

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS**

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**MARIST COLLEGE**

Plaintiff,

**DECISION & ORDER  
Index No.: 2009-5006**

-against-

**MATTHEW BRADY, THE COMMONWEALTH  
OF VIRGINIA and JAMES MADISON UNIVERSITY**

Defendants,

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**WOOD, J.**

Defendants Commonwealth of Virginia (hereinafter the "Commonwealth") and James Madison University (hereinafter "JMU") move for an order, pursuant to CPLR § 317, § 5015(a)(1), and § 5015(a)(4) vacating the default judgment, and, upon vacating the default judgment, granting their motion to dismiss or, in the alternative permitting them to interpose an answer and defend the action on the merits. Upon the foregoing papers,<sup>1</sup> the motion is decided as follows:

In the event of a pleading default, a defendant may avail himself of certain relief codified in the CPLR. Where a default judgment has been issued, a motion for relief may be made under CPLR § 5015 (a). In pertinent part, CPLR § 5015 (a) states "the court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interest person with such notice as the court may

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<sup>1</sup> The following papers were read on the motion: Notice of Motion, Affidavit of Eric M. Kurtz, Esq. with Exhibits A-S, Affidavit of John S. Knight, Esq., Affidavit of Jeffrey T. Bourne; Memorandum of Law in Opposition; Reply Affidavit of Eric M. Kurtz, Esq.

direct". CPLR § 5015 (a)(1) allows a court to vacate a prior judgment due to excusable default (see Moore v Day, 55 AD3d 80, 804 [2d Dept 2008]). It is well settled that to vacate a default, the moving party must demonstrate a "reasonable excuse for the default and the existence of a meritorious cause of action" (Scarlett v McCarthy, 2 AD3d 623 [2d Dept 2003]; see Weekes v Karavianakis, 304 AD2d 561 [2d Dept 2003]; see also Matter of Heinz v Faljean, 57 AD3d 665, 666 [2d Dept 2008]). In determining whether to vacate a default judgment, the court should consider the "lack of prejudice to the plaintiffs from the delay, the existence of potentially meritorious defenses, and public policy which favors resolving cases on the merits" (Yonkers Rib House, Inc. v 1789 Central Park Corp., 19 AD3d 687, 688 [2d Dept 2002]; see Stuart v Kushner, 39 AD3d 535, 536 [2d Dept 2007]). As New York has a strong public policy of resolving cases on the merits, the court has inherent discretion to relieve a party from a default (A&C Construction of New York v Flanagan, 34 AD3d 510 [2d Dept 2006]; Rukeyser v Richardson, 43 AD3d 815 [2d Dept 2007]).

In this case, the excuse presented is law office failure due to confusion by the Commonwealth and JMU concerning the status of the instant action before this court. This court has discretion to accept law office failure as a reasonable excuse (Rockland Transit Mix, Inc. v Rockland Enterprises, Inc., 28 AD3d 630 [2d Dept 2006]; see Political Marketing Int'l, Inc. v Jailman, 67 AD3d 661 [2d Dept 2009]). The affidavit of John F. Knight, Esq., attorney for the Commonwealth and JMU, establishes that the default was not willful or deliberate, and there is no evidence that plaintiff has been prejudiced.<sup>2</sup> Furthermore, the affidavit of Jeffrey T. Bourne contains allegations sufficient to establish the existence of a potentially meritorious defense.<sup>3</sup> Based on the forgoing, the default of the Commonwealth and JMU is hereby vacated.

The Commonwealth and JMU also ask this court to dismiss the plaintiff's complaint on the basis of an allegation that this court lacked jurisdiction to render a default judgment. The court begins by noting that

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<sup>2</sup> Affidavit of John F. Knight, Esq., sworn to August 24, 2010, at ¶ 4-13.

<sup>3</sup> Affidavit of Jeffrey T. Bourne, sworn to August 24, 2010, at ¶ 5-9.


it addressed these arguments in its Decision and Order, dated June 30, 2010. The court denied defendants' cross motion based upon a failure to comply with CPLR § 2215, a procedural technicality. However, rather than simply dismissing the cross motion, this court found it a provident expenditure of judicial resources to address the defendants' claims on the merits. As the court has already exhaustively examined and addressed these issues relating to jurisdiction, it hereby adopts and incorporates by reference its previous findings of fact and conclusions of law contained in its Decision and Order, dated June 30, 2010, as they relate to the issues of jurisdiction, venue, and valid causes of action. The defendants' motion to dismiss on jurisdictional grounds and failure to state a cause of action is therefore denied.

The court does grant the moving defendants' request to interpose an answer to the plaintiff's complaint and defend the action on the merits. The Commonwealth and JMU are hereby directed to interpose an answer to the instant proceeding within 30 days of being served with a copy of this order plus notice of entry.

The court has considered the remainder of the factual and legal contentions of the parties, and to the extent not specifically addressed herein, finds them to be either without merit or rendered moot by other aspects of this Decision. The parties are hereby ordered to appear before this court on January 20, 2011. This constitutes the Decision and Order of the court.

**Dated: December 29, 2010**

**Poughkeepsie, New York**

  
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**HON. CHARLES D. WOOD**  
Justice of the Supreme Court

To: Paul O. Sullivan, Esq.  
*Attorney for the Plaintiff*  
35 Market Street  
Poughkeepsie, New York 12601

John P. Hannigan, Esq.  
*Attorney for the Plaintiff*  
One North Lexington Avenue  
White Plains, New York 10601

John F. Knight, Esq.  
*Attorney for Defendants JMU and the Commonwealth*  
80 S. Main Street, MSC 7614  
Harrisonburg, Virginia 22807

Eric M. Kurtz, Esq.  
*Attorney for Defendants JMU and the Commonwealth*  
85 Main Street (PO Box 3939)  
Kingston, New York 12402

Ernest Edward Badway, Esq.  
*Attorney for Defendant Brady*  
100 Park Avenue, Suite 1500  
New York, New York 10017

Joseph F. Murray, Esq.  
*Attorney for Defendant Brady*  
1533 Lake Shore Drive  
Columbus, Ohio 43204