

<b>Rubinfeld v County of Suffolk</b>
2007 NY Slip Op 34601(U)
September 17, 2007
Supreme Court, Suffolk County
Docket Number: 24637-97
Judge: Elizabeth H. Emerson
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NO.: 24637-97SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 8 SUFFOLK COUNTYPRESENT: Hon. Elizabeth Hazlitt EmersonMOTION DATE: 3-28-07  
SUBMITTED: 4-18-07  
MOTION NO: 004-MD; CASE DISP\_\_\_\_\_  
JOSHUA RUBINFELD,

Plaintiff,

-against-

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New City, New York 10956

COUNTY OF SUFFOLK,

Defendant.

CHRISTINE MALAFI, ESQ.  
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Upon the following papers numbered 1 to 11 read on this motion to vacate default ; Order to Show Cause and supporting papers 1-6 ; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 7-9 ; Replying Affidavits and supporting papers 10-11 ; it is,

**ORDERED** that the branch of the motion by the plaintiff which is to vacate an order of this court dated January 23, 2007, which granted the defendant's motion for summary judgment upon his default is denied; and it is further

**ORDERED** that the branch of the motion by the plaintiff which is for leave to reargue the defendant's motion for summary judgment is denied.

As a defaulting party, the plaintiff does not have the right to reargue (*see*, **Matter of Kurth v Susskind**, 200 AD2d 572, 573-574). Accordingly, the plaintiff's remedy is limited to vacatur of his default pursuant to CPLR 5015(a)(1) (**Id.** at 573).

A party seeking to vacate an order entered upon his default in opposing a motion must demonstrate a reasonable excuse for the default and a meritorious defense to the motion (*see*, **Matter of Phillips v Goord**, 16 AD3d 422). Here, the plaintiff has demonstrated neither. The plaintiff's unsubstantiated denial of receipt of the motion papers is insufficient to rebut the presumption of proper service created by the defendant's affidavit of service (*see*, **Town House St., LLC v New Fellowship Full Gospel Baptist Church, Inc.**, 29 AD3d 893, 894). In order to demonstrate a meritorious defense, a party must submit an affidavit from an individual with knowledge of the facts (*see*, **Peacock v Kalikow**, 239 AD2d 188, 190). The affirmations of the plaintiff's attorneys that are submitted in support of the motion do not even assert a defense to the

defendant's motion for summary judgment (*see, Spencer v Sanko Holding USA*, 247 AD2d 532). Moreover, the plaintiff's argument that the motion was untimely is improperly raised for the first time in the plaintiff's reply papers. The court, therefore, declines to consider it (*see, Klimis v Lopez*, 290 AD2d 538; *Feratovic v Lun Wah, Inc.*, 284 AD2d 368, 369; *Voytek Tech. v Rapid Access Consulting*, 279 AD2d 470, 471; *Watt v Irish*, 184 Misc 2d 413, 416-417). Accordingly, the motion is denied.

**HON. ELIZABETH HAZLITT EMERSON**

DATED: September 17, 2007

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J. S.C.