| **Gerschel v Christensen** |
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| 2015 NY Slip Op 32373(U) |
| December 4, 2015 |
| Supreme Court, New York County |
| Docket Number: 651561/10 |
| Judge: Barbara Jaffe |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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ALEXANDER J. GERSCHEL, ANDRE F. GERSCHEL, DANIEL A. GERSCHEL, and PHIILPPE J. GERSCHEL,

Plaintiffs,

-against-

CRAIG G. CHRISTENSEN, CHRISTENSEN CAPITAL LAW CORPORATION, CHRISTENSEN LAW GROUP LLP, CHRISTENSEN AND BARRUS, INC., JEFFREY M. MORITZ, UNIVEST FINANCIAL SERVICES, INC., LAND BASE LLC, NATURE ISSUES, INC., STERLING PEAK, INC., ZAMWORKS, LLC, PROPRIETARY MEDIA, INC., JOHN DOES 1-50, JOHN DOE CORPORATIONS 1-50,

Defendants.

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Index No. 651561/10

Motion seq. no. 004

**DECISION & ORDER**

BARBARA JAFFE, JSC:

**For plaintiffs, self-represented:**
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**For defendants:**
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By notice of motion, defendants Christensen and Christensen Capital Law Corporation (moving defendants) move pursuant to CPLR 5015(a) for an order vacating the order of default entered against them by the Appellate Division, First Department. Plaintiffs oppose.

## I. PROCEDURAL BACKGROUND

By summons and complaint efiled on July 1, 2011, this action was commenced against moving defendants. Briefly, it is alleged that moving defendants engaged in misconduct when they transferred funds from two trusts formed for the benefit of plaintiffs, among others, distributed the assets to their own companies and associates, and fraudulently concealed the

transfers from plaintiffs. (NYSCEF 4).

By notice of motion efiled on November 22, 2011, moving defendants, along with other defendants, moved pursuant to CPLR 3211(a)(8) and (e) for an order dismissing the action against them (NYSCEF 16), and by cross motion efiled on February 3, 2013, plaintiffs cross moved for a default judgment (NYSCEF 19). By decision and order dated June 25, 2013, I denied their motion and granted plaintiffs' cross motion. (NYSCEF 35).

By notice of motion efiled on July 3, 2013, moving defendants and other defendants moved pursuant to CPLR 2221(d) for an order granting them leave to reargue the June 2013 decision, and by decision and order dated January 7, 2014, I granted their motion and thereupon dismissed the complaint. (NYSCEF 57). By decision dated May 7, 2015, the Appellate Division, modified my January 2014 decision to the extent of denying moving defendants' motion and granting plaintiffs' cross motion for a default judgment, and ordered an assessment of damages, thereby rejecting moving defendants' claim of an absence of personal jurisdiction resulting from plaintiffs' violation of CPLR 1003. (NYSCEF 85).

## II. LAW OF THE CASE

Because a determination that the Appellate Division's May 2015 decision would constitute the law of the case and be dispositive of the instant motion, it is addressed first.

### A. Contentions

Plaintiffs claim that the Appellate Division's decision constitutes the law of the case, thereby precluding my consideration of the instant motion, and they argue that having failed to seek a vacatur of their default after I granted the default judgment in my June 2013 order, defendants have "displayed consistent neglect." They rely on case law holding that a trial court

may not disregard or undermine an order of the Appellate Division, until it is modified or reversed by a higher court, and assert that defendants are limited to seeking vacatur of the default in the Appellate Division or seeking relief from the Court of Appeals. (NYSCEF 91).

As the issue of whether defendants have established an excusable default and meritorious defense was never addressed by the Appellate Division, defendants maintain that it was never actually litigated, a condition precedent, they claim, to a finding that a prior decision constitutes the law of the case. They also argue that the entry of the order of default has no preclusive effect; rather, it triggers the right to seek vacatur, and deny that a default judgment was entered following my June 2013 decision, observing that it was first entered in Supreme Court on May 19, 2015. (NYSCEF 99).

B. Analysis

When parties have had a full and fair opportunity to litigate an issue, the resolution of that issue on the merits by a prior order in the same action constitutes the law of the case. (*People v Evans*, 94 NY2d 499, 502 [2000]; *South Point, Inc. v Redman*, 94 AD3d 1086 [2d Dept 2012]; *Thompson v Cooper*, 24 AD3d 203 [1st Dept 2005]). As the law of the case applies only when the same question is at issue in the same case (*Erickson v Cross Ready Mix, Inc.*, 98 AD3d 717 [2d Dept 2012]), a court determining the preclusive effect of another determination must consider "the procedural posture and evidentiary burdens of the litigants" (*Feinberg v Boros*, 99 AD3d 219, 224 [1st Dept 2012], *lv denied* 21 NY3d 851 [2013]).

The determination of a motion made pursuant to CPLR 3211 and one made pursuant to CPLR 5015 are governed by different standards. Thus, a determination of the former does not preclude arguments made in support of the latter. (*191 Chrystie LLC v Ledoux*, 82 AD3d 681,

682 [1st Dept 2011]; *Riddick v City of New York*, 4 AD3d 242, 245 [1st Dept 2004]). Here, plaintiffs fail to identify anything in the Appellate Division's decision indicating that defendants' entitlement to vacatur of the default was addressed beyond the determination that plaintiffs' motion for a default judgment was wrongly denied, and there was no judgment to vacate until judgment was entered in this court. Consequently, defendants are not precluded from seeking relief here, and plaintiffs offer no authority to the contrary that is on point.

III. MOTION TO VACATE

Pursuant to CPLR 5015(a)(1), an order granted on default may be vacated upon a showing of both a reasonable excuse for the default and a meritorious claim. (*Youni Gems Corp. v Bassco Creations, Inc.*, 70 AD3d 454 [1st Dept 2010], *lv denied* 15 NY3d 863; *Cato v City of New York*, 70 AD3d 471 [1st Dept 2010]; *Campos v New York City Health & Hosps. Corp.*, 307 AD2d 785 [1st Dept 2003]). The determination as to whether to vacate a default judgment rests within the sound discretion of the motion court. (*Frenchy's Bar & Grill v United Intern. Ins. Co.*, 251 AD2d 177, 177 [1st Dept 1998]).

The party seeking to vacate a default must provide facts to explain the default (*Ogunmoyin v 1515 Broadway Fee Owner, LLC*, 85 AD3d 991 [2d Dept 2011]; *Matter of Esposito v Esposito*, 57 AD3d 894 [2d Dept 2008]), and an affidavit of merit from someone with personal knowledge of the facts (*Rugieri v Bannister*, 22 AD3d 305 [1st Dept 2005]; *Katz v Robinson Silverman Pearce Aronsohn & Berman, LLP*, 277 AD2d 70, 74 [1st Dept 2000]; *City of New York v Elghanayan*, 214 AD2d 329 [1st Dept 1995]).

A. Excusable neglect

Defense counsel explains that he confused the date on which moving defendants were

served with the pleadings with the date on which another defendant was served. He thus thought that he was interposing the CPLR 3211 motion within the time allotted for answering or otherwise moving. Counsel characterizes his error in this regard as a law office failure, and thus argues that the default was the product of his good faith belief that there was no default. Given his belief that his motion was timely interposed, he was unaware of the default or of any need to demonstrate an excusable default or meritorious defense. Moreover, he promptly sought leave to reargue the June 2013 decision denying the motion, and sought leave to present an excusable default and meritorious defense only in the alternative. Then, having granted defendants' motion for leave to reargue and thereupon dismissing the complaint as against the moving defendants in the January 2014 decision, there was no need to consider defendants' request for alternative relief. (NYSCEF 76).

Plaintiffs argue that defendants' "consistent neglect" of the case precludes a finding that their neglect is excusable. (NYSCEF 91).

Law office failure may constitute a reasonable excuse if it is supported by "a detailed and credible explanation for the default." (*GMAC Mtge., LLC v Guccione*, 127 AD3d 1136, 1138 [2d Dept 2015]; *see* CPLR 2005). A conclusory, undetailed, and uncorroborated explanation of law office failure is insufficient to warrant relief. (*Neilson v 6D Farm Corp.*, 123 AD3d 676, 679 [2d Dept 2014]).

Here, moving defendants offer a detailed and credible explanation of their default, and there is no factual basis for finding that they neglected the litigation to such an extent that they should be precluded from vacating their default.

B. Meritorious defense

Describing the gravamen of plaintiffs' complaint against them as having authorized and made decisions with respect to the transfer of funds from the two trusts, defendants offer as evidence the affidavit of plaintiffs' father attesting that he had sole authority over the trusts, that he made all decisions with respect to the transfers of the funds, and that moving defendants had no authority to make such decisions or that they made such decisions. (NYSCEF 89). They also offer the affidavit of defendant Christensen who attests to the authority of plaintiffs' father over the trusts, and denies that defendants ever acted as plaintiffs' attorneys, possessed the funds, refused to distribute the funds to plaintiffs, or profited from the funds (NYSCEF 88).

Christensen specifically alleges that acting as counsel to plaintiffs' father, he reviewed the trusts and determined that they were flawed to the extent that upon their dissolution, an ensuing federal tax liability would exhaust the corpus of both trusts. Plaintiffs' father then hired another attorney to prepare limited powers of attorney for each plaintiff authorizing Christensen to negotiate the dissolution with the trustees. Christensen received the executed powers of attorney from plaintiffs' father, and then recommended that the trusts' funds be distributed to a new foreign trust and held until the expiration of any applicable statute of limitations. At the direction of plaintiffs' father, Christensen then formed a foundation abroad for the receipt of the trust proceeds, over which plaintiffs' father was appointed trustee. After the trusts in issue were dissolved, plaintiffs' limited powers of attorney expired by operation of law, and at the direction of plaintiffs' father, the trust assets in the new foreign trust were transferred to a "dormant" corporation Christensen had formed which he reactivitated for that purpose. Then, in 2005, and again at the direction of plaintiffs' father, and without Christensen's involvement, the funds were

transferred to the attorney escrow account of another defendant, and then again to other defendants. (*Id.*).

Defendants also argue that all of plaintiffs' claims are time-barred, given plaintiffs' knowledge in 2004 that their father's investment decisions resulted in losses to the trusts, and that their cousins received distributions from the trusts in 2003. As the first tolling agreement was effective September 15, 2010, defendants contend that all of plaintiffs' causes of action are time-barred. (NYSCEF 76).

Plaintiffs observe that while defendants deny having been retained as their attorney, they admit to having been their attorney-in-fact. They argue whether attorney or attorney-in-fact, moving defendants owed them a fiduciary duty, and deny knowing that the funds had been transferred out of the trusts until learning of it in February 2009, and and of defendants' involvement in October 26, 2009. They thus deny that their claims are time-barred, and maintain that equitable considerations should preclude defendants from invoking the statutes of limitations. (NYSCEF 91).

In response, defendants observe that plaintiffs only challenge the credibility of their affiants with their own and that plaintiffs' affidavits are, in any event, largely based on hearsay. (NYSCEF 99).

Here, defendants offer affidavits indicating that plaintiffs' father had sole authority to effect the allegedly tortious transfers, and that moving defendants had no such authority. Absent any dispute that plaintiffs executed the powers of attorney in favor of Christensen, there is no basis for finding that the proffered defense is without potential merit. That defendants offer no defense as to their failure to pay the $100,000 for the second tolling agreement does not alter this

result.

IV. PLAINTIFFS' MOTION FOR SANCTIONS

Denied.

V. CONCLUSION

For all of the foregoing reasons, it is hereby

ORDERED, that defendants' motion for for an order vacating their default is granted; and it is further

ORDERED, that plaintiffs' motion for sanctions is denied.

ENTER:

Barbara Jaffe, JSC

HON. BARBARA JAFFE

DATED: December 4, 2015
New York, New York