

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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MOSHIK REGEV,

Plaintiff,

- against -

3612 BRONX BOULEVARD, LLC,

Defendant.

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The following papers numbered 1, read on this motion, noticed on 3/31/2022, and duly submitted as no. 3 on the Motion Calendar of 3/31/2022.

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

Defendant's motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 4/18/22


 Hon. **FIDEL E. GOMEZ, A.J.S.C.**

1. CHECK ONE..... CASE DISPOSED NON-FINAL DISPOSITION
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
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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MOSHIK REGEV,

Plaintiff,

DECISION AND ORDER

- against -

Index No. **807562/2021E**

3612 BRONX BOULEVARD, LLC,

Defendant.

-----X

Defendant 3612 Bronx Boulevard, LLC (“Defendant”) moves for an order granting leave to renew and reargue pursuant to CPLR 2221, and upon renewal and reargument, dismissing this action pursuant to CPLR § 3012(b). Plaintiff Moshik Regev (“Plaintiff”) does not oppose.

For the reasons which follow, Defendant’s motion to reargue is granted, and upon reargument, this action is dismissed.

BACKGROUND:

On May 25, 2021, Plaintiff commenced the instant action against Defendant by filing a summons with notice.

On August 23, 2021, Plaintiff served Defendant with the summons with notice by service upon the Secretary of State of the State of New York pursuant to Limited Liability Company Law § 303.

On November 2, 2021, Defendant filed a notice of appearance.

On November 24, 2021, Defendant filed the prior motion to dismiss.

On February 18, 2022, the Court denied the prior motion.

On March 10, 2022, Defendant filed the instant motion to renew and reargue. The motion was marked fully submitted on March 31, 2022.

DISCUSSION:

Defendant moves to reargue the prior motion, arguing that the Court overlooked CPLR 2101(f) and case law relevant thereto. Defendant argues that Plaintiff’s failure to reject

Defendant's notice of appearance as untimely within fifteen days, as required by CPLR 2101(f), effectuated a waiver of the untimely appearance.

CPLR 2221(d) provides, in relevant part, that:

A motion for leave to reargue: 1. shall be identified specifically as such; 2. 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; and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.

“A motion for leave to reargue is addressed to the sound discretion of the Supreme Court” (*Rides Unlimited of New York, Inc. v Engineered Energy Solutions, LLC*, 184 AD3d 695, 695 [2d Dept 2020]; *Bueno v Allam*, 170 AD3d 939, 940 [2d Dept 2019]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]).

“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 principle 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. Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application. It may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion. . . . ‘A motion for reargument is not an appropriate vehicle for raising new questions’” (*Foley* at 567-568; *see also DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 [1st Dept 2005] [“Reargument is not available where the movant seeks only to argue ‘a new theory of liability not previously advanced’”]).

Here, Defendant has demonstrated that the Court overlooked the fact that Plaintiff retained the belated notice of appearance, and therefore did not apply the prevailing law regarding Plaintiff's waiver of Defendant's untimely appearance. Case law holds that a plaintiff who retains a late answer without timely objection waives late service of the answer (*Pena-Vazquez v Beharry*, 82 AD3d 649, 649 [1st Dept 2011] [“Plaintiff's acceptance of defendants' answer, without objection, constituted a waiver of the late service and default”]; *U.S. Bank, N.A. v Lopez*, 192 AD3d 849, 850 [2d Dept 2021] [“Here, the plaintiff's undisputed failure to reject the defendant's answer within the fifteen-day statutory time frame constituted a waiver of the late service and the

default”]; *Glass v Captain Hulbert House, LLC*, 103 AD3d 607, 608 [2d Dept 2013] [“the plaintiff’s retention of its answer without objection constituted a waiver of the late service and the default”]). Defendant’s untimely appearance in this action was waived by Plaintiff’s retention of the notice of appearance without timely objection. In fact, to date, Plaintiff has not objected to the untimely appearance. Plaintiff does not oppose.

Accordingly, Defendant’s motion to reargue is granted, without opposition.

Based on the foregoing, Defendant’s motion for an order dismissing this action pursuant to CPLR § 3012(b) is granted. Defendant argues that it filed its notice of appearance on November 2, 2021. Defendant argues that since it did not file a demand for service of the complaint, Plaintiff had twenty days from service of the notice of appearance to serve the complaint. Defendant argues that Plaintiff had until November 23, 2021 to serve its complaint, but failed to do so.

CPLR § 3012(b) states that:

If the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of rule 320 for an appearance. Service of the complaint shall be made within twenty days after service of the demand. If no demand is made, the complaint shall be served within twenty days after service of the notice of appearance. The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision. A demand or motion under this subdivision does not of itself constitute an appearance in the action.

To avoid dismissal of the action for failure to serve a complaint pursuant to CPLR 3012(b), “a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and a potentially meritorious cause of action” (*Carducci v Russell*, 120 AD3d 1375, 1375-1376 [2d Dept 2014]; *Perez v Geico Ins. Co.*, 105 AD3d 1025, 1025 [2d Dept 2013]).

Here, it is undisputed that Plaintiff did not serve the complaint within twenty days of service of Defendant’s notice of appearance. In fact, to date, Plaintiff has not filed or served a complaint. Plaintiff does not oppose.

Accordingly, Defendant’s motion to dismiss this action pursuant to CPLR § 3012(b) is granted, without opposition. In light of the foregoing, the Court need not consider Defendant’s motion to renew.


It is hereby

ORDERED that the Clerk dismiss the Plaintiff’s complaint; and it is further

ORDERED that Defendant serve a copy of this Decision and Order upon Plaintiff, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 4/18/22

Hon. 
FIDEL E. GOMEZ, A.J.S.C.