

<b>Elite Limousine Plus Inc. v RX Med. Dynamics, LLC</b>
2020 NY Slip Op 30025(U)
January 7, 2020
Supreme Court, New York County
Docket Number: 154697/2018
Judge: Andrew Borrok
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This opinion is uncorrected and not selected for official publication.

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK

PART

IAS MOTION 53EFM

*Justice*

-----X

ELITE LIMOUSINE PLUS INC

INDEX NO. 154697/2018MOTION DATE 12/23/2019

Plaintiff,

MOTION SEQ. NO. 004

- v -

RX MEDICAL DYNAMICS, LLC,

## DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for

VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents and for the reasons stated on the record and set forth below, RX Medical Dynamics LLC's (**RX**) motion, brought pursuant to CPLR 5015(a)(1), to vacate and set aside the court's decision dated July 16, 2019 (NYSCEF Doc. No. 33) and judgment (NYSCEF Doc. No. 39) and to restore this action to the calendar is granted on the conditions set forth below.

Per the decision and order dated July 16, 2019 (the **Default Order**), the court granted as unopposed Elite Limousine Plus Inc.'s (**Elite**) motion for a default judgment (NYSCEF Doc. No. 33). The Default Order also noted that default judgment was also appropriate pursuant to 22 NYCRR 202.27 as RX failed to appear for two separate conferences on 3/20/2019 and 4/5/2019 (NYSCEF Doc. Nos. 28-30). The conference order from the compliance conference on 3/20/2019 states:

Counsel for [defendant] having failed to appear at the court scheduled compliance conference on 3/20/19 and having failed to contact the court w/any excuse, it is not ordered that counsel for [defendant] appear in court on 4/5/19 [at] 11:30 AM. Failure to appear will result in leave for [plaintiff] to move for all appropriate relief.

(NYSCEF Doc. No. 28).

The conference order from 4/5/2019 incorporates the order dated 3/20/2019 and states:

Defendant having failed to again appear for a status conference on 4/5/19, having last failed to appear on 3/20/19, counsel for [plaintiff] has leave to file [a motion] for default, which shall be filed on or before 4/19/19.

(NYSCEF Doc. No. 29).

Elite filed its motion for default on 4/18/2019. No opposition to the motion by RX's then-counsel of record was ever filed. Now, in support of the instant motion to vacate the default, RX submits an affidavit from its principal Frank Cerasoli, who attests that RX never intended to default in this action and relied on its prior counsel, Lawrence A. Garvey, Esq. to keep it apprised of the progress in this action, including any deadlines and notices in the case, but that Mr. Garvey failed to do so (Cerasoli Aff., ¶¶ 2-4, NYSCEF Doc. No. 42). According to Mr. Cerasoli, RX never instructed Mr. Garvey not to appear for conferences and did not receive any notice of default until December 19, 2019 when it received a notice (the **Marshal's Notice**) from the Marshal of the City of New York dated December 16, 2019 stating that there was a judgment against RX for \$54,251.08 (*id.*, ¶¶ 4-5). Mr. Cerasoli attests that RX never received any Notice of Entry of the Default Judgment and no such entry is reflected in NYSCEF (*id.*, ¶ 6). Immediately after it was served with the Marshal's Notice, RX retained new counsel (James J. DeCristafaro, Esq.) who now brings this motion to vacate on its behalf.

Pursuant to order to show cause dated April 17, 2019 and returnable on July 15, 2019 – i.e., one day prior to the date of the Default Order -- RX's prior counsel, Mr. Garvey, had moved to be relieved as attorney of record in this action (NYSCEF Doc. No. 21). A stay of the proceedings was never requested (nor granted) in the order to show cause to be relived (*id.*). On July 15, 2019, the court denied the order to show cause due to Mr. Garvey's failure to comply with the service requirements therein, i.e., his failure to effect personal service on RX (NYSCEF Doc. No. 35). As a result, Mr. Garvey was still counsel of record at the time the Default Order was entered.

To vacate a default judgment, RX must show a reasonable excuse for its default and a potentially meritorious defense to the action (CPLR 5015[a][1]; *Chiaramonte v Coppola*, 81 AD3d 426 [1<sup>st</sup> Dept 2011]). Bare allegations of law office failure based upon a prior counsel's unspecified negligent acts, errors, and omissions do not constitute a reasonable excuse for a default (*Carillon Nursing & Rehab. Ctr., LLP v Fox*, 118 AD3d 933, 934 [2d Dept 2014]). However, the determination of what constitutes a reasonable excuse for default, as ground for relief from default judgment, generally lies within the sound discretion of the trial court (CPLR 5015[a][1]; *Madonna Mgmt Servs., Inc. v Naghavi*, 123 AD3d 986 [2d Dept 2014]). A court also has the discretion to "vacate its own judgment for sufficient reason and in the interest of substantial justice" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]).

Here, as to the reasonable default, Mr. Cerasoli has adequately alleged that he was always ready and willing to defend against this action and, indeed, as soon as he was served with the Marshal's Notice, which he alleges is the first time he had notice of the default judgment, he

obtained new counsel to represent him in this matter. As to a meritorious defense, the court has already found that there are “material issues of fact as to whether the defendant received all the services sued on in the action, whether the defendant was properly billed for those services and the extent to which the defendant contested the billing. In addition, the vouchers submitted in connection with the motion are illegible so that the invoices can not be verified against the vouchers” when it previously denied Elite’s motion for summary judgment in this action (NYSCEF Doc. No. 18). In addition, as set forth on the record at oral argument, RX has stipulated to depositing the full amount of the default judgment in escrow with its new counsel on or before January 10, 2020 to ensure that Elite’s rights in this action are protected and Elite did not object to the default judgment being vacated upon proof of such escrow deposit. Under these circumstances and keeping in mind the public policy in favor of resolving cases on the merits, the interests of justice require that the default judgment be vacated.

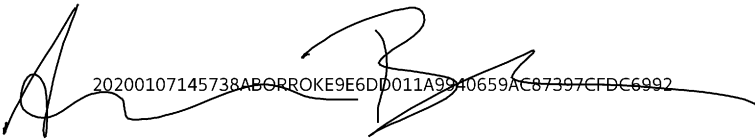
Accordingly, it is

ORDERED that the motion to vacate the default is granted on the condition that the defendant deposit the amount of the judgment (\$50,031.20) in escrow with its counsel of record on or before January 10, 2020, and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that the Clerk restore this action to the calendar upon the filing of proof of deposit by the defendant.

<u>1/7/2020</u> DATE		 20200107145738ABORROKE9E6DD011A9540659AC87397CFDC6992 ANDREW BORROK, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE