

Do Gooder Prods., Inc. v Ensemble Theatre

2007 NY Slip Op 31529(U)

June 4, 2007

Supreme Court, New York County

Docket Number: 0100976/2003

Judge: Shirley W. Kornreich

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

PRESENT **SHIRLEY WERNER KORNREICH**
Index Number : 100976/2003 J.S.C.

PART 54

DO GOODER PRODUCTIONS, INC.

vs
ENSEMBLE THEATRE

Sequence Number : 003

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this motion to/for Reargue

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4,5

6-8

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

FILED

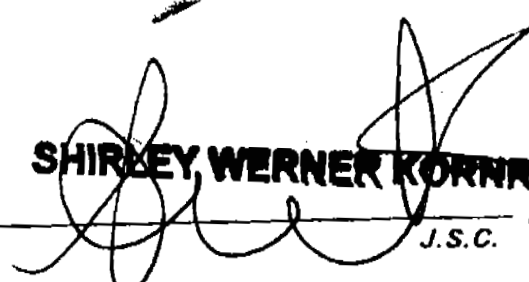
JUN 08 2007

COUNTY CLERK'S OFFICE
NEW YORK

Dated: _____

6/4/07

SHIRLEY WERNER KORNREICH



J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
DO GOODER PRODUCTIONS, INC.,
ALAN BRANDT, MARK ROBERT GORDON
and "2 1/2 JEWS" PRODUCTIONS, LLP,

Plaintiffs,

-against-

ENSEMBLE THEATRE,
ENSEMBLE THEATRE BOARD OF DIRECTORS,
TIM HART and PEGGY HART,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

Index No.: 100976/03

DECISION
and
ORDER

FILED
JUN 08 2007
COUNTY CLERK'S OFFICE
NEW YORK

This is an action seeking monetary damages for an alleged breach of contract and other causes of action arising in tort. Plaintiffs originally filed their summons and complaint alleging that on December 18, 2000, defendant Ensemble Theatre ("Ensemble") entered into a licensing agreement with plaintiff Do Gooder Productions, Inc. ("Do Gooder") by which Do Gooder granted limited production rights to Ensemble and Ensemble consented to New York jurisdiction. Plaintiffs now move for reargument and renewal of defendants' prior motion to dismiss this action, which had been granted on default on December 12, 2005. Defendants oppose.

I. **Background**

The complaint in this action alleges the following. Plaintiff Do Gooder is a New York not-for-profit corporation which owns the licensing rights to a play entitled "2 1/2 Jews" (the "play"). Defendant Ensemble is an Arizona not-for-profit corporation that produces plays in

Scottsdale, Arizona at its venue, the Metro Theatre. Plaintiffs allege that Do Gooder and Ensemble are parties to a license agreement (the "agreement") granting Ensemble limited production rights in the play at its theater. The agreement provided that "[u]pon receipt of the royalty billed, this license shall become effective [and t]his Agreement constitutes an offer revocable by Do Gooder Productions, Inc. at any time prior to the payment of the royalty billed." It further provided that for litigation matters, "[v]enue shall be in the State of New York . . . at the trial level state court in the borough of Manhattan, New York."

In the complaint, plaintiffs allege that defendant Tim Hart did not purchase scripts for the play as required by the agreement and that defendants thereby "lost their right to produce the PLAY[.]" Production rights were then licensed to plaintiff "2 1/2 Jews" Productions, LLP ("2 1/2 Jews"), which produced the play at Ensemble's theater. Ensemble's only interest in the play was "to collect rent for the use of their [sic] theater and box office as well as to collect mutually agreed expenses." Plaintiffs allege that, defendants—together and individually—committed a series of torts, all of which occurred in Arizona.

After defendants moved to dismiss the complaint, and plaintiffs failed to oppose, the court granted defendants' motion. Specifically, the court found that the defendants were all non-domiciliaries located or residing in Arizona. Further, the Licensing Agreement contained a condition precedent to its formation, which never occurred and, thus, it never became effective.

Plaintiffs now submit the affidavit of Mark Robert Gordon, claiming that, due to the physical ailments of their attorney, Norman S. Goldsmith, it was "difficult for plaintiffs to contact Mr. Goldsmith[.]" Further, plaintiffs assert that the complaint filed in this action was "an early, incomplete version of the complaint[.]" which "did not incorporate all of the relevant facts

of this case.” In the instant motion, plaintiffs submit various documents—admittedly available to them at the time of the original motion—which they claim demonstrate that the complaint should not have been dismissed. Plaintiffs also submit “a true and correct copy of the final version of the complaint that Mr. Goldsmith was supposed to file on plaintiffs’ behalf to begin this case.”¹ Though the complaint in this action was filed in January 2003, plaintiffs claim they first learned that it had been filed in September 2003.

When defendants first moved to dismiss the complaint, in July 2003, Mr. Goldsmith sought, and obtained, three stipulations extending the time by which he had to file opposition to the motion. The final stipulation adjourned the motion to September 29, 2003. However, Mr. Goldsmith did not submit any opposition papers at that time or subsequently.

Meantime, on September 19, 2003, Mr. Goldsmith filed an order to show cause requesting that he be relieved as plaintiffs’ counsel. At that time, Mr. Goldsmith also informed plaintiffs that there was a pending motion to dismiss and that no response had been filed on plaintiffs’ behalf. On October 9, 2003, the court granted Mr. Goldsmith motion, relieving him as counsel and staying the action for thirty days after plaintiffs were served with the order, to allow them to appoint substitute counsel. The stay became effective on October 24, 2003, when plaintiffs were served, and expired on November 24, 2003. Although the parties requested an additional sixty-day stay of the proceedings, the court declined to grant such an order.²

Mr. Gordon, who is both the executive director of Do Gooder and a member of “2 1/2

¹ Mr. Goldsmith has not submitted any affidavit on this motion.

² Noted in both parties’ papers is the fact that Mr. Gordon is an attorney, as are at least two members of Do Gooder’s Board of Directors. Mr. Gordon avers that he is not admitted to the bar in the State of New York, although he is admitted elsewhere.

Jews” Productions, LLP, avers that as of December 22, 2003, he was aware of the court’s December 15 decision, which dismissed this action. While the court issued its order on December 15, 2003, it appears that plaintiffs were not served with notice of entry. On March 12, 2004, Ensemble was administratively dissolved and is now defunct, as reflected in a print-out of Arizona Corporate Records, submitted by defendants.

II. *Conclusions of Law*

Initially, plaintiffs have submitted nothing to persuade the court that it misapprehended the facts or the law in issuing its original decision. *See Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 971 (1st Dept. 1984) (motion for reargument is designed to give party opportunity to establish that court overlooked or misapprehended relevant facts, or misapplied any controlling principle of law), *lv dismissed* 64 N.Y.2d 646 (1984), *citing Foley v. Roche*, 68 A.D.2d 558 (1st Dept. 1979). Plaintiffs point neither to a fact overlooked nor a principle of law misapplied by the court. On the other hand, plaintiffs’, by their own motion, acknowledge that the complaint—as submitted—was “incomplete” and lacked proper evidentiary support. *See Saren v. Palma*, 263 A.D.2d 544, 545 (2^d Dept. 1999) (“well settled that in the context of civil litigation, an attorney’s errors or omissions are binding on the client and, absent extraordinary circumstances, a claim of ineffective assistance of counsel will not be entertained). Thus, reargument must be denied.

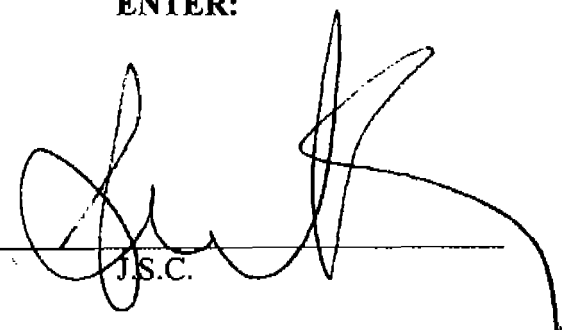
Similarly, plaintiff has not set forth any “new or additional” facts that would change the result of the December 15 order. *See Garner v. Latimer*, 306 A.D.2d 209 (1st Dept. 2003) (motion for leave to renew shall direct the court to new or additional facts that, although they may have existed when original motion was made, were unknown then to party seeking renewal); CPLR § 2221(e). Not only were the facts that plaintiffs seek to assert now known to them at the

time of the original motion, they offer *no excuse for their almost four-year delay* in moving to renew. According to plaintiffs' own affidavit, they knew that their attorney had failed to oppose the motion to dismiss, in September of 2003. They fail to explain why, in the intervening years, they took *absolutely no action* to rectify the errors that they claim were made by their previous counsel.

Nor are plaintiffs entitled to vacate their default on the previous motion. They have failed to set forth either a meritorious defense to that motion, nor have they offered a reasonable excuse for their delay in seeking the instant relief. Finally, defendants would clearly be prejudiced by plaintiffs' delay since Ensemble, the corporate defendant, has since been dissolved and is now defunct. Accordingly, it is

ORDERED that plaintiffs' motion is denied in its entirety.

ENTER:

A handwritten signature in black ink, appearing to be 'J.S.C.', written over a horizontal line.

Date: June 4, 2007
New York, New York

FILED
JUN 08 2007
COUNTY CLERK'S OFFICE
NEW YORK