New York Supreme Court, Albany County

Gerard Aprea, John Vidurek, Plaintiffs; - vs - NEW YORK STATE BOARD OF ELECTIONS, DUTCHESS COUNTY BOARD OF ELECTIONS, GREEN COUNTY BOARD OF ELECTIONS, Defendants.	CASE NO. 7215-11 HON Judge *Joseph C. Teresi* **PLAINTIFFS MEMORANDUM OBJECTION**

PLAINTIFFS WHO ARE "NOT ATTORNEYS" OBJECT to the "request" that we respond to Ms. Galvin's alleged letter allegedly dated November 28, 2011 with clerks time stamp. **Exhibit 119**.

1. Plaintiffs presume Ms. Galvin is counsel for the NYSBOE, since plaintiffs have received "no" communications from a Ms Galvin or anyone else claiming to represent the NYSBOE.

2. Plaintiffs have requested and received by fax a copy of Ms Galvin's alleged letter allegedly dated November 28, 2011 on December 20, 2011.

3. Plaintiffs note that Ms Galvin's alleged letter allegedly dated November 28, 2011 was addressed to Judge Teresi and received by the clerk on December 14, 2011, as per time stamp on the top right corner of the letter.

4. Plaintiffs note that Ms Galvin's alleged letter allegedly dated November 28, 2011 observes by the language in Judge Teresi's letter, "*I now have Ms Galvin's [letter] of November 28, 2011*", tells us that Judge Teresi just received this letter on December 14th or 15th.

5. By Judge Teresi's lack of response at an earlier date tells us that Judge Teresi was also unaware of the alleged letters existence before December 14, 2011, seven (7) days after defendants default. **Exhibit 119**.

6. Plaintiffs question why a letter dated November 28, 2011 took 17 days to reach the Judge's chambers.

7. Plaintiffs question why a letter concerning this case would be sent to Judge Teresi and not copied to the plaintiffs, as the court rules require.

8. To respond in these pleadings to Ms. Galvin's alleged letter allegedly dated November 28, 2011 would give the alleged letter credence that might be interpreted by the court as accepting the alleged letter as an accepted late pleading, therefore the plaintiffs refuse the courts inappropriate "request".

9. Plaintiffs have no interest in communicating with defendants council, seeing the defendant is in default, until defendant's attorney is able to fulfill the law that would permit them to plead, which they cannot.

10. The defendant was in default 7 days before letter was filed with judges clerk.

11. The defendant was in default 12 days before letter was received by plaintiff.

12. A defaulted defendant is unable to raise any issues because they failed to plead.

POSTPONEMENT OF PRELIMINARY CONFERENCE

13. Plaintiffs found out about the cancellation of this preliminary hearing on December 19th at 5:45PM which may have caused grief to scores of people.

14. **PLAINTIFFS OBJECT** that the court would cancel a hearing, without a pleading from the defendant, on the eve of the conference that was according to the court "*unable to accommodate any postponement of the conference in this case" and, whereas "failure to appear ... may result in default*". **Exhibit 120**.

15. **PLAINTIFFS OBJECT** to the court deferring the hearing on the basis of an alleged "letter" from the alleged NYSBOE counselor without contacting the plaintiff for rebuttal.

16. Plaintiffs contact information is on all papers, therefore a phone call or a fax from the defendant or the court was in order.

17. The cancellation has caused hardships to many people who made arrangements to be at this scheduled hearing so early in the morning, three days before Christmas eve.

MOTION TO DISMISS

18. Ms. Galvin's alleged letter allegedly dated November 28, 2011 is not part of the pleadings, it's a letter.

19. The court does not have the authority to entertain a motion to dismiss from a defendant that did not respond to the courts summons to answer the complaint.

20. The court does not have the authority to entertain a motion to dismiss this case based on an alleged letter filed 7 days after defendants default.

21. The court does not have the authority to entertain a motion to dismiss on behalf of the defendant when the defendant has made no such pleading.

22. Defendant (NYSBOE) has not and cannot make a motion for dismissal because defendant failed to plead and therefore have given up all rights of defense.

MOTION FOR DEFAULT JUDGMENT

23. The court already has before it a motion for default judgment against the defendant filed on December 13, 2011, plaintiffs note, one day before the appearance of Ms. Galvin's alleged letter allegedly dated November 28, 2011, received by the clerk time stamped December 14, 2011.

24. The Court "must" respond to plaintiffs motion for "default judgment" on January 4th 2012 as prescribed by law.

25. This court is govern by **N.Y. CVP. LAW §622.15** and must act accordingly, (d) ... The ALJ may grant a motion to reopen a default upon a showing that a meritorious defense is likely to exist and that good cause for the default exists.

26. Defendant is unable to prove that a meritorious defense is likely to exist nor can the defendant show that good cause for the default exists therefore this court must rule in favor of the plaintiff for default judgment against the defendant.

27. The aforementioned conclusion is also supported by an abundance of Case law, by which this court is controlled.

28. **Kouzios v Dery, 2008 NY Slip Op 10590 (App. Div., 2nd)**

> *The Supreme Court providently exercised its discretion in granting the plaintiffs' motion for leave to enter a default judgment on the issue of liability upon the defendant's failure to answer and to set the matter down for an inquest on the issue of damages. To successfully oppose the plaintiffs' motion, the defendant was required to demonstrate a reasonable excuse for his default and the existence of a meritorious defense* **(see CPLR 5015[a][1]; Giovanelli v Rivera, 23 AD3d 616; Mjahdi v Maguire, 21 AD3d 1067, 1068; Thompson v Steuben Realty Corp., 18 AD3d 864, 865; Dinstber v Fludd, 2 AD3d 670, 671)**... *Moreover, the Supreme Court providently exercised its discretion in rejecting the defendant's further claim that he assumed that he did not need to answer the complaint because of purported settlement negotiations* **(see Antoine v Bee, 26 AD3d 306;**

Majestic Clothing Inc. v East Coast Stor., LLC, 18 AD3d 516, [*2]518). *Furthermore, the defendant failed to demonstrate the existence of a meritorious defense*.

29. **Montefiore Med. Ctr. v Auto One Ins. Co., 2008 NY Slip Op 10596 (App. Div., 2nd)**

The Supreme Court providently exercised its discretion in denying the defendant's motion pursuant to CPLR 5015(a)(1) to vacate a judgment entered upon its default in appearing or answering the complaint since it failed to demonstrate a reasonable excuse for the default **(see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., 67 NY2d 138, 141; Giovanelli v Rivera, 23 AD3d 616)**.

30. **Maida v Lessing's Rest. Servs., Inc., 2011 NY Slip Op 00490 (App. Div., 2nd 2011)**

To vacate the order entered upon its default in opposing the motion for leave to enter a default judgment, the defendant Lessing's Restaurant Services, Inc. (hereinafter the appellant), was required to demonstrate, inter alia, a reasonable excuse for its default in appearing or answering the complaint and a potentially meritorious defense to the action **(see CPLR 5015[a][1]; Abdul v Hirschfield, 71 AD3d 707; Bekker v Fleischman, 35 AD3d 334; Epps v LaSalle Bus, 271 AD2d 400)**. *In support of its motion, which was not made until nine months after the order granting the plaintiff's motion for leave to enter a default judgment, the appellant did not offer a reasonable excuse for its failure to appear or answer the complaint* **(see Gartner v Unified Windows, Doors & Siding, Inc., 71 AD3d 631, 632; Kramer v Oil Servs., Inc., 65 AD3d 523, 524; Leifer v Pilgreen Corp., 62 AD3d 759, 760; Martinez v D'Alessandro Custom Bldrs. & Demolition, Inc., 52 AD3d 786, 787; Segovia v Delcon Constr. Corp., 43 AD3d 1143, 1144)**. *Accordingly, it is unnecessary to consider whether the appellant sufficiently demonstrated the existence of a potentially meritorious defense to the action* **(see Abdul v Hirschfield, 71 AD3d at 709; Segovia v Delcon Constr. Corp., 43 AD3d at 1144; American Shoring, Inc. v D.C.A. Constr., Ltd., 15 AD3d 431)**. *In addition, contrary to the appellant's contention, the plaintiff's submissions in support of her motion for leave to enter a default judgment were sufficient. The verified complaint and the plaintiff's affidavit set forth sufficient facts to enable the Supreme Court to determine that the plaintiff alleged a viable cause of action* **(see Woodson v Mendon Leasing Corp., 100 NY2d 62, 71; Neuman v Zurich N. Am., 36 AD3d 601, 602)**. *Accordingly, the Supreme Court providently exercised its discretion in denying the appellant's motion to vacate the order dated November 24, 2008*.

31. Defendant took the strategy that the county boards could insulate them and carry the case, the defendant was wrong.

WHEREFORE: plaintiffs move the court to enter an order denying defendants ability to plead by letter or answer since the defendant's default was fatal as per **N.Y. CVP. LAW §3215 and §622.15**.

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DATE: The Twentieth Day of the Twelfth month of the Year of Our Lord two thousand eleven and the two hundred thirty-fifth Year of Our Independence.

John Vidurek, Sui Juris, unrepresented
Lead Plaintiff

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