SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: EIGHTH DEPARTMENT
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ABCD & CO.

Plaintiff-Respondent,

-against-

ABCD FLORIST, INC. and
MARY SMITH

New York County
Index No. xxxxx/xx

Defendants-Appellants.

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MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR STAY

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PRELIMINARY STATEMENT

Appellants are appealing the lower court's denial of their Motion to Vacate a default judgment in an order dated June 26, 2000.[1] Plaintiff ABCD & Co. filed a Complaint alleging breach of contract and requesting damages and a preliminary injunction enjoining Appellants ABCD Florist, Inc. ("ABCD Florist") and Mary Smith ("Smith") (collectively referred to as "Appellants") from using the name "ABCD Florist."[2] The Court set a conference for April 25, 2000, but then never gave Smith and ABCD Florist notice of the conference setting. Instead, the Court telephoned an outdated number listed in its file for Appellants' counsel and then proceeded to docket the conference even though the court staff never contacted Appellants' counsel. When Appellants' counsel failed to appear at the

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[1]. For the convenience of the Court, copies of these documents are assembled and numbered in an appendix following the affirmation of Ronald J. Devito in support of the motion and will be referred to as "App. __ "with a reference to the page where the particular document can be found.

[2]. A copy of the summons and complaint may be found in the appendix at App.21-28. A copy of the answer may be found in the appendix at App. 29-34. A copy of the Order and Notice of Entry of the April 27, 2000 default judgment (hereafter default judgment) may be found in the appendix at App.15. A transcript of the April 25, 2000 conference may be found in the appendix at App. 16-20. A copy of the Appellant's Order to Show Cause filed on May 11, 2000 to vacate the default judgment (hereafter Order to Show Cause) may be found in the appendix at App.1-2. The affirmations and affidavits in support of the Order to Show Cause, including those of Ronald J. DeVito, Mary Smith, Christine Giabmvalvo, and Marion Solotoroff may be found in the appendix at App.3-14. The exhibits, affirmation, and affidavits in opposition to the Order to Show Cause, including those of Peter D. Assail and of Ted C. Anastasakis, may be found in the appendix at App.39-52. A copy of the Court's order denying the motion to vacate the default judgment dated June 26, 2000 (hereafter the order appealed from) may be found in the appendix at App.53. A copy of the transcript of the June, 2000 hearing on the motion to vacate may be found in the appendix at App.54-60. A copy of the notice of appeal dated July 5, 2000 (hereafter notice of appeal) may be found in the appendix at App.61. A copy of the pre-argument statement may be found in the appendix at App.62.

conference due to the court staff's carelessness, the court struck Appellants' Answer and entered a default judgment against them for non-appearance on April 27, 2000. Despite Appellants' meritorious defenses, as part of the default judgment, the court enjoined Smith and ABCD Florist from using the name "ABCD Florist" or otherwise confusing the public or depriving Plaintiff of its customers. As a result, the court ordered Appellants to remove their signage, to use another replacement operating name, and to place advertisement promoting the replacement name and disclaiming all connection with Plaintiff.

Smith and ABCD Florist submit this Memorandum of Law in support of their Motion for a Stay of the proceedings in the lower court. Specifically, Appellants seek to stay the enforcement of the default judgment and the enforcement of the permanent injunction incorporated into the default judgment enjoining them from using their business name ABCD Florist, Inc. Appellants have filed a notice of appeal and are appealing the lower court's denial of their motion to vacate the default judgment filed on June 26, 2000.

QUESTIONS PRESENTED

1. When Appellants failed to appear at a conference setting, the court granted default judgment in Plaintiff's favor, enjoining Appellants from using the business name "ABCD Florist." The Court concedes, however, that it never gave Appellants notice of the conference setting because court staff called an outdated telephone number and never spoke with Appellants' counsel. Should a stay be granted because vacatur of the default judgment is likely on due process grounds?

2. In the alternative, even if Appellants' due process rights were not violated, which Appellants contest, NY CPLR section 5015(a)(1) requires vacatur of a default judgment when the defaulting party has a reasonable excuse for the default and has meritorious defenses. Should this Court stay the enforcement of the default judgment during the pendency of the appeal because reversal of the order denying vacatur of the default judgment pursuant to NY CPLR §5015(a)(1) is likely on appeal?

3. A permanent injunction was entered as part of the default judgment, enjoining Appellants from using their incorporated business name, ABCD Florist, Inc. Should a stay be granted because vacatur of the permanent injunction entered as part of the default judgment is also likely?

4. If the permanent injunction is enforced during the pendency of the appeal, Appellants will incur great expenses in removing signage, changing stationary, re-listing their telephone number, retracting advertisements, and replacing their packaging. Appellants will also lose customers and good will due to misdirected marketing and confusion. Should a stay be granted because enforcement of the injunction will irreparably harm Appellants, notwithstanding the merits of their appeal and almost inevitable vacatur of the default judgment and the permanent injunction once the appeal is heard?

The answer to all these questions is yes.

STATEMENT OF FACTS

The following facts are undisputed.

A. In 1997, Plaintiff ABCD & Co. Enters into a Stipulation of Settlement with Appellants ABCD Florist, Inc. and Mary Smith in which Appellants Agree Not to Use the Name "ABCD & Co." or "ABCD & Co. Florist West."

After a dispute which resulted in litigation, the parties entered into a Stipulation of Settlement in which Appellants agreed not to use the business trade names "ABCD & Co." or "ABCD & Co. Florist West." The Stipulation stated in pertinent part:

> Smith and all Defendants agree not to use or cause others to use business trade names ABCD & Co. or ABCD & Co. Florist West at premises 1318 2nd Avenue, New York, New York 100021 or at any other retail location either in the florist trade of any other business trade. Plaintiffs have no objection to Smith or other Defendants using the name ABCD & Turner II as a d/b/a of Scarcella Florist, Inc. or variations on that name.

(Stipulation of Settlement, App. 35-38). Nowhere in the Stipulation did Plaintiff request or Appellants agree to refrain from using the name ABCD Florist, Inc.

B. In 1999, Plaintiff Files Suit Against Appellants Alleging They Breached the 1997 Stipulation of Settlement by Using the Business Name ABCD Florist, Inc.

On December 13, 1999, Plaintiff ABCD & Co. filed an action against Appellants in the Supreme Court of the State of New York, County of New York. The Complaint alleged that Appellants breached the 1997 Stipulation of Settlement by doing business as ABCD Florist, Inc. without Plaintiff's authorization. (Complaint, App. 22-24, ¶¶ 8,16).

C. Appellants Timely Served an Answer Denying the Allegations in the Complaint and Asserting Numerous Affirmative Defenses and a Counterclaim for Plaintiff's Frivolous Suit.

On January 26, 2000, Appellants served an Answer denying the allegations in the Complaint. (Answer, App. 29-34, ¶¶ 1-14). In the Answer, Appellants raised other affirmative defenses such as documentary evidence, res judicata, collateral estoppel, equitable estoppel, and failure to state a cause of action. (Answer, App. 31-32). Appellants also filed a Counterclaim under 22 NYCRR § 130-1.1 to recoup expenses and attorneys' fees for Plaintiff's frivolous suit. As is evident from the plain language of the stipulation, use of the name ABCD Florist, Inc. does not violate the Stipulation of Settlement, which only forbids use of "ABCD & Co." or "ABCD & Co. Florist West."

D. Appellants and their Counsel are not Notified when the Court Sets the Case for Conference, and the Court Enters a Default Judgment and Preliminary Injunction in Their Absence.

Unbeknownst to Appellants' counsel, the lower court scheduled a conference for April 25, 2000. (See Affirmation of Ronald DeVito dated July 7, 2000, hereinafter DeVito Affirmation). No one in counsel's office received any verbal notice, or written communication or submission to the Court with notice, of the conference. Neither the court nor opposing counsel ever gave Appellants notice of the upcoming conference. (DeVito affirmation, App. 3-7; Giambalvo affirmation, App. 11-12; Solotoroff affidavit, App. 13-14). As a result, Appellants were unaware of the conference setting through no fault of their own and did not appear at the conference.

At the conference, the Honorable Ira Gammerman entered the Default Judgment, granted Plaintiff a permanent injunction against Appellants, and set the case for an inquest on May 16, 2000 to determine damages. (default judgment, App. 15; 4/25/00 transcript, App. 17-18). First, the court ordered Appellants' Answer struck as a penalty for non-appearance and granted a default judgment in Plaintiff's favor. (default judgment, App. 15; 4/25/00 transcript, App. 17). The court never considered less stringent penalties such as ordering Appellants to pay cost and rescheduling the conference prior to striking Appellants' Answer. Second, the court granted a permanent injunction, enjoining Appellants from "taking any action which will cause any confusion or mistake in the public mind that the defendant ABCD Florist, Incorporated is in any way related to the plaintiff ABCD and Company." The court prohibited Appellants from using the Plaintiff's customer list, using the name ABCD in the defendant's business, diverting any of Plaintiff's customers to the defendants, using any other trade name that would be confusingly similar to the Plaintiff's name, and inducing the public to believing that the Defendants' product is endorsed or sponsored by the Plaintiff. The court also required that Defendants post new advertisements under its new name, disclaiming any connection with the Plaintiff. (default judgment, App. 15; 4/25/00 transcript, App. 17-18). Plaintiff never filed a proper motion requesting injunctive relief, and Appellants had no reason to believe the court would consider granting injunctive relief without a formal cross-motion. (DeVito Affirmation, ¶ 12). Finally, the court set the case for an inquest on May 16, 2000 to determine damages arising under the

default judgment.(default judgment, App. 15; 4/25/00 transcript, App. 18). The default judgment was entered on April 27, 2000. (default judgment, App. 15).

E. Appellants Discover and the Court Subsequently Admits that They did not Receive Notice of the Conference Because the Court Used an Incorrect Phone Number from Its File Rather than Counsel's Correct Telephone Number.

There is no evidence that Appellants' default was intentional or that their non-appearance was knowing. Appellants' counsel received a copy of the default judgment and contacted opposing counsel, who advised counsel that the court scheduled the conference and called counsel's office to give notice of the date. No one at Appellants' counsel's office received any phone calls or messages regarding a conference setting. (Order to Show Cause App. 1-2; DeVito affirmation, App. 3-7; Giambalvo affirmation, App. 11-12; Solotoroff affidavit, App. 13-14; DeVito Affirmation, ¶ 7). When Appellants' counsel contacted the court, Patricia Giles, the Justice's secretary, informed him that the court file contains an old telephone number which had not been current since counsel moved offices in October, 1996. (DeVito Affirmation, ¶ 7). The old telephone number was almost four years out of date.

F. Appellants Filed an Order to Show Cause for Vacatur of the Default Judgment, which was Subsequently Denied by the Court when Appellants' Counsel would not agree to Stipulate to the Injunctive Relief Already Entered.

Appellants filed an Order to Show Cause for vacatur of the default judgment on May 30, 2000, on the basis of the undisputed lack of notice. Appellants also alleged that they had a meritorious defense to the action as they did not breach the Stipulation of Settlement. The

Order to Show Cause was supported by affirmations and affidavits unequivocally detailing the lack of notice. (Order to Show Cause and attached affidavits and affirmation, App. 1-14).

During the hearing on the Order to Show Cause on June 14, 2000, the Court admitted that it failed to give Appellants notice of the conference by calling the incorrect phone number. (6/14/00 Transcript, App. 55). Regardless, the Court refused to vacate the default judgment unless Appellants would agree to conditions on the vacatur including entry of an injunction enjoining Appellants from using their business name ABCD Florist, Inc. (Id. at pp. 59-60). Appellants' counsel refused to capitulate to the court's demand believing that Plaintiff was not entitled to a preliminary injunction because Plaintiff never moved for injunctive relief, Appellants had no reason to believe that the Court would consider injunctive relief in the absence of a formal cross-motion. (DeVito Affirmation, ¶ 12). As a result, the court denied the motion to vacate the default judgment despite the conceded lack of notice. (order appealed from, App. 53; 6/14/00 transcript, App. 60).

Appellants appealed from the lower court's denial of their motion to vacate the default judgment entered on June 26, 2000. They timely filed notice of appeal on July 5, 2000, and now urge this Court to grant their Motion for Stay of the enforcement of the default judgment and preliminary injunction to avoid irreparable harm to their business during the pendency of a most likely successful appeal. (notice of appeal, App. 61; DeVito Affirmation, ¶¶ 13-14).

ARGUMENT

Standard of Review

Appellants respectfully urge this Court to grant a necessary stay of the enforcement of the default judgment and the permanent injunction below during this appeal so that Appellants do not suffer irreparable harm despite the merits of their appeal. This Court has the authority to grant such stay of proceedings in the interest of equity and judicial economy:

> (c) Stay and limitation of stay by court order. The court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision(a) or subdivision (b) or this subdivision, except that only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a).

NY CPLR §5519 (c). "In considering whether to grant a stay under subdivision(c), the court's discretion is the guide. It will be influenced by any relevant factor, including the presumptive merits of the appeal and any exigency or hardship confronting any party." 1995 Practice Commentaries: C5519:4 Court Ordered Stay. Accordingly, this Court can grant a stay of the proceedings below after considering either the merits of the appeal or the equitable balancing of irreparable harm and prejudice to the parties.

Smith and ABCD Florist respectfully submit that this Court should grant a stay of the enforcement of the default judgment and permanent injunction entered on April 27, 2000 for both these reasons. First, the likelihood of Appellants winning on the merits of their appeal from the lower court's denial of their motion to vacate is very high. (order appealed from,

App. 53). Entry of the default judgment, which incorporated a permanent injunction enjoining Appellants from using their business name of "ABCD Florist, Inc.," violated Appellants' due process rights. It is undisputed that Smith and ABCD Florist had no notice of the conference setting on April 25, 2000. (6/14/00 transcript, App. 55; DeVito Transcript ¶ 7). The court conceded that it had the wrong telephone number listed for Appellants' counsel. (6/14/00 transcript, App. 55). The carelessness of the court's staff is alarming. After calling a telephone number that had been outdated for almost four years and failing to contact DeVito, the court staff still docketed the conference for April 25, 2000. Because the court and opposing counsel failed to give Appellants notice of the conference setting, Smith and ABCD Florist were deprived of the opportunity to a hearing prior to entry of the default judgment and the subsequent permanent injunction depriving them of property rights. The lower court erred in denying Appellants motion to vacate, and based upon the high likelihood of Appellants' success on appeal, this Court should grant the Motion to Stay until it renders an opinion.

Moreover, even if this Court concludes that entry of the default judgment and permanent injunction was not unconstitutional, Smith and ABCD Florist should still succeed in reversing the lower court's denial of their motion to vacate on the basis of NY CPLR section 5015. Appellants had a reasonable excuse for failing to appear at the April 25, 2000 conference – they lacked notice of the conference setting. Moreover, Appellants also have a meritorious defense to Appellants' breach of contract claim and request for injunctive

relief. As is evident from the plain language of the Stipulation of Settlement entered between the parties in 1997, the Settlement only forbids using the names "ABCD & Co." or "ABCD & Co. Florist West." (Stipulation of Settlement, App. 36-37). Moreover, Smith states in her affidavit in support of the Order to Show Cause, that Plaintiff authorized the use of "ABCD Florist, Inc." in exchange for Smith investing over $500,000 in ABCD companies. (Smith affidavit, App. 9). Therefore, notwithstanding violation of Appellants' due process rights, the lower court erred in denying Appellants' motion to vacate the default judgment (and permanent injunction) in light of Appellants' reasonable excuse for the alleged default and their meritorious defenses to both Plaintiff's breach of contract claim and request for injunctive relief. A stay should be granted due to the high likelihood of success on these grounds.

Finally, as tay should also be granted because a brief stay in enforcement of the default judgment will not prejudice Plaintiff, but will result in irreparable harm to Smith and ABCD Florist. Without a stay, Appellants will have to cease using their business name of ABCD Florist, Inc., tear down signage, change stationary, re-list advertising, transfer telephone numbers, and lose countless sales and customers. (DeVito Affirmation, ¶¶ 15-16). Appellants will also suffer injury to their goodwill and customer base because customers, believing ABCD Florist, Inc. is no longer in business, will transfer their business to other florists and develop new loyalties. Appellants business will be destroyed not on the basis of the merits of the case but because the court called the wrong phone number.

I. THE STAY SHOULD BE GRANTED BECAUSE APPELLANTS HAVE A STRONG LIKELIHOOD OF SUCCEEDING ON THE MERITS OF THEIR APPEAL AND IN VACATING THE DEFAULT JUDGMENT AND INJUNCTION.

This Court should grant Appellants' Motion for Stay because a strong likelihood exists that they will succeed on the merits of their appeal concerning the lower court's denial of their motion to vacate and that the default judgment and the permanent injunction will be vacated. It is within this Court's discretion to grant a stay of enforcement of the default judgment or the preliminary injunction during the pendency of the appeal on the basis of "the presumptive merits of the appeal...." 1995 Practice Commentaries: C5519:4 Court Ordered Stay. Accordingly, a stay should be granted because a strong likelihood exists that Appellants will succeed on appeal and that the default judgment and preliminary injunction will be vacated.

A. A Stay Should be Granted Because the Entry of the Default Judgment and the Issuance of the Permanent Injunction Violated Appellants' Due Process Rights.

This Court should stay the enforcement of both the default judgment and the subsequent permanent injunction because both were entered in violation of Smith's and ABCD Florist's due process rights. No person shall be deprived of life, liberty, or property without due process of law. U.S. Const. Amend. XIV; NY Const. Art. 1, § 6. Due process requires an opportunity to be heard when personal or property rights are threatened by state action. *See Parratt v. Taylor*, 451 U.S. 527 (1981). Through no fault of their own and

because of the court's own oversight, Smith and ABCD Florist never received notice of the conference setting on April 25, 2000.

The evidence is undisputed that Appellants did not receive notice of the conference setting. Numerous affirmations have been submitted showing that counsel and no one at his office were ever contacted regarding the conference setting. (DeVito Affirmation ¶ 7; Solotoroff affidavit and Giambalvo affirmation, App. 11-14). Appellants first received notice of the conference setting when counsel received a copy of the default judgment. (DeVito Affirmation, ¶ 7). Upon investigation, counsel was told by court personnel that the court had attempted to contact him at an incorrect telephone number. (DeVito Affirmation, ¶ 7). During the subsequent hearing on Appellant's motion to vacate the default judgment, the court conceded that it had the wrong telephone number listed for Appellants' counsel. (6/14/00 transcript, App. 55). Not only was the phone number the court relied upon almost four years out of date, but the court staff was alarmingly careless in scheduling a conference even after they failed to reach Appellants' counsel at the outdated telephone number. Accordingly, Appellants never received notice of the conference setting, and the default judgment should be vacated on the basis of reasonable excuse for their nonappearance at the conference.

Despite the Court's own admission that it telephoned an incorrect number and never contacted Appellants' counsel regarding the conference setting, the court entered a default judgment and an accompanying permanent injunction as a result of Appellants'

nonappearance at the conference. The Court of Appeals has stated that at a minimum "due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights." *In re Coates*, 9 N.Y.2d 242, 249, 173 N.E.2d 797, 801, 213 N.Y.S.2d 74, 79 (1961). Therefore, "[a] hearing or an opportunity to be heard is absolutely essential." *Id.* (emphasis added). When appellants, unaware of the conference, did not appear on April 25, 2000, the court granted the default judgment against them (entered on April 27) and then went so far as to grant injunctive relief that Plaintiff had not even proven it was entitled to in a motion. Despite the frivolousness of Plaintiff's suit and Appellants' meritorious defenses, the court has entered judgment against Smith and effectively ordered Smith to forever padlock the doors of ABCD Florist as it is known to its customers. (default judgment, App. 15; 4/25/00 transcript, App. 55-56). Specifically, the court enjoined Appellants from "taking any action which will cause any confusion or mistake in the public mind that the defendant ABCD Florist, Incorporated is in any way related to the plaintiff ABCD and Company." The court prohibited Appellants from using the Plaintiff's customer list, using the name ABCD in the defendant's business, diverting any of Plaintiff's customers to the defendants, using any other trade name that would be confusingly similar to the Plaintiff's name, and inducing the public to believing that the Defendants' product is endorsed or sponsored by the Plaintiff. The court also required that Defendants post new advertisements under its new name, disclaiming any connection with the Plaintiff. (4/25/00 transcript, App. 55-56).

B. In the Alternative, Even if the Court did not Violate Appellants' Due Process Rights by Depriving them of Property Interests Without Notice, the Default Judgment and the Permanent Injunction Should be Set Aside Because Appellants have a Reasonable Excuse for Their Non-Appearance and a Meritorious Defense.

Appellants urge this Court to reverse the lower court's denial of their motion to vacate the default judgment because entry of the default judgment violated their due process rights. In an abundance of caution, however, Appellants also argue that the default judgment should be set aside under NY CPLR §5015. A default judgment will be vacated in cases where the defaulting party has a reasonable excuse for the default and a meritorious defense. *See Reyes v. New York City Housing Authority*, 236 A.D.2d 277, 279, 653 N.Y.S.2d 585 (1st Dep't 1997). Such vacatur is commonplace because courts look upon default judgments with disfavor and the law favors disposition of cases on the merits. *Reyes v. New York City Housing Authority*, 236 A.D.2d 277, 279, 653 N.Y.S.2d 585 (1st Dep't 1997). In this case, the default judgment, and incorporated permanent injunction, should have been vacated pursuant to NY CPLR §5015 because Appellants meet both requirements - a reasonable excuse for the default and a meritorious defense. First, Appellants had a reasonable excuse for their non-appearance at the conference setting. It is undisputed that neither opposing counsel, nor the court notified Appellants of the conference setting because the court had an incorrect telephone number for counsel that was four years out of date. (6/14/00 transcript, App. 55; DeVito Affirmation, ¶ 7). Second, Appellants also have meritorious defenses and a counterclaim for a frivolous suit. The plain language of the Stipulation of Settlement only

forbids use of the names "ABCD & Co." and "ABCD and Co. Florist West." (stipulation of settlement, App. 36-37). Accordingly, the default judgment should be vacated on appeal and the enforcement of the default judgment should be stayed.

1. Appellants had a Reasonable Excuse for their Non-Appearance at the Conference Setting because Appellants Never Received Notice of the Conference Setting from the Court or Opposing Counsel.

The default judgment entered in this case should be vacated because it is undisputed that neither the lower court or opposing counsel notified Appellants of the conference setting at which default judgment was entered against them. Appellate courts have vacated default judgments where a party's non-appearance was either inadvertent or due to lack of notice. *See Reyes*, 236 A.D.2d at 279; *Lohmann v. Castleton Gallery,* Inc., 252 A.D.2d 482, 675 N.Y.S.2d 123 (2d Dep't 1998); *Barillari v. 511 Main Street Corp.*, 216 A.D.2d 859, 629 N.Y.S.2d 365 (4th Dep't 1995). In *Reyes*, this Court vacated a default judgment because plaintiff's nonappearance was attributable to reasonable excuses such as counsel's difficulty in reaching plaintiff, the recent death of plaintiff's mother, miscommunication between counsel, and a calendaring error. *Reyes*, 236 A.D.2d at 279. In *Lohmann*, the appellate court vacated a default judgment because the individual defendants claimed they never received notice of the scheduled deposition or of the plaintiff's motion for a default judgment due to the defendants' non-appearance at the depositions. In *Barillari*, the court held that the failure to notify the Secretary of State of a change of address, if inadvertent, could constitute a reasonable excuse for a corporation's default. *Barillari*, 216 A.D.2d at 850. The facts in

this case warranting vacatur are comparable to those in *Lohmann* and are even more compelling than those in *Reyes* and *Barillari.* It is undisputed that Appellants never received notice of the conference setting.

2. Appellants Have Meritorious Defenses and a Counterclaim to Plaintiff's Action.

The default judgment should be vacated on appeal because, in addition to having a reasonable excuse for their non-appearance, Appellants also have meritorious defenses and a counterclaim. *See Reyes*, 236 A.D.2d at 279; *Merling Marx & Seidman, Inc. v. Repo Auto Warehouse, Inc.*, 105 A.D.2d 675, 482 N.Y.S.2d 17, 18 (1st Dep't 1984). In *Reyes*, this Court vacated the default judgment after concluding that a reasonable excuse existed for plaintiff's nonappearance and that plaintiff had a meritorious action. The plaintiff submitted affidavits detailing the dangerous condition on the stairwell leading to plaintiff's slip and fall and the numerous complaints from other housing tenants. *Reyes*, 236 A.D.2d at 279. Likewise, in *Merling Marx,* this Court concluded that denial of the motion to vacate was improper because the defendant did not receive notice and had a meritorious defense. "Although the defenses alleged by the defendant in the papers submitted on behalf of its motion to vacate the default are phrased in conclusory terms, enough appears from the record to present a question as to whether the judgment actually entered accurately reflects the amount owed." *Merling Marx & Seidman, Inc.* 105 A.D.2d at 676. As is abundantly clear from these cases, courts will vacate default judgments in non-appearance cases where the party lacked notice of the proceeding and had a meritorious defense.

As in *Reyes* and *Merling Marx*, the allegations in Appellants' Answer and Counterclaim and the supporting evidence show that Appellants have both meritorious defenses and a counterclaim. First, contrary to Plaintiff's allegations, Appellants did not breach the Stipulation of Settlement by using the name ABCD Florist, Inc. Even a cursory reading of the stipulation shows this claim to be frivolous:

> Smith and all Defendants agree not to use or cause others to use business trade names ABCD & Co. or ABCD & Co. Florist West at premises 1318 2nd Avenue, New York City or at any other retail location either in the florist trade or any other business trade. Plaintiffs have no objection to Smith or other Defendants using the name ABCD & Turner II as a d/b/a of Scarcella Florist, Inc. or variations on that name.

(stipulation of settlement, App. 36-37). The plain language of the stipulation shows that Plaintiff only objected to the use of two specific names - "ABCD & Co." or "ABCD & Co. Florist West." Thus, Appellants have not violated the Stipulation of Settlement by using their incorporated business name, ABCD Florist, Inc.

Moreover, other defenses exist as enumerated in the Answer such as res judicata, collateral estoppel, equitable estoppel, and failure to state a cause of action. (Answer, App. 29-34, at ¶¶ 16-18). In her affidavit, Smith states that Plaintiff agreed through its agent Ted Anastasakis that she could use a derivation of the ABCD name other than those listed in the Stipulation of Settlement, i.e. "ABCD & Co." and "ABCD & Co. Florist West." Smith received use of the name ABCD after investing over half a million dollars in Anastasakis' ABCD ventures. (Smith Affidavit, App. 8-10 at ¶¶ 4-6). Smith also swore that ABCD Florist, Inc.'s customer base was due to Smith's own efforts. (*Id.,* at ¶ 7). Because the use

of ABCD Florist, Inc. clearly does not violate the language of the Stipulation of Settlement, Appellants also brought a meritorious counterclaim against Plaintiff under 22 NYCRR § 130-1.1 for its frivolous claim. (Answer, App. 29-34 at ¶¶ 19-23).

As the permanent injunction was entered as a result of the default judgment, it will also be overturned on appeal on the basis of Appellants' meritorious defenses. Although it is within the lower court's discretion to grant or deny provisional relief, reversal is required where the lower court exceeds or abuses its discretionary powers. *Doe v. Axelrod*, 73 N.Y.2d 748, 532 N.E.2d 1272, 536 N.Y.S.2d 44 (1988). The Court exceeded its authority and abused its discretion in granting injunctive relief despite Plaintiff's frivolous suit and its failure to consider Appellants' meritorious defenses.

Plaintiff failed to prove it was entitled to a permanent injunction. To obtain injunctive relief, the movant must prove three things: (1) the likelihood of its ultimate success on the merits; (2) irreparable injury to it absent the granting of the injunction; and (3) a balancing of the equities. *Doe v. Axelrod*, 73 N.Y.2d 748, 750, 532 N.E.2d 1272, 1272, 536 N.Y.S.2d 44, 45 (1988) (reversing issuance of preliminary injunction as a matter of law where plaintiff failed to prove likelihood of success on the merits); *Paine & Chriscott v. Blair House Associates*, 70 A.D.2d 571, 417 N.Y.S.2d 68, 69 (1st Dep't 1979). Plaintiff failed to prove any of the three elements, and the court never gave Appellants notice that it was considering injunctive relief, nor considered Appellants' meritorious defenses to the action. As maintenance of the status quo is more equitable in the absence of any proof that Plaintiff will

ultimately prevail, this Court should stay the enforcement of the preliminary injunctive until this appeal has been heard and an opinion issued.

3. The Court also Erred in Denying the Motion to Vacate Because it did not Consider Less Severe Penalties Prior to Imposing Extreme Sanctions and Striking Appellants' Answer.

Appellants are also likely to succeed in appealing the lower court's denial of its motion to vacate because the court did not consider less severe sanctions prior to striking Appellants' Answer. "Striking of pleadings is too drastic a remedy where the party's default is not willful." *First Bank of the Americas v. Motor Car Funding,* Inc., 257 A.D.2d 287, 292, 690 N.Y.S.2d 17 (1st Dep't 1999), *citing Newman v. Chartered New England Corp.*, 63 A.D.2d 617, 405 N.Y.S.2d 87 (1st Dep't 1978). This Court has reversed imposition of severe sanctions where there was no showing on the record that the defendant's non-appearance was willful. *See Comarco Data Services, Inc. v. Tru-Check Computer Systems, Inc.*, 154 A.D.2d 249, 250, 546 N.Y.S.2d 87 (1st Dep't 1989) (reversing lower court's striking of counterclaims where there was no evidence that the defendant's non-appearance at a deposition was willful); *Bako v. V. T. Trucking Co.*, 143 A.D.2d 561, 532 N.Y.S.2d 767, 768 (1st Dep't 1988) (reversing lower court's order striking appellant's Answer for failure to appear at a preliminary conference where there was no finding of bad faith or willful conduct or that the other party was prejudiced). Here, the court ordered Appellants' Answer struck as a penalty for their non-appearance at the conference. But prior to imposing such an extreme sanction, the court did not consider other penalties such as assessing costs against

Appellants or rescheduling the conference. (4/25/00 transcript, p. 55). Moreover, no where on the record did the court make a finding that Appellants' non-appearance was willful or in bad faith, thus, justifying imposition of such dire sanctions. To the contrary, the undisputed evidence shows that Appellants' non-appearance was not willful. The court failed to notify Appellants of the conference setting. Accordingly, striking Appellants' Answer was an extreme sanction, and the lower court erred in denying Appellants' motion to vacate.

C. The Court Abused Its Discretion in Making Vacatur of Default Judgment Obtained in Violation of Appellants' Due Process Rights Conditional Upon Appellants' Stipulation to a Preliminary Injunction.

When Smith and ABCD Florist argued their motion to vacate the default judgment, the court offered counsel two options: either agree to the *sua sponte* issuance of a preliminary injunction without being able to respond to the merits of the injunction <u>or</u> the motion to vacate the default judgment would be denied, despite the admitted lack of notice. This "condition" upon vacatur of the default judgment was improper because the Court was required to vacate the default judgment. This is not a case of default or neglect, but a case concerning due process violations. The court granted default judgment on the basis of non-appearance at the conference after the court admittedly failed to give Appellants' notice of the conference setting. Accordingly, Appellants' counsel properly refused to capitulate to the court's demand. (6/14/00 transcript at pp.57-59). Not only had Plaintiff failed to prove entitlement to injunctive relief, but the Court lacked authority to force a preliminary injunction upon Appellants' as a condition of vacating an unconstitutional default judgment.

II. THIS COURT SHOULD GRANT A STAY BECAUSE ALTHOUGH PLAINTIFF WOULD NOT BE PREJUDICED BY THE BRIEF STAY, APPELLANTS WOULD SUFFER IRREPARABLE HARM IN ITS ABSENCE.

Appellants respectfully urge this court to grant the Motion for Stay in order to prevent irreparable harm to their business. It is within this Court's discretion to grant a stay of enforcement of the default judgment or the preliminary injunction during the pendency of the appeal on the basis of "any exigency or hardship confronting any party." 1995 Practice Commentaries: C5519:4 Court Ordered Stay. In addition to the inequities presented by a default judgment, which incorporates a permanent injunction, denial of this stay will result in irreparable harm to Appellants, both as a business and as an individual.

Although Plaintiff will not suffer any prejudice from the brief stay requested during the appeal, injury to Smith and ABCD Florist cannot be remedied by money damages. The permanent injunction entered as part of the default judgment on April 27, 2000 prohibits Smith from using the name of ABCD Florist, Inc. The injunction, if not stayed, will effectively shut down ABCD Florist as it now operates, replace its name with an unknown substitute, and then allow it to re-open only to flounder in the business world with a confused and stranded customer base. Appellants will have to expend irreplaceable time in changing their stationary, invoices, merchant accounts, phone listings, and advertising. Smith's and ABCD Florist's customers will be unable to contact the company: if customers walk up, they will be greeted with the sign of a strange business; if they try to call, they will receive a disconnection message; if they receive solicitations, the stationary will be identified

as that of a different business; and even if they come into the store confusion will reign as all traces of ABCD Florist will be wiped away. Allowing a court to enforce such an extreme remedy while not affording even the minimum guarantees of due process cries out for a remedy. Granting a stay would maintain the status quo, preserve ABCD Florist, and allow ABCD Florist to finally receive a hearing and due process during the appeals process.

In addition to immediate harm, Smith and ABCD Florist will continue to suffer future injury even if their appeal is successful and the default judgment is vacated. The injunction damages the company's goodwill and decimates their customer base, which Smith has build up through her own efforts over time. (Smith Affirmation, App. 8-10 at ¶ 7). They will never recapture those customers who defect to other florists, believing that ABCD Florist has been bought out or driven out of business. As confused customers form new alliances with replacement vendors, ABCD Florist will lose current business and the prospect of future repeat business from formerly loyal customers. This Court should grant the stay, therefore, as Plaintiff will not suffer any prejudice by a stay during the short pendency of this appeal but Appellants will suffer irreparable loss to their business.

CONCLUSION

For the foregoing reasons, Appellants request that this Court stay proceedings pending appeal, including a stay against enforcement of the default judgment and the permanent injunction granted without notice, a motion, the required showing and the mandatory undertaking, along with such other and further relief granted to appellants as this Court may deem just and proper.

Dated: July 7, 20xx

JANE DOE, P.C.

By: ____________________________

Jane Doe
Attorneys for Defendants/Appellants