

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

139

CA 10-01202

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND MARTOCHE, JJ.

COUNSEL FINANCIAL SERVICES, LLC,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID MCQUADE LEIBOWITZ, P.C. AND DAVID
MCQUADE LEIBOWITZ, DEFENDANTS-APPELLANTS.

LAW OFFICE OF BRUCE S. ZEFTEL, BUFFALO (BRUCE S. ZEFTEL OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

PHILIP B. ABRAMOWITZ, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered February 24, 2010. The order denied defendants' motion to vacate the default order and judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Defendants appeal from an order denying their motion seeking to vacate a default order and judgment entered against them following their failure to oppose plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213. On a prior appeal, we affirmed the default order and judgment that granted plaintiff's motion and ordered defendants to pay a specified amount due on a promissory note executed by defendant David McQuade Leibowitz, P.C. and personally guaranteed by defendant David McQuade Leibowitz (*Counsel Fin. Servs., LLC v David McQuade Leibowitz, P.C.*, 67 AD3d 1483). Even assuming, arguendo, that the default order and judgment may be vacated pursuant to CPLR 5015 (a) (1) despite defendants' prior appeal (*see Pergamon Press v Tietze*, 81 AD2d 831, *lv dismissed* 54 NY2d 605; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5015:6), we conclude that Supreme Court properly refused to do so inasmuch as defendants failed to establish a reasonable excuse for their default and a meritorious defense to the action (*see Brehm v Patton*, 55 AD3d 1362; *cf. Wilcox v U-Haul Co.*, 256 AD2d 973; *see generally* CPLR 5015 [a] [1]).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court