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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:**

-----X **Index No: 153127/2014**

**MICHAEL J. BORRELLI,
BORRELLI & ASSOCIATES, P.L.L.C.,**

Plaintiff,

**Order To Show Cause To Vacate
Default Judgment**

- against-

ROSS ROSENFELD

Defendant

**SUPREME COURT
NEW YORK COUNTY
EX-PARTE MOTION PART**

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Upon the annexed affirmation of Seth Rosenfeld Esq., duly subscribed on October 20, 2014, the annexed exhibits and upon all the papers and proceedings had heretofore herein, **LET** the Plaintiff, MICHAEL J. BORRELLI, show cause before me or one of the judges of the Supreme Court of the State of New York, County of New York, at a motion support part thereof, room _____ located at _____, NY, on the ____ day of _____, 2014, at _____ a.m./p.m. or as soon thereafter as counsel can be heard, **WHY** an order should not be issued, pursuant to to C.P.L.R. §§ 5015 and C.P.L.R 2004, and CPLR 3211 (a)4, which:

- A: Grants the Defendant's instant application which seeks to vacate the default judgment, and/or
- B: Allows the Defendant Ross Rosenfeld to file the attached answer to the above entitled action, and/or
- C: To stay the hearing on damages, and/or
- D: To place the case back on the Court's calendar and allow the Defendant to

present his defenses, and/or

D: Grants the Defendant such other and further relief as this Court deems just and equitable.

SUFFICIENT CAUSE THEREFORE APPEARING let service of a copy of this order and the papers upon which it is predicated-by first class mail (with/without certificate of mail) or by certified mail upon the Plaintiff's attorney, and the sheriff if any, be deemed good and sufficient service if served on or before the _____ day of _____ 2014.

Proof of service may be filed on or before the return date of this motion.

PENDING A HEARING AND DETERMINATION OF THIS MOTION,

Let the Plaintiff be stayed, and let the plaintiff, their agents, assigns, employees or any individual or entity acting on their behalf are hereby stayed from undertaking any and all efforts which seek to enforce or execute upon the judgment. Let the Sherriff if any be stayed, and let the Sherriff, their agents, assigns, employees or any individual or entity acting on their behalf are hereby stayed from undertaking any and all efforts which seek to enforce or execute upon the judgment. There is a stay on the hearing on damages.

Dated Queens, New York
October 21, 2014

Supreme Court Justice Debra James

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:**

-----X **Index No: 153127/2014**

MICHAEL J. BORRELLI

Plaintiff,

**ATTORNEY'S
AFFIRMATION IN
SUPPORT**

- against-

ROSS ROSENFELD

Defendant

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Seth Rosenfeld Esq , an attorney duly licensed to practice law before the Courts of the State of New York hereby affirms the following:

1. I am the attorney for the Defendant Ross Rosenfeld in the above entitled action and make this affirmation in support of the instant emergency Order to Show Cause filed by the Defendant herein to vacate the default judgment and allow the Defendant to file an answer in above entitled action, to stay the hearing on damages, and for the case to be placed back on the Court calendar, and for such other and further relief as the Court may deem necessary.

2. The Defendant's motion must be granted. Since the default in appearing was not caused by any willful action on behalf of the Defendant not to appear and because the Defendant proffers a meritorious defense, their motion to vacate the default order and judgment entered herein should be freely granted.

3. Notwithstanding, the instant proceeding should be vacated pursuant C.P.L.R. §

5015(a)(1), which states, 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, 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"

4. Thus, a party may move to vacate a judgment if he/she proffers an excusable reason for the default and a meritorious defense to the action or proceeding. *See* C.P.L.R §§ 318, 5015; DiLorenzo v. A.C. Lumber Co., Inc., 67 N.Y.2d 138, 141, 501 N.Y.S.2d 8 (1986); Fennell v. Mason, 612 N.Y.S.2d 416, 417, 204 A.D.2d 599, 599 (App. Div. 2d Dept. 1994); Putney v. Pearlman, 203 A.D.2d 333, 333, 612 N.Y.S.2d 919 (App. Div. 2d Dept. 1994).

5. Indeed, the determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the court. *See* Kathy A. Barbagallo v. Nationwide Exterminating & Deodorizing, Inc., 260 A.D.2d 518, 519, 88 N.Y.S.2d 246 (App. Div. 2d Dept. 1999) (citing Grutman v. Southgate at Bay Harbor Home Owners Ass'n, 207 A.D.2d 526, 527, 616 N.Y.S.2d 68 (App. Div. 2d Dept. 1994)).

6. In the case at bar the Plaintiffs have acted in bad faith by starting Supreme Court litigation under index number **600668/2014 in Nassau County, and failing to include these claims. I have had numerous conversations with the Plaintiff (an attorney) and members of his firm regarding the case under Supreme Court Nassau County index 600668/2014 over the last several months and they never informed me that they had started this litigation. They never served me or at the very least provided me with a courtesy copy of the legal papers they allege to have sent the**

Defendant. I have been speaking to the Plaintiff for several months and having litigated in Court with them over the Defendant's websites I find it egregious that they started a second case in this jurisdiction over the exact same claim for Libel Per Se and never mentioned it or pursued this claim in Nassau County where we have been litigating for months. Based on their claims in their legal papers it is clear they were aware of this website and could have litigated it in Nassau where they started a case based on the same cause of action. They only wanted to wait until it was too late for the Defendant to answer this litigation. The Defendant who does not remember being served with this case constantly receives legal papers in regard to Nassau County case index number 600668/2014 and believes that papers he might have received were a part of that litigation which is ongoing in Nassau County. Had the Defendant known that the Plaintiff would start a second litigation, even though his lawyer was in constant contact with the Plaintiff, it would have been a lot easier for the Defendant to identify these papers as being separate litigation despite being for the same cause of action between the same parties. The Defendant is eager to have his day in court and the only reason there was a default in this case is from the honest mistake of the Defendant and devious practices by the Plaintiff who is using the court to go after a complaining former client. It has been found, that default judgments should be freely vacated when they result from "*honest mistakes' or ignorance of a rule of law*" on behalf of a non-appearing defendants. Richards, Fagone & Associates, Inc. v. Center Stage Stores, 44 A.D.2d 857, 857 354 N.Y.S.2d 739 (App. Div. 3d Dept. 1974) (vacating a default judgment even though the defendant failed to submit an answer); S.G.S.G. Construction Corp. v. Jerry Marr, 94 A.D.2d 765, 96 A.D.2d

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