

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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JACOB TEITELBAUM,	:	Docket No. 12-CV-2858(B)
	:	ECF Case
Plaintiff,	:	
	:	
-against-	:	
JUDA KATZ; CHAYA KATA; JOEL TENNENBAUM;	:	
BLUMA TENNENBAUM; DAVID RUBENSTEIN;	:	
KIRYAS JOEL COMM AMBULANCE CRP;	:	
DISTRICT FAMILY COURT OF ORANGE COUNTY	:	
9 <sup>TH</sup> JUDICIAL DISTRICT; HON. ANDREW B.	:	
BIVONA; ATTY. MARIA PETRIZIO; CHILDREN'S	:	
RIGHTS SOCIETY OF ORANGE COUNTY;	:	
ATTY. KIM PAVLOVIC; ATTY JOHN FRANCIS X.	:	
BURKE; CHILD PROTECTIVE SERVICES OF	:	
ORANGE COUNTY; CHRISTINE BRUNET;	:	
ATTY STEPHANIE BAZILEOR;	:	
JOHN DOES 1 THROUGH 95; JANE DOES 1-20,	:	
Defendants.	:	

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**MEMORANDUM OF LAW**

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Dated: February 19, 2013

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**PRELIMINARY STATEMENT**

This memorandum and the accompanying affirmation are respectfully submitted in opposition to the plaintiff's application for a default judgment.

**POINT**

**A DEFAULT JUDGMENT OUGHT NOT BE ENTERED HERE;  
RELIEF SHOULD BE GRANTED SO AS TO ALLOW THE  
DEFENDANT TO PROCEED TO DEFEND THIS CASE**

In determining whether to grant a default judgment, the Court may consider "numerous factors, including 'whether plaintiff has been substantially prejudiced by the delay involved [ ] and whether the grounds for default are clearly established or in doubt.'" *O'Callahan v. Sifre*, 242 F.R.D. 69, 73 (S.D.N.Y. 2007) (quoting 10 A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* 52685 (3d Ed. 1998)). The Court is guided by the same factors which apply to a motion to set aside an entry of a default. See, *Pecarsky v. Galaxiworld.com.Ltd.*, 249 F.3d 167, 170-171 (2d Cir.2001). These factors are: (1) "whether the defendant's default was willful; (2) whether defendant has a meritorious defense to plaintiff's claims; and (3) the level of prejudice the non-defaulting party would suffer as the result of the denial of the motion for default judgment." *Mason Tenders Dist. Council v. Duce Construc. Corp.*, No. 02 Civ 9044, 2003 WL 1960 548 at \*2 (S.D.N.Y. Apr. 25, 2003); see also, *Barile v. Wiggs*, 08-CV-7594, 2009 WL 1561769, at \*4 (S.D.N.Y. May 29, 2009) (listing factors for court's consideration including "possibility of prejudice to the plaintiff, the merits of the plaintiff's substantive claim, the sum at stake and whether the default was due to excusable neglect.") Considering each of these factors, it is respectfully urged that this Court ought not enter a default judgment as to John Burke.

As to the consideration of willfulness, while an attorney's failure may, in some instances, be attributed to the party, in this case, it is urged that to do so would not be just. John Burke had every right to rely upon his attorney's faithful execution of his responsibilities. That he should not have done so should not prejudice John Burke.

Also, the resolution of the remaining considerations, i.e., the related questions of whether John Burke has a meritorious defense to the plaintiff's claims and whether the plaintiff has a meritorious claim, and a consideration of the level of prejudice to the plaintiff militate, we urge, in favor of the denial of defendant's request for the entry of a default judgment.

All the other lawyer defendants in this case have moved for a summary disposition of this matter. The reasons expressed in the papers submitted on behalf of the other lawyers defendants apply as well to John Burke's case. To allow John Burke to raise similar defenses at this time will impose no additional prejudice upon the plaintiff. Also, in the area of the meritorious nature of the plaintiff's claim, a serious question exists as to whether the plaintiff's claim can survive appropriate analysis. John Burke should be permitted to raise these issues and defend the plaintiff's claims despite his attorney's default.

### **CONCLUSION**

For the reasons set forth above and in the accompanying affirmation, it is respectfully requested that the plaintiff's application for a default judgment be denied.

Dated: Goshen, New York  
February 19, 2013

Respectfully submitted,

/s/ Patrick T. Burke

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