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CPLR 5015(a)(1): Busy Schedule Does Not Constitute Ground for "Excusable Default"

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prejudice of the disobedient plaintiff's cause of action.[51] As demonstrated by *In re Porter*,[52] though dismissal is rare,[53] the court will experience little compunction in so doing when the evasive conduct goes to the essence of a party's claim.

In *Porter* an objectant to proceedings in the surrogate's court was ordered to answer certain questions on August 14 and to appear in court for examination on August 31. The objectant not only failed to appear on either occasion, he also neglected to respond to the instant motion. The court recognized that if it merely precluded the objectant from adducing any evidence, the estate would be in a position to move for summary judgment. For, since the scope of disclosure encompassed his entire claim, the preclusion order would be equally broad in its sweep.[54] Moreover, the court was convinced that the claim was totally devoid of merit. Accordingly, the objections were dismissed with prejudice.

ARTICLE 50 — JUDGMENTS GENERALLY

CPLR 5015(a)(1): Busy schedule does not constitute ground for "excusable default."

Under CPLR 5015 the court's "inherent discretionary power to vacate its own judgment for sufficient reason and in the interests of substantial justice"[55] is affirmed statutorily. CPLR 5015(a)(1) prescribes the manner in which a party may move for vacatur of a judgment or an order on the ground of "excusable default." Although courts have been generous in opening default judgments in the past,[56] a recent case, *Hoffman v. Biendo*,[57] illustrates that relief is not automatic. Specifically, "law office failure" will not be considered "excusable default" within the purview of this subsection.[58]

In *Hoffman* counsel had assured the court that he would be ready to proceed to trial on a specific date after an adjournment had been granted because he was not prepared. Nevertheless, he failed to appear with defendant and efforts to page him proved futile. Defendant subsequently applied for an order vacating the resultant default judg-

51 *See, e.g.*, Laverne v. Incorporated Village of Laurel Hollow, 18 N.Y.2d 635, 219 N.E.2d 294, 272 N.Y.S.2d 780 (1966).

52 64 Misc. 2d 1016, 316 N.Y.S.2d 504 (Surr. Ct. N.Y. County 1970).

53 7B McKINNEY'S CPLR 3126, commentary 7, at 646-48 (1970).

54 *See id.*, commentary 8, at 649-50 (1970).

55 THIRD REP. 204; *see also* 5 WK&M ¶5015.12.

56 5 WK&M ¶ 5015.04.

57 64 Misc. 2d 499, 314 N.Y.S.2d 759 (N.Y.C. Civ. Ct. N.Y. County 1970).

58 *Cf.* Beermont Corp. v. Yager, 34 App. Div. 2d 589, 308 N.Y.S.2d 109 (3d Dep't 1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 145, 162 (1970) (busy schedule does not constitute justifiable excuse for delay under CPLR 3216).

ment, maintaining that on the day in question he had a case load of 40 cases in 13 different parts. In denying the motion, the court ruled that "'where no attempt was made to hire outside counsel, and there was indication that [the] case was prepared for trial"[59] the policy of deciding cases on the merits must yield to two superseding considerations: the inconvenience and loss caused the plaintiff and the responsibility of the bar to assist in ameliorating the court's calendar dilemma.[60]

ARTICLE 55 — APPEALS GENERALLY

CPLR 5528(a)(5): Bar advised to reproduce testimony in logical sequence when utilizing the appendix method.

CPLR 5528(a)(5) permits an appeal to be prosecuted by the appendix method whereby the appellant submits only so much of the record as is material to the questions presented on appeal. This proviso is directed at reducing the appellant's costs and easing the court's burden.[61] Moreover, a thoroughly prepared appendix by the appellant can obviate the appellee's need to print any part of the record in his own brief.[62] Because of the benefits that could conceivably be derived by all concerned if the appendix is satisfactory, the courts have indicated that abuses will not be tolerated and have expressed their displeasure by withholding or imposing costs on the lax party.[63]

In *Kimberly-Clark Corp. v. Power Authority*[64] the appellant submitted an appendix in which he presented the testimony of the witnesses in alphabetical order rather than in the order of their appearance at the trial. As a result of this illogical sequence, the appellate division was presented with a distorted record. Refusing to be subjected to the chore of untangling facts from the incoherent appendix, the court rejected it as inadequate and unacceptable.

ARTICLE 75 — ARBITRATION

CPLR 7502(b): Referral of "threshold" question to arbitrator ruled improper.

In *Blends, Inc. v. Schottland Mills, Inc.*[65] a spinner of yarn, Textiles, sold goods to a weaver, Schottland Mills, Inc. (Schottland), which

59 64 Misc. 2d at 500, 314 N.Y.S.2d at 760.

60 *Cf.* Herbert Land Co. v. Lorenzen, 113 App. Div. 802, 99 N.Y.S. 937 (2d Dep't 1906).

61 *See* 7 WK&M ¶ 5528.01.

62 *Cf.* SECOND REP. 354.

63 *See, e.g.*, Richard C. Mugler Co. v. A. C. Management Corp., 29 App. Div. 2d 548, 286 N.Y.S.2d 81 (2d Dep't 1967) *aff'd mem.* 24 N.Y.2d 814, 248 N.E.2d 446, 300 N.Y.S.2d 591 (1969); *see also* Lo Gerfo v. Lo Gerfo, 30 App. Div. 2d 156, 290 N.Y.S.2d 1005 (2d Dep't 1968), *discussed in The Quarterly Survey*, 43 ST. JOHN'S L. REV. 498, 527 (1969).

64 35 App. Div. 2d 330, 316 N.Y.S.2d 68 (4th Dep't 1970).

65 35 App. Div. 2d 377, 316 N.Y.S.2d 912 (1st Dep't 1970).