

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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HAROLD L. ROSENBERGER,

Plaintiff,

-against-

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

Defendants.

**REPLY DECLARATION  
OF DAVID B. ROBERTS**

04-CV-0475

(GLS)(DRH)

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 reply to plaintiff's opposition to defendants' motion to set aside the Clerk's entry of default and in opposition to plaintiff's motion for a default judgment.

3. As set forth in the declaration I submitted to the Court in support of defendants' motion to set aside the entry of default ("Roberts Decl. I"), I neglected to serve and file a timely response to the complaint or to obtain an adjournment of time to do so. I explained that the default was not wilful but was occasioned by my failure to properly calendar the deadlines, caused by my

lapse of memory, aggravated by a pressing workload of other litigation commitments.

4. I have reviewed plaintiff's memorandum of law submitted in opposition to defendants' motion, wherein plaintiff questions whether the default was wilfull. Plaintiff is certainly correct when he says that the attorneys of this office are not supposed to rely on their memories to keep track of litigation deadlines. Although I cannot precisely recall what happened, I am certain that I intended to make an appropriate entry on my calendar and was no doubt sidetracked by one of the other cases on my caseload.

5. I must also note that independent of each attorney's personal litigation calendar, the office maintains a computer database of deadlines based on summones and complaints forwarded by clients who have been served. As explained in the accompanying Affidavit of Linly L. Rarick, a clerk in this office, these deadlines are supposed to be entered by clerks when the materials are first received from the clients. A pink sheet with each attorney's upcoming deadlines is generally printed out and distributed to the attorneys on a weekly basis. In this case, I do not remember having seen the upcoming deadline listed on my deadline sheet. It appears, upon investigation, as explained by Mr. Rarick, that the deadlines for this case were not properly entered into the database. I therefore was not prompted to recall the deadline through this method.

6. Plaintiff argues that this office received multiple copies of the complaint, one sent by plaintiff directly to the Attorney General's office, one served upon defendant the New York State Office of Temporary and Disability Assistance ("OTDA") and upon defendant Doar, OTDA's Commissioner, and one served upon the Ulster County Family Court. He further contends that this office must have received multiple copies of the Order signed by the Honorable David R. Homer, United States Magistrate Judge, on May 7, 2004, which directed defendants to serve a response to the complaint as required by the Federal Rules of Civil Procedure. Plaintiff thus implies that because I missed multiple opportunities to properly calendar the deadline to respond to the complaint, my failure must have been wilfull. This is not true.

7. The first copy of plaintiff's complaint, sent directly by plaintiff and received in this

office on May 5, 2004, did not constitute service on any defendant and therefore did not trigger any deadlines that needed calendaring. The second and third copies, forwarded by the defendants once they were served, arrived in this office on May 18 and 19 of 2004. I do not recall precisely when I reviewed them, but it is likely that within a few days they were processed by the office clerks, placed into my mailbox and reviewed by me, probably both at the same time within a day or two. At that time, of course, I should have but did not make an appropriate entry in my calendar.

8. As for the May 7, 2004 Order by Magistrate Homer, I did not, to the best of my recollection, receive a copy of such Order. At the outset, I would note that Orders of the Court are usually communicated by email, through the Court's electronic filing system, but that this office had not yet appeared on May 7, 2004, when the Order was issued. The Order therefore would not have been emailed to me or anyone else in this office at the time. Further, it should be obvious that a copy of the May 7 Order could not have been included with the complaint sent to this office by plaintiff, which was received on May 5, 2004. In addition, the physical file maintained for this case does not reflect that the copies of the complaint I received from the defendants included a copy of the Order. Even if I had received copies of the Order from the defendants, they would have arrived at the same time as the complaints.

9. Accordingly, despite plaintiff's argument to the contrary, I did not miss multiple opportunities to calendar the deadline for this case. There was only the one occasion when I received the complaint from the defendants; at that time, I should have made an entry on my calendar. As noted above, I am sure that I intended to do so but did not.

10. It is unfortunate that both my personal calendaring system as well as the office's computer calendaring system failed as to the one case. I want to assure the Court that this is a rare occasion. There are thousands of cases handled by the Attorney General's office each year and I am aware of only a handful over many years which involve failures to respond to inductory papers. Additionally, I must take exception to plaintiff's assertion that I have failed to express remorse for my failure. My earlier declaration specifically stated that "I am apologetic for my error", Roberts

Decl. I ¶ 7, and that is absolutely true.

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 the defendants.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed on July 26, 2004.

A handwritten signature in black ink that reads "DAVID B. ROBERTS". The signature is written in a cursive, slightly slanted style. Below the signature is a solid horizontal line.

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