research related to Respondents' representations of Petitioners and other class members in their prosecution of the Class Actions." The petition alleges that as counsel to petitioner in the class actions, respondents created and maintained files relating to that representation, on behalf of their clients to whom they owed fiduciary and ethical duties, and that respondents have an obligation to make their files available to petitioner.

Although respondents did not serve or file an answer to the petition, on April 15, 2005, they did respond by filing a notice of removal to the United District Court for the Southern District of New York. On May 2, 2005, petitioner moved in federal court for remand of the proceeding to this Court. By a Memorandum Opinion and Order dated July 7, 2005, the Hon. George B. Daniels granted petitioner's motion and remanded the proceeding to this Court.

The following day, on July 8, 2005, respondents wrote to petitioner's counsel, requesting that petitioner "withdraw the recently remanded action" in view of "Judge Daniels' decision describing you client's claims as 'dubious' and developments in the Federal Action before Judge Platt [the Eastern District Judge handling the class actions and petitioner's Rule 60(b) motion to reopen the settlement]." Petitioner did not respond to that letter, but instead moved for a default judgment granting the relief requested in the petition, based on respondents' failure to answer the petition. Respondents' defaulted on that motion, and by a decision dated August 5, 2005, this Court issued a decision granting the motion and directing petitioner to settle an order on notice directing the respondent law firms to turnover to petitioner, certain client files. In the instant motion, respondents now seek to vacate that decision, and serve and file the proposed answer that is annexed to their motion papers.

As a general rule, a party seeking to vacate a default judgment pursuant to CPLR 5015(a)(1) must demonstrate both a meritorious defense to the action and a reasonable excuse for the default. Eugene Di Lorenzo, Inc. V. A.C. Dutton Lumber Co., Inc., 67 NY2d 138, 141 (1986); Perez v. Villa Josefa Realty Corp., 293 AD2d 306 (1st Dept 2002); Navarro v. A. Trenkman Estate, Inc., 279 AD2d 257, 258 (1st Dept 2001). "Moreover, it is within the sound discretion of the motion court to determine whether the proffered excuse and the statement of

merits are sufficient." Id.

Here, respondents are entitled to relief pursuant to CPLR 5015(a)(1), as they have established both a meritorious defense to the proceeding and excusable default. As to a meritorious defense to turning over the discovery materials and other documents demanded by petitioner, respondents assert that this proceeding is moot. Specifically, respondents allege that as a result of court orders issued by Judge Platt in the Eastern District of New York, petitioners have received the majority of the documents sought in this proceeding, with the exception of those protected by the attorney work-product doctrine. Respondents further allege that petitioner is not entitled to any documents protected by the attorney work-product doctrine.

Respondents have also made a sufficient showing of excusable default. Even assuming without deciding that respondents have not provided a reasonable explanation for neglecting to answer the petition and oppose the motion for a default judgment, respondents have participated in this proceeding from the outset, by filing papers for removal to federal court, appearing in federal court, and, after remand, requesting that petitioner withdraw the proceeding. Such participation demonstrates a clear intent on respondents' part to defend this proceeding, and establishes that their defaults were not willful. See Pricher v. City of New York, 251 AD2d 242 (1st Dept 1998). Moreover, in the absence of any demonstrable prejudice (petitioner does not allege that any prejudice has been sustained), and in view of the strong public policy favoring the resolution of matters on the merits, respondents have established excusable default. See Stephenson v. Hotel Employees & Restaurant Employees Union Local 100, 293 AD2d 324 (1st Dept 2002); Navarro v. A. Trenkman Estate, Inc., supra; Pricher v. City of New York, supra.

Thus, respondents' motion for relief pursuant to CPLR 5015(a)(1) is granted, and this Court's decision of August 5, 2005 is vacated, and petitioner's special proceeding shall be restored to this Court's pre-trial calendar.[1]

Accordingly, it is hereby

ORDERED that respondents' motion is granted and this Court's order of August 5, 2005 is vacated, and the proceeding shall be restored to this Court's pre-trial calendar; and it is further

ORDERED that the proposed answer annexed to respondents' motion papers shall be deemed served and filed upon service of a copy of this decision and order with notice of entry; and it is further

ORDERED that respondents shall serve a copy of this decision and order with notice of entry upon the Clerk of Trial Support, Room 158, 60 Centre Street, and upon such service the Clerk shall restore this matter to the Part 11 pre-trial calendar and place it on the Part 11 preliminary conference calendar for January 26, 2006, at 9:30 am; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on January 26, 2006, at 9:30 am, in Part 11, Room 351, 60 Centre Street.

The Court is notifying the parties by mailing copies of this decision and order.

DATED: December 29, 2005

ENTER:

J.S.C.

[1]In light of this determination, the Court need not address respondents' alternative grounds for the motion pursuant to CPLR 2001.