NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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ABUBACAR JAWARA AND AICHA TRIORE,

Index No. 35429/19E

Plaintiff,

Hon. **FIDEL E. GOMEZ**

- against - Justice

BENEDICT E. ARAKA,

Defendant.

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The following papers numbered 1 to 4, Read on this motion and cross-motion noticed on 3/30/22 and 4/25/22, respectively, and duly submitted as no. 2 on the Motion Calendar of 4/25/22.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	4	
Notice of Cross-Motion - Affidavits and Exhibits	3	
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law		

Defendant's motion and plaintiffs' cross-motion are decided in accordance with the Decision and Order annexed hereto.

Dated: 6/8/2022

_____ Hon. _____

FIDEL E. GOMEZ, AJSC

1.CHECK ONE ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION X GRANTED IN PART
3. CROSS-MOTION IS X DENIED

3. CHECK IF APPROPRIATE.
- ☐ SETTLE ORDER
- ☐ SUBMIT ORDER
- ☐ DO NOT POST
- ☐ FIDUCIARY APPOINTMENT
- ☐ REFEREE APPOINTMENT
- ☐ NEXT APPEARANCE DATE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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ABUBACAR JAWARA AND AICHA TRIORE, **DECISION AND ORDER**

Plaintiff(s), Index No: 35429/19E

- against -

BENEDICT E. ARAKA,

Defendant(s).

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In this action for, *inter alia*, specific performance, defendant moves for an order renewing and rearguing this Court's Decision and Order dated February 18, 2022, which denied his motion seeking summary judgment, as well as plaintiffs' cross-motion seeking identical relief. With regard to reargument, defendant contends that this Court misapprehended the facts inasmuch as it failed to address his motion for the entry of a default judgment against plaintiffs for their failure to interpose a reply to his counterclaims. With respect to renewal, defendant avers that insofar as the Court's denial of his prior motion for summary judgment was premised on his failure to cancel the agreement between the parties in writing, defendant has now terminated the contract in writing. Thus, defendant contends that this Court ought to consider the foregoing termination, grant renewal of this Court's prior decision, and then grant defendant summary judgment.

Plaintiffs oppose defendant's motion inasmuch as he seeks renewal of this Court's prior decision. Saliently, plaintiffs aver that because the writing terminating the agreement between the parties did not exist until after this Court's decision, it may not be considered as a basis to renew. Plaintiffs also cross-move seeking renewal and reargument of this Court's decision, which denied their cross-motion seeking summary judgment. Saliently, plaintiffs contend that the Court misapprehended the facts when it determined that there existed more than one agreement between the parties, the latest of which, while fully executed, was never accompanied by the requisite deposit. Plaintiffs contend that the foregoing misapprehension warrants reargument, and upon reargument, summary judgment in plaintiffs' favor. Defendant opposes plaintiffs' cross-motion, asserting that the Court did not misapprehend the relevant facts.

For the reasons that follow hereinafter, defendant's motion is granted, in part, and plaintiffs' cross-motion is denied.

The complaint alleges that in May 2018, the parties entered into an agreement whereby defendant would sell the premises he owned, located at 1536 Jesup Avenue, Bronx, NY 10452 (1536) to plaintiffs. Pursuant to the terms of the agreement, plaintiffs tendered a $10,000 deposit to Kathleen Bradshaw, defendant's attorney. Despite plaintiffs' fulfilment of all obligations under the agreement, defendant refused to deliver the deed to 1536.

Based on the foregoing, plaintiffs interpose a cause action for specific performance. Plaintiffs also interpose a cause of action for money damages, which they allege resulted from having to extend the mortgage commitment and in reapplying for a new mortgage. Lastly, plaintiffs interpose a cause of action for legal fees. Specifically, plaintiffs allege that in bringing this action, they have incurred $7,500 in legal fees and costs.

Within his answer, dated February 26, 2020, defendant interposes four counterclaims, including one for declaratory judgment.

On February 18, 2022, this Court denied defendant's application seeking an order granting him summary judgment. Significantly, this Court held that defendant failed to establish prima facie entitlement to summary judgment "because he never - as required by the agreement-terminated the instant agreement in writing" (*Jawara v Araka*, 74 Misc 3d 1212(A), *7 [Sup Ct 2022]). Significantly, this Court noted that a version of the record established that there were two agreements between the parties - one executed only by plaintiffs, pursuant to with which plaintiffs provided the $10,000 deposit required thereunder, and which defendant refused to execute - and another executed by all parties, which, after the first deposit had been returned - was not accompanied by the requisite deposit (*id*. at *7). Thus, the Court held that under that version of the record, plaintiffs breached the

agreement between the parties and that as a result, defendant could terminate the agreement (*id.* at *7). Because the agreement required written termination, this Court held that "inasmuch as defendant fails to establish that subsequent to plaintiffs' breach of the agreement, he properly, as defined by Agreement 2, terminated the agreement, defendant fails to establish prima facie entitlement to summary judgment" (*id.* at *7).

DEFENDANT'S MOTION

Reargument

Defendant's motion seeking reargument of this Court's decision is granted. Upon a review of the record, it is clear that this Court failed to address defendant's motion for the entry of a default judgment on his counterclaims. The Court thus grants reargument, and thereafter dismisses the counterclaims.

CPLR § 2221(d)(1) authorizes the reargument of a prior decision on the merits and states that such motion

> shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.

Accordingly,

> [a] motion for reargument, addressed to the discretion of the Court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principal of law. Its purpose is not to serve as a

> vehicle to permit the unsuccessful party to argue once again the very questions previously decided

(*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; *see also*, *Fosdick v Town of Hemstead*, 126 NY 651, 652 [1891]; *Vaughn v Veolia Transp., Inc.*, 117 AD3d 939, 939 [2d Dept 2014]). Thus, because reargument is not a vehicle by which a party can get a second bite at the apple, a motion for reargument precludes a litigant from advancing new arguments or taking new positions which were not previously raised in the original motion (*Foley* at 567).

A motion to reargue must be made within 30 days after service of a copy of the underlying order with notice of entry (CPLR § 2221[d][3]; *Perez v Davis*, 8 AD3d 1086, 1087 [4th Dept 2004]; *Pearson v Goord*, 290 AD2d 910, 910 [3d Dept 2002]).

In support of his motion, defendant directs this Court's attention to its prior application, wherein he sought the entry of a default judgment on the four counterclaims in his answer on grounds that plaintiff has never interposed a reply to the same.

A review of defendant's answer, appended to his prior motion, evinces that it is dated February 26, 2020. The answer contains four counterclaims. The first seeks a declaratory judgment declaring that there is no valid agreement between the parties with respect to the sale and purchase of 1536. The second counterclaim seeks dismissal of the complaint because it lacks merit. The third counterclaim seeks special damages for breach of contract. The

fourth counterclaim seeks cancellation of the lis pendens lodged against 1536.

Here, it is clear that the Court neglected to address defendant's motion seeking the entry of a default judgment on his counterclaims, which were served upon plaintiffs. Thus, in its prior decision, this Court misapprehended the facts related to this portion of defendant's motion and reargument is therefore warranted.

Pursuant to CPLR § 3011, which defines the kinds of pleadings in civil actions, a plaintiff against whom counterclaims are interposed is required to interpose a reply. Specifically. CPLR § 3011 states that

> [t]here shall be a complaint and an answer. *An answer may include a counterclaim against a plaintiff* and a cross-claim against a defendant. A defendant's pleading against another claimant is an interpleader complaint, or against any other person not already a party is a third-party complaint. *There shall be a reply to a counterclaim denominated as such*, an answer to an interpleader complaint or third-party complaint, and an answer to a cross-claim that contains a demand for an answer. If no demand is made, the cross-claim shall be deemed denied or avoided. There shall be no other pleading unless the court orders otherwise (emphasis added).

Pursuant to CPLR § 3012(a), "[s]ervice of an answer or reply shall be made within twenty days after service of the pleading to which it responds." When a plaintiff fails to timely interpose a

reply to counterclaims, the entry of a default is warranted (*Simons v Doyle*, 262 AD2d 236, 237 [1st Dept 1999] ["The IAS court properly determined that plaintiff had defaulted in replying to defendant's counterclaims since plaintiff failed to serve a reply denominated as such within 25 days of the service of defendant's answer and counterclaims" [internal citations and quotation marks omitted]; *P & L Group, Inc. v Garfinkel*, 150 AD2d 663, 664 [2d Dept 1989] ["The plaintiff failed to offer a plausible excuse for its failure to reply."]; *Zheng v Evans*, 63 AD3d 791, 792 [2d Dept 2009] ["The Supreme Court also properly granted that branch of the defendants' motion which was for leave to enter a default judgment on their counterclaim for the return of their down payment upon the plaintiffs' failure to serve a reply to the counterclaim."]).

Although not expressly mentioned within CPLR § 3215, which governs the entry of a default judgment upon the failure to interpose an answer to a complaint, CPLR § 3215 also governs the entry of a default judgment upon the failure to reply to a counterclaim. To be sure, the Court in *Giglio v NTIMP, Inc.* (86 AD3d 301 [2d Dept 2011]) stated that

> [w]hile counterclaims are not specifically mentioned anywhere in CPLR 3215, the statute's legislative history reveals that it was intended to apply to claims asserted as counterclaims, cross claims, and third-party claims, in addition to those set forth in complaints

(*id.* at 307). Thus, CPLR § 3215(c), authorizing the dismissal of

a pleading when more than a year has elapsed since a party's failure to answer, has been routinely applied when there is a failure to seek a timely default after a counterclaim has gone unanswered (*id.* at 306-307 ["The Supreme Court properly granted that branch of the plaintiffs' cross motion which was pursuant to CPLR 3215(c) to dismiss Napper Tandy's counterclaim against Robert Sr.]; *see Wells Fargo Bank, N.A. v Chaplin*, 107 AD3d 881, 882 [2d Dept 2013] ["When a defendant asserting counterclaims fails to seek leave to enter a default judgment within one year after the default on the counterclaims has occurred, the counterclaims are deemed abandoned pursuant to CPLR 3215(c)."]). Moreover, it is clear that the jurisprudence governing the quantum of proof necessary for the entry of a default judgment upon a defendant's failure to interpose an answer to a complaint - proof of service of the pleading and proof that the claims asserted have merit - apply to an application to enter a default judgment upon a plaintiff's failure to interpose a reply to a counterclaim (*Zheng* at 792 ["The defendants submitted proof of service of their verified answer and counterclaim, proof of the facts constituting the counterclaim, and an affirmation from their attorney regarding the plaintiffs' default in serving a reply."]).

Pursuant to CPLR § 3215[f], "[o]n any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting

the claim"]; *Pampalone v Giant Building Maintenance, Inc.*, 17 AD3d 556, 557 [2d Dept 2005] [Default judgment granted once plaintiff submitted proof that defendant was served with the summons and complaint and an affidavit of the facts constituting the claim.]; *Andrade v Ranginwala*, 297 AD2d 691, 691-692 [2d Dept 2002]). Once the requisite showing has been made and the requisite proof proffered, a motion for a default judgment must be granted unless the defendant can establish a meritorious defense to the claims made, a reasonable excuse for the delay in interposing an answer, and that the delay in interposing an answer has in no way prejudiced the plaintiff in the prosecution of the case (*Buywise Holding, LLC v Harris*, 31 AD3d 681, 683 [2d Dept 2006]; *Giovanelli v Rivera*, 23 AD3d 616, 616 [2d Dept 2005]).

Pursuant to CPLR §3215(a), "[i]f the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default." Significantly, no trial on damages or inquest need be held if the damages sought in an action are for a sum certain (*Rokina Optical Co., Inc., v Camera King, Inc.*, 63 NY2d 728, 730 [1984]; *Arent Fox Kinter Plotkin & Kahn, PLLC v Gmbh*, 297 AD2d 590, 590 [2d Dept 2002]). The term sum certain contemplates a situation where once liability has been established, "there can be no dispute as to the amount due, as in actions on money judgments and negotiable instruments" (*Reynolds Securities, Inc. v Underwriters*

Bank and Trust Company, 44 NY2d 568, 572 [1978]). If, however, the damages sought are not for a sum certain or for an amount which can be made certain, a default judgment is only as to liability, where the defendant admits all traversable allegations in the complaint as to liability only (*Rokina Optical Co., Inc.* at 730 ; *Arent Fox Kinter Plotkin & Kahn, PLLC* at 590). In case of the foregoing, a trial on inquest must be held wherein the defendant is afforded an opportunity to present and try a case in mitigation of damages (*Rokina Optical Co., Inc.* at 730; *Arent Fox Kinter Plotkin & Kahn, PLLC* at 590]).

With regard to establishing the merits of the claim, plaintiff can use an affidavit or a complaint verified by the plaintiff (*Mullins v DiLorenzo*, 199 AD2d 218, 220 [1st Dept 1993]; *Gerhardt v J & R Salacqua Contr. Co., Inc.*, 181 AD2d 719, 720 [2d Dept 1992]). Additionally, plaintiff can also use deposition testimony (*Empire Chevrolet Sales Corporation v Spallone*, 304 AD2d 708, 709 (2d Dept 2003]); *Ramputi v Timko Contracting Corp.*, 262 AD2d 26, 27 [1st Dept 1999]). While generally a plaintiff cannot establish the merits of his or her claims using a complaint verified by an attorney (*Deleon v Sonin & Genis*, 303 AD2d 291, 292 [1st Dept 2003]); *Juseinoski v Board of Education of the City of New York*, 15 AD3d 353, 356 [2d Dept 2004]), a complaint verified by an attorney, where the attorney has personal knowledge of facts constituting the claim, is sufficient to establish the merits of a plaintiff's claim

(*State Farm Mutual Automobile Insurance Company v Rodriguez*, 12 AD3d 662, 663 [2d Dept 2004]; *Martin v Zangrillo*, 186 AD2d 724, 724 [2d Dept 1992]).

CPLR § 3215(c) states that

> [i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

Thus, a party who fails to take a default within a year after said default could have been taken, has abandoned his case and the remedy is dismissal (*Kay Waterproofing Corp. v Ray Realty Fulton, Inc.*, 23 AD3d 624, 625 [2d Dept 2005]; *Geraghty v Elmhurst Hosp. Center of New York City Health and Hospitals Corp.*, 305 AD2d 634, 634 [2d Dept 2003]). Significantly, pursuant to CPLR § 320(a), generally "[a]n appearance shall be made within twenty days after service of the summons." In order to avoid dismissal under this section, a plaintiff must offer a reasonable excuse for the failure to timely move for a default and must also demonstrate the merits of the action (*Truong v All Pro Air Delivery, Inc.*, 278 AD2d 45, 45 [1st Dept 2000]; *LaValle v Astoria Construction & Paving Corp.*, 266 AD2d 28, 28 [1st Dept 1999]; *State Farm Mutual Automobile Insurance Company v Rodriguez*, 12 AD3d 662, 663 [2d Dept 2004]). Provided

that the excuse is not vague, conclusory, or unsubstantiated, law office failure is a reasonable excuse for failing to timely move for a default judgment (*Ibrahim v Nablus Sweets Corp.*, 161 AD3d 961, 964 [2d Dept 2018] [Court declined to find cognizable law office failure when "[t]he excuse was contained in a brief paragraph in the supporting affirmation of an associate who stated, in sum and substance, that the attorney who commenced the action left the employ of the law firm of record, and the plaintiff's file was only discovered in May 2016 when the firm was relocating its offices. There was no affirmation from a principal of the law firm and no indication in the associate's affirmation that he had any personal knowledge of the purported law office failure or that he was even employed by the firm at the time it allegedly occurred. The one-year period to move for the entry of a default judgment lapsed in August 2015, and there is no indication that the attorney had left prior thereto."]; *Giglio v NTIMP, Inc.*, 86 AD3d 301, 310 [2d Dept 2011] ["a bald and unsubstantiated claim of law office failure is insufficient to explain a delay in meeting the one-year deadline of CPLR 3215[c]" [internal quotation marks omitted]).

Notably, in the absence of a motion seeking dismissal for the failure to timely seek a default, a court has the power to dismiss an action *sua sponte* (*Perricone v City of New York*, 62 NY2d 661, 663 [1984]; *Winkelman v H & S Beer and Soda Discounts, Inc.*, 91 AD2d 660, 661 [2d Dept 1982]).

Based on the foregoing, on this record, defendant's motion seeking the entry of a default judgment on his counterclaims is denied. Significantly, the record is bereft of an affidavit evincing when and if defendant served his counterclaims upon plaintiffs, which is essential to any motion for the entry of a default judgment. This alone warrants denial of the instant motion.

Nevertheless, using February 26, 2020, the date on defendant's answer, which is the date defendant urges the same was served, as the date when the counterclaims were served upon plaintiffs, it is clear that the instant motion must be denied and pursuant to CPLR § 3215(c), the counterclaims must be dismissed instead.

Assuming that defendant served his answer upon plaintiffs' counsel by mail, pursuant to CPLR § 3012(a) and CPLR § 2103(b)(1)[1], plaintiffs had 25 days - or until March 22, 2020 - to interpose a reply to the counterclaims within defendant's answer. Thus, defendant had a year therefrom or until March 20, 2021 to move for the entry of a default judgment. However, defendant did not seek to enter a default judgment until January 13, 2022[2] - almost two

[1] Pursuant to CPLR § 2103(a)(2), "where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period if the mailing is made within the state and six days if the mailing is made from outside the state but within the geographic boundaries of the United States."

[2] Pursuant to the affidavit of service appended to defendant's motion for summary judgment, the motion was served on

years after plaintiffs defaulted and almost a year after the time to make such motion expired - when he made his motion seeking, *inter alia*, summary judgment. Having provided no reason whatsoever for the inordinate delay of almost two years, the motion to enter a default judgment is denied and pursuant to CPLR § 3215(c), the counterclaims are dismissed on this Court's own motion.

Renewal

Defendant's motion to renew this Court's prior decision is denied. Significantly, the basis for renewal - written termination of the agreement between the parties - does not resolve the question of fact raised by plaintiffs and noted in this Court's prior decision.

It is well settled that a motion to renew

> shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and . . . shall contain reasonable justification for the failure to present such facts on the prior motion(CPLR § 2221[e][2], [3]).

Thus,

> [a]n application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known

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January 13, 2022 and, thus made on that date (CPLR § 2211 ["A motion is an application for an order. A motion on notice is made when a notice of the motion or an order to show cause is served."]).

> to the party seeking leave to renew, and, therefore, not made known to the Court. Renewal should be denied where a party fails to offer a valid excuse for not submitting the additional facts upon the original application

(*Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]; *see also Healthworld Corporation v Gottlieb*, 12 AD3d 278, 279 [1st Dept 2004]; *Walmart Stores, Inc. v United States Fidelity and Guaranty Company*, 11 AD3d 300, 301 [1st Dept 2004]; *Linden v Moskowitz*, 294 AD2d 114, 116 [1st Dept 2002]; *Basset v Bando Sangsa Co.*, 103 AD2d 728, 728 [1st Dept 1984]. Renewal is a remedy to be used sparingly and granted only when there exists a valid excuse for failing to submit the newly proffered facts on the original application (*Beiny v Wynyard*, 132 AD2d 190, 210 [1st Dept 1987]). In fact, renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application (*Burgos v City of New York*, 294 AD2d 177, 178 [1st Dept 2002]; *Chelsea Piers Management v Forest Electric Corporation*, 281 AD2d 252, 252 [1st Dept 2001]), and "the remedy [is unavailable] where a party has proceeded on one legal theory on the assumption that what has been submitted is sufficient, and thereafter sought to move again on a different legal argument merely because he was unsuccessful upon the original application" (*Foley* at 568).

Notwithstanding the foregoing, courts have nevertheless carved an exception to the general rule and a motion to renew will be

granted even when all requirements for renewal are not met (*Bank One v Mui*, 38 AD3d 809, 811 [2d Dept 2007], *abrogated on other grounds by* 95 AD3d 1147 [2d Dept 2012]; *Strong v Brookhaven Memorial Hospital Medical Center*, 240 AD2d 726, 726 [2d Dept 1997]). As such, motions to renew can be granted even when the newly offered evidence was in fact known and available to the movant but never provided to the Court (*Tishman Construction Corporation of New York v City of New York*, 280 AD2d 374, 376 [1st Dept 2001]; *Trinidad v Lantigua*, 2 AD3d 163, 163 [1st Dept 2003]; *Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]; *U.S. Reinsurance Corporation v Humphreys*, 205 AD2d 187, 192 [1st Dept 1994]; *J.D. Structures, Inc. v Waldbum*, 282 AD2d 434, 436 [2d Dept 2001]; *Sorto v South Nasaau Community Hospital*, 273 AD2d 373, 373-374 [2d Dept 2000]; *Cronwall Equities v International Links Development Corp.*, 255 AD2d 354, 355 [2d Dept 1998]; *Goyzueta v Urban Health Plan, Inc.*, 256 AD2d 307, 307 [2d Dept 1998]; *Liberty Mutual Insurance Company v Allstate Insurance Company*, 237 AD2d 260, 262 [2d Dept 1997]). Renewal with new evidence previously known and available to movant - a departure from precedential case law and the statute - is, thus, warranted if the interests of justice and substantial substantive fairness so dictate (*Trinidad* at 163; *Mejia* at 871; *Metcalfe v City of New York*, 223 AD2d 410, 411 [1st Dept 1996]; *Scott v Brickhouse*, 251 AD2d 397, 397 [2d Dept 1998]; *Strong* at 726; *Goyzueta* at 307). Stated differently, a motion to renew can

be granted, in the exercise of the court's discretion, even when the new evidence proffered was readily available to the moving party, such that all requirements necessary for renewal have not been met - including the failure to proffer an excuse for failing to provide previously available and known evidence with the previous motion - if considering the new evidence changes the outcome of the Court's prior decision (*Trinidad* at 163; *J.D. Structures, Inc.* at 436).

In *J.D. Structures, Inc.*, the court granted a renewal of its prior when renewal after considering previously available evidence, but which while known to the movant, it did not submit on the original motion (*id.* at 435-436). The court had initially denied plaintiff's motion seeking summary judgment on grounds of an agreement according said relief because plaintiff failed to include evidence relative to the debt owed, such evidence dispositive on the motion (*id)*. On renewal, plaintiff tendered evidence of the debt owed averring that the failure to provide the same on the prior motion was the mistaken belief that the motion would be decided favorably without such evidence (*id.*). The court granted renewal despite plaintiff's failure to submit previously available evidence, which was known to plaintiff on grounds that an excuse had been proffered for the failure to submit the same and because the new evidence warranted judgment in plaintiff's favor (*id.*). Simiarly, in *Trinidad*, the court granted renewal when the same was

premised upon the submission of a previously known and available expert affidavit despite the fact that no excuse was proffered for the failure to previously submit the same (*id.* at 163).

In support of his motion seeking renewal, defendant submits a letter dated March 7, 2022, which is sent by defendant's counsel to plaintiffs' counsel. The letter indicates that with respect to 1536, pursuant to paragraph 28 of the agreement, defendant elects to terminate the agreement because defendant had not yet received the deposit required thereunder.

Defendant also submits an affidavit, wherein he states that the written termination of the agreement

> was not available at the time of the motion because the parties had by their conduct indicated that the contract was no longer subsisting, hence my attorney did not follow up to send a formal letter terminating the contract.

Based on the foregoing, renewal is denied.

First, applying the prevailing law related to applications to renew prior decisions, the document submitted by defendant falls outside the ambit of the kinds of evidence allowed on an application to renew. To be sure, as noted above, "an application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the Court" (*Foley* at 568; *see also Healthworld Corporation* at 279; *Walmart Stores, Inc.* at 301; *Linden* at 116;

Basset at 728). Here, the written cancellation *was created after* the Court's decision and therefore *did not exist* at the time the prior motion was made. Indeed, the written cancellation is nothing less than the fabrication of new evidence in a misguided attempt to correct perceived deficiencies in defendant's prior motion papers. Clearly, this is an impermissible use of the remedy of renewal and precisely what the case law proscribes (*Foley* at 568 ["the remedy [is unavailable] where a party has proceeded on one legal theory on the assumption that what has been submitted is sufficient, and thereafter sought to move again on a different legal argument merely because he was unsuccessful upon the original application."]).

Second, even if the Court were to consider the newly created evidence, it would not avail defendant. To be sure, a reading of this Court's prior decision in no way indicates, as urged, that had defendant terminated the agreement in writing, his motion would have been granted. Instead, this Court only held that had the agreement been properly terminated, he would *have established prima facie entitlement to summary judgment* (*Jawara* at *7 ["Based on the foregoing, defendant fails to establish prima facie entitlement to summary judgment, because he never - as required by the agreement-terminated the instant agreement in writing."]).

Sadly, defendant fails to realize that had he met his burden, the Court would have then been required to review plaintiffs'

evidence, which, as the decision makes clear, controverted defendant's evidence and would have - had the Court reached the issue - raised issues of fact as to whether defendant was entitled to terminate the contract. To be sure, in discussing plaintiffs' evidence, this Court noted that

> [b]ased on the foregoing, plaintiffs establish prima facie entitlement to summary judgment on their breach of contract and specific performance claims. Significantly, plaintiffs' affidavits establish that they performed all of the obligations under Agreement 2 - namely that they provided a $10,000 check for the down payment required by paragraph 3 of the agreement and procured a mortgage for $474,990 as required by paragraphs 3 and 8 of the same. Plaintiffs' affidavits also establish that despite the foregoing, defendant refused to attend the closing and has refused to sell them the house. Thus, since the essential elements in an action for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach, here, plaintiffs establish that defendant has breached the terms of the agreement and therefore, establish prima facie entitlement to summary judgment

(*id*. at *8).

Accordingly, even if defendant properly terminated the agreement between the parties, questions of fact would nevertheless preclude summary judgment in his favor.

PLAINTIFFS' CROSS-MOTION

Plaintiffs' cross-motion seeking renewal and/or reargument of

this Court's prior decision is denied. Significantly, although denominated as a motion to renew and reargue, a review of plaintiffs' cross-motion evinces that it is solely one for reargument. To that end, plaintiffs fail to establish, as urged, that this Court misapprehend the facts.

Plaintiffs' salient argument in support of reargument is that this Court misapprehended the relevant facts when it noted that there were two agreements at issue - one which was never fully executed and therefore, resulted in the return of plaintiffs' deposit and another agreement, which was fully executed and in connection to which plaintiffs never provided a deposit. What seems to escape plaintiffs is the fact that the Court did not conjure these facts from thin air. Instead, as detailed by this Court in its decision, the version of the events assailed by plaintiffs was established by defendant in an affidavit and with evidentiary submissions. Significantly, this Court noted that

> [i]n support of his motion, defendant submits an affidavit wherein he states, in pertinent part, that in 2018, the plaintiffs wanted to purchase 1536, which defendant owned, for $499,999. Pursuant to the agreement between the parties, the sale was conditioned on plaintiffs making a $10,000 down payment. Initially, the agreement, executed only by plaintiffs, was provided to Katherine Bradshaw (Bradshaw), defendant's attorney, along with a check for $10,000 from Citibank dated May 7, 2018. The check was made payable to Bradshaw. Because the parties were not in agreement with the terms in the contract, both the contract signed

> only by plaintiffs and the check were sent back to plaintiffs. Thereafter, plaintiffs contacted Bradshaw and indicated that they would agree to the terms in the agreement proposed by defendant's attorney, who by then was Silvia Metrena (Metrena). Plaintiffs' attorneys sent the agreement, already signed by plaintiffs, to Metrena, who asked defendant to execute the same while she waited for the down payment. Bradshaw notified plaintiffs' counsel that they needed to reissue the check for the down payment and that it should be made payable to Metrena. Defendant states that plaintiffs deposited the original down payment into their account and never provided the same after the contract was fully executed.

Thus, no matter how many times plaintiffs aver that there was only one contract for which a deposit was tendered, defendant's evidence to the contrary would controvert the same, thereby precluding summary judgment in plaintiffs' favor. Accordingly, the Court did not misapprehend the facts and reargument is denied. It is hereby

ORDERED defendant's counterclaims be hereby dismissed. It is further

ORDERED that defendant serve a copy of this Decision and Order with Notice of Entry upon plaintiffs within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : June 8, 2022
Bronx, New York

HON. FIDEL E. GOMEZ, AJSC