

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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HAROLD L. ROSENBERGER,

Plaintiff,

-against-

04-CV-0475

NEW YORK STATE OFFICE OF TEMPORARY AND  
DISABILITY ASSISTANCE; ROBERT DOAR,  
Commissioner, in his official capacity; and ULSTER  
COUNTY FAMILY COURT,

(GLS)(DRH)

Defendants.

DAVID B. ROBERTS, being a duly licensed attorney in the State of New York and an Assistant Attorney General in the offices of Eliot Spitzer, Attorney General of the State of New York, does hereby declare, under penalty of perjury, that:

1. I am an attorney duly admitted to practice law in the State of New York and to appear before the District Court for the Northern District of New York. I am employed as an Assistant Attorney General in the offices of Eliot Spitzer, the Attorney General for the State of New York and counsel for the defendants.

2. I submit this declaration in support of defendants' motion pursuant to Rule 55(c) of the Federal Rules of Civil Procedure to set aside the Clerk's entry of default against defendants.

3. The defendants in this action are the New York State Office of Temporary and Disability Assistance ("OTDA"), OTDA's Commissioner, Robert Doar, and the Ulster County Family Court. Each of the defendants was served with process and requested representation by the Attorney

General. I was assigned to the case.

4. A response to the complaint was supposed to be served on behalf of defendants OTDA and Doar on or before June 2, 2004; for defendants Ulster County Court, the deadline was June 6, 2004. Although I became aware of these deadlines when the defendants advised that they had been served, I failed to properly calendar the deadlines and did not serve and file a timely response or obtain an adjournment of time to submit such response. This failure resulted from my lapse of memory, aggravated by a pressing workload of other litigation commitments, and was not wilful.

5. On the evening of June 21, 2004, I first became aware that plaintiff had mailed to the Attorney General's Office a "Notice of Defendants' Failure to Serve Answer". I was in New York City in depositions all day on June 22, 2004, and therefore could not immediately act upon the notice. Upon my return to the office on this date, I became aware for the first time that the Clerk had entered default against the defendants on June 22, 2004.

6. I immediately undertook to ensure that a response to the complaint would be served and filed on this date, albeit by another Assistant Attorney. I also ensured that the instant request to set aside the entry of default would be served upon plaintiff and submitted to the Court on this date. Another Assistant Attorney General has been assigned to make those submissions on behalf of defendants because I make this declaration.

7. Although I am apologetic for my error, I would note that no prejudice has resulted to the plaintiff because of defendants' failure to timely serve a response to the complaint. As noted, a motion to dismiss has been served and submitted on this date, meaning that a response to the complaint was served, at most, twenty-one days after it was initially due. This is not a lengthy delay.

8. Moreover, none of the factual allegations asserted in the complaint suggest that the twenty-one day delay could possibly have aggravated any deprivation of rights alleged by plaintiff. Similarly, plaintiff's ability to pursue the causes of action raised in this lawsuit has not been compromised by the twenty-one day delay.


9. It is also significant that defendants have a number of meritorious defenses that

warrant dismissal of the complaint, as specifically set forth in the Memorandum of Law in Support of Defendants' Motion to Dismiss. Despite the delay in submitting the motion to dismiss, defendants should be given the opportunity to interpose the defenses and objections asserted in the motion to dismiss.

10. This is particularly true given the gravity of what plaintiff seeks in this litigation: plaintiff asks the Court to declare unconstitutional and effectively annul two state statutes which form an inseparable part of the State's commitment to the protection of children. The equities demand that defendants be permitted to respond to such challenge.

11. For the reasons set forth herein and in the accompanying memorandum of law, I respectfully request that the Court set aside the Clerk's entry of default against defendants OTDA, Commissioner Doar and the Ulster County Family Court.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct. Executed on June 23, 2004.

A handwritten signature in black ink, appearing to read "DAVID B. ROBERTS", is written over a solid horizontal line.

DAVID B. ROBERTS  
Assistant Attorney General  
Federal Bar Roll No.102455