[* 1]

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

PRESENT: JAFFE BARBARA JAFFE J.S.C. Justice PART 5

Index Number : 101644/2001

BROWN, ERIC

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 009

VACATE

CAL # 16

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

n this motion to/for margin

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4, 5, 6

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 31 2010
NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/20/10

AUG 20 2010

J.S.C.

BARBARA JAFFE
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

ERIC BROWN,

Plaintiff,

-against-

CITY OF NEW YORK, TROCOM CONSTRUCTION CORP., ANTHONY SANTORO, JOSEPH TRAVATO, FELIX EQUITIES, INC., FELIX INDUSTRIES, INC., URBITRAN ASSOCIATES, INC., URBITRAN ASSOCIATE ENGINEERS, P.C., URBITRAN CONSTRUCTION AND MANAGEMENT CORP., JOHN COELLO, and ROBERT COELLO,

Defendants.

Index No. 101644/01

Motion Subm: 7/21/10
Motion No.: 009
Calendar No.: 16

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Marc Gertler, Esq.
Eric H. Green, Esq.
295 Madison Ave., 16th Fl.
New York, NY 10017
212-532-2450

For Trocom defendants:
Lam D. Le, Esq.
Cerussi & Spring
One North Lexington Ave.
White Plains, NY 10601
914-948-1200

For defendant City:
Craig Koster, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-788-7295

By decision and order dated April 20, 2010, I summarily dismissed this complaint as against City and Trocom Construction Corp., Anthony Santaro, and Joseph Travato (collectively, Trocom defendants). By notice of motion dated May 17, 2010, plaintiff now moves for an order vacating the April 20 order. City and the Trocom defendants oppose.

I. FACTS

The court's records reflect that on September 22, 2009, the Trocom defendants served plaintiff with their motions for summary judgment, and City served its on September 24, 2009.

On the return date, October 28, 2009, the motion was adjourned at plaintiff's request to December 2, 2009, then to January 14, 2010, again at plaintiff's request, and finally, to March 4, at plaintiff's request and he was given until February 4 to serve and file his opposition papers. It was also agreed that reply papers would be served on the return date. Plaintiff served all defendants with his opposition papers by mail on March 3, 2010, but they were not received by defendants until several days later.

On March 4, 2010, plaintiff sought a fourth adjournment and the application was referred by the motion support office to me. (Uniform Civil Rules for the Supreme Court and the County Court § 202.8[e][1]). Defendants objected to plaintiff's application and asked that I disregard any submission. After hearing from all parties, I denied plaintiff's request and deemed the motion fully submitted, considered all of the depositions, and granted the motion as follows:

> [E]ven if the Trocom defendants had negligently closed the lane or placed the compressor, the evidence demonstrates that the accident was caused solely by Coello's decision to swerve from the middle to the left lane, his collision with the curb, his release of the steering wheel, and his failure to brake. His alleged speed, intoxication, and alignment problem, while they may have caused him to lose control of the car, did not proximately cause the accident. Rather, Coello's actions were the sole proximate cause of the accident, resulting in the car entering the construction site and river.

II. CONTENTIONS

Plaintiff argues that I erred in finding that he had defaulted in opposing City's and the Trocom defendants' motions, as he had served his opposition papers on March 3, 2010. He explains his delay in opposing the motion as follows: First, the attorney who had been handling the file left the firm by the time defendants' motions were served, leaving the newly assigned attorney a "voluminous" file. Moreover, an expert, hired in 2009 and on whose opinion plaintiff had hoped to rely in opposing defendants' motions, had lately notified plaintiff of his need to

withdraw given a conflict of interest arising from his involvement with a City project related to plaintiff's case. Consequently, plaintiff sought the adjournments to first resolve the expert issue, and then to hire a new expert. Plaintiff thus claims that he has demonstrated that his default in opposing the motions was not willful and is reasonably excused.

Plaintiff relies on the allegations set forth in his opposition papers for his meritorious cause of action. (Gertler Aff., Exh. C; Affirmation of Marc Gertler, Esq., dated May 17, 2010). In opposing a summary dismissal, plaintiff alleged, based on the testimony of defendants' witnesses, that there exist issues of fact as to whether the right lane of the construction zone was properly closed, whether only one lane was closed, and whether there were flagpersons posted at the construction zone, and argued that these facts may constitute evidence of negligence given Coello;s testimony that he saw no signs indicating the presence of the construction zone. He also denied that his notice of claim was insufficient. (*Id.*).

The Trocom defendants deny that plaintiff has demonstrated a reasonable excuse for his default, observing that he had from October 2009 to March 2010 to oppose the motion and that the denial of his fourth request for an adjournment was within the court's discretion. They argue that plaintiff's expert should have learned of the possibility of the expert's conflict of interest between 2006, when he was retained, and 2009, when the motions were filed, and that, in any event, plaintiff had six months from the date the motions were filed to resolve the conflict and hire a new expert. (Affirmation of Lam D. Le, Esq., dated May 28, 2010).

City observes that although I denied plaintiff's request for a fourth adjournment, the motion was granted on the merits. Nonetheless, it joins the Trocom defendants' argument to the extent of agreeing that plaintiff has not set forth a reasonable excuse for his delay or a

meritorious cause of action against it. (Affirmation of Craig Koster, ACC, dated June 3, 2010).

In reply, plaintiff argues that I should consider the merits of his claim, and asserts again that the delay was caused by plaintiff's expert advising counsel at the last moment that he had a conflict of interest. (Reply Affirmation of Marc Gertler, Esq., dated June 4, 2010).

III. ANALYSIS

A. Reasonable excuse

As I denied plaintiff's request for an adjournment and considered the motion fully submitted on March 4 before having received plaintiff's papers, the motion was considered on default. A party moving to vacate an order rendered on default must establish a reasonable excuse for its default and a meritorious claim. (CPLR 5015[a][1]; *Gal-Ed v 153rd St. Assocs., LLC*, 73 AD3d 438 [1st Dept 2010]).

Plaintiff furnishes no details concerning when the former attorney left the firm, when the new attorney was assigned to the file, and the new attorney's effort to oppose the motion during the six months during which the motion was pending. (*See eg Mora v Scarpitta*, 52 AD3d 663 [2d Dept 2008] [counsel's conclusory reasons for default were bereft of detailed facts and thus insufficient to constitute reasonable excuse]; *Ortega v Bisogno & Meyerson*, 38 AD3d 510 [2d Dept 2007] [failure to oppose motion not excused; that plaintiff's attorneys had recently been substituted did not explain their inaction for six months when they had knowledge of pending motion]; *Gayle v Parker*, 300 AD2d 145 [1st Dept 2002] [plaintiff's failure to submit opposition to motion was inexcusable; that counsel's father died unexpectedly on return date did not explain counsel's failure to submit opposition papers as other attorneys in counsel's office had previously handled case and motion had already been adjourned three times at plaintiff's request]; *G. E.*

Capital Mtge. Servs., Inc. v Holbrooks, 245 AD2d 170 [1st Dept 1997] ["[c]ounsel's conclusory assertion that prior counsel's . . . opposition to the motion for summary judgment was not submitted because of 'confusion generated by substitution of attorneys' was properly rejected by the [ ] court as an inadequate excuse for defendant's default"]). That the new attorney inherited a voluminous file, without more, is unenlightening. (*See eg 47 Thames Realty, LLC v Robinson*, 61 AD3d 923 [2d Dept 2009] [counsel's vague and unsubstantiated allegation that he failed to appear for conference because he was "busy attorney" was unreasonable excuse]; *Weitzenberg v Nassau County Dept. of Recreation and Parks*, 282 AD2d 741 [2d Dept 2001] [defendant's excuse for not opposing motion due to counsel's heavy schedule unreasonable]; *Kyriacopoulos v Mendon Leasing Corp.*, 216 AD2d 532 [2d Dept 1995] [counsel's excuse that her law firm failed to answer complaint due to large volume of cases was unreasonable; counsel did not demonstrate "factual basis to support the conclusory allegation that her law firm was overwhelmed by the number of cases it handled"]).

Moreover, plaintiff offers no description of the efforts made to resolve the expert conflict or retain a new expert. (*See Cohen v TLC Women's Svces., Inc.*, 157 AD2d 764 [2d Dept 1990] [plaintiff failed to set forth reasonable excuse for not opposing summary judgment motion; although plaintiff claimed that prior to motions' return date, she was unable to reach expert to obtain opposing affidavit, she did not explain what efforts were taken to locate expert and she had notice of motion for seven weeks prior to return date]; *see also Cole-Hatchard v Grand Union*, 270 AD2d 447 [2d Dept 2000] [plaintiff's excuse for not opposing summary judgment motion, that eyewitness to accident was not contacted, did not explain why counsel did not contact eyewitness once discovery revealed his identity and upon receipt of motion]). And his

mere "hope" that he would be able to rely on an expert opinion forms an insufficient basis for failing to oppose the motion without the opinion.

For all of these reasons, plaintiff has failed to establish a reasonable excuse for his default.

B. Meritorious Claim

Although plaintiff has failed to set forth a reasonable excuse for his failure to oppose the motions, I nevertheless consider whether he demonstrated that he has a meritorious claim against City and the Trocom defendants. The pertinent facts are set forth in the April 20 order.

Given my finding that Coello's conduct was the sole cause of the accident and that any negligence in setting up the construction zone was immaterial, the facts referenced by plaintiff in his opposition papers do not raise a material issue for trial as to the liability of the Trocom defendants. And, absent any evidence that the guardrail was defective or insufficient, there is no proof that City breached any duty owed plaintiff.

Finally, as I determined that plaintiff's notice of claim was not defective, that portion of plaintiff's opposition is moot.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion to vacate is denied.

ENTER:

Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: August 20, 2010
New York, New York