

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT**

Deac v. Il Postino, Inc.

2020 NY Slip Op 08034 (N.Y. Ct. App. 2020) · No. 2018-09667 · Decided December 30, 2020

SUMMARY

The Appellate Division, Second Department, affirmed an order denying the plaintiff's motion for summary judgment in an action seeking damages for personal injuries. Because the action had previously been dismissed on defendants' unopposed motion for summary judgment, the plaintiff first needed to move to vacate the default and demonstrate both a reasonable excuse and a potentially meritorious cause of action.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	William F. Mastro, J.P.; Cheryl E. Chambers, J.; Angela G. Iannacci, J.; Linda Christopher, J.
JURISDICTION	New York
DECIDED	December 30, 2020
DOCKET	2018-09667
DISPOSITION	affirmed
PROCEDURAL POSTURE	The plaintiff appealed from an order denying his motion, among other things, for summary judgment on the complaint.
PRECEDENTIAL VALUE	published
PARTIES	Ovidiu Marcel Deac v. Il Postino, Inc., et al.

TOPICS

[summary judgment](#) [default](#) [appellate procedure](#) [civil procedure](#)

PRACTICE AREAS

[civil procedure](#) [personal injury](#)

QUESTIONS PRESENTED

1. Whether a plaintiff may move for summary judgment on the complaint while a prior order, entered on the plaintiff's default, granting defendants summary judgment dismissing the complaint remains in effect.
2. What procedure a defaulting party must follow to challenge an order made on default.

HOLDINGS

1. A party may not move for summary judgment on the complaint while an order entered on that party's default granting the opposing party summary judgment dismissing the complaint remains in effect; the party must first move to vacate the default order.
2. The defaulting party must move to vacate the default and submit evidence in admissible form demonstrating both a reasonable excuse for the default and a potentially meritorious cause of action.

KEY QUOTATIONS

“The proper procedure for challenging an order made on default is for the defaulting party to move to vacate his or her default, submitting evidence in admissible form demonstrating both a reasonable excuse for his or her default and a potentially meritorious cause of action”

FACTUAL BACKGROUND

The plaintiff brought an action, among other claims, to recover damages for personal injuries. The defendants obtained an order granting their unopposed motion for summary judgment dismissing the complaint. The plaintiff later sought summary judgment on the complaint without first vacating that order.

PROCEDURAL HISTORY

The Supreme Court, Queens County, had previously granted the defendants' unopposed motion for summary judgment dismissing the complaint in an order dated June 29, 2016. The plaintiff subsequently moved for summary judgment on the complaint without first moving to vacate the prior order. The Supreme Court denied that motion, and the Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- Countrywide Home Loans, Inc. v. Vittorio, 178 A.D.3d 1017
- Matter of Renner v. Costigan, 125 A.D.3d 664, 665
- Matter of Geraldine Rose W., 196 A.D.2d 313, 315-318

OPINION

PER CURIAM.

Deac v Il Postino, Inc. (2020 NY Slip Op 08034) Deac v Il Postino, Inc. 2020 NY Slip Op 08034 Decided on December 30, 2020 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on December 30, 2020 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department WILLIAM F. MASTRO, J.P.

CHERYL E. CHAMBERS ANGELA G. IANNACCI LINDA CHRISTOPHER, JJ. 2018-09667 (Index No. 22716/12) [*1]Ovidiu Marcel Deac, appellant, vIl Postino, Inc., et al., respondents. Ovidiu Marcel Deac, Maspeth, NY, appellant pro se. DECISION & ORDER In an action, inter alia, to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (David Elliot, J.), dated June 14, 2018.

The order denied the plaintiff's motion, among other things, for summary judgment on the complaint. ORDERED that the order is affirmed, without costs or disbursements. We agree with the Supreme Court's determination denying the plaintiff's motion, inter alia, for summary judgment on the complaint.

The court directed dismissal of the action in an order dated June 29, 2016, which granted, without opposition, the defendants' motion for summary judgment dismissing the complaint. The plaintiff could not move for summary judgment on the complaint without first vacating the order dated June 29, 2016.

The proper procedure for challenging an order made on default is for the defaulting party to move to vacate his or her default, submitting evidence in admissible form demonstrating both a reasonable excuse for his or her default and a potentially meritorious cause of action (see *Countrywide Home Loans, Inc. v Vittorio*, 178 AD3d 1017; *Matter of Renner v Costigan*, 125 AD3d 664, 665; *Matter of Geraldine Rose W.*, 196 AD2d 313, 315-318).

MASTRO, J.P., CHAMBERS, IANNACCI and CHRISTOPHER, JJ., concur. ENTER: Aprilanne Agostino Clerk of the Court