

Vardi Colored House, Inc. v Dean

2008 NY Slip Op 31362(U)

May 5, 2008

Supreme Court, New York County

Docket Number: 0602499/2007

Judge: Richard B. Lowe

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

PRESENT: Lowe ^{HON. RICHARD B. LOWE, III}
Justice

PART 56m

Vardi Colored House, Inc.

INDEX NO. 602409/07

MOTION DATE 4/28/08

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

- v -

Kaseem Dean et al

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 13 2008
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 5/5/08

[Signature]
HON. RICHARD B. LOWE, III
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
VARDI COLORED HOUSE, INC., and BEN VARDI,

Plaintiffs,

Index No. 602499/07

-against-

KASSEEM DEAN, (P/K/A SWIZZ BEATZ)
FULL SURFACE RECORDS, LLC,
GIOVANNI A. GIACOMELLI, DANIELLE
GIACOMELLI and MARIO MARTELLACCI,

Defendants.

-----X
HON. RICHARD B. LOWE, III:

Defendants Kasseem Dean (P/K/A Swizz Beatz) and Full Surface Records, LLC (collectively, "defendants") move this court for an order "reconsidering" the denial of the prior motions seeking to vacate the default judgment against them and to lift the restraints that are in place against certain of the defendants' bank accounts.

Background

This court has twice denied applications by the defendants to grant the relief sought within this instant motion. The defendants refer to this third effort as a "motion to reconsider".¹

Specifically, on April 1, 2008, defendants presented an order to show cause to vacate the default judgment due to an alleged lack of proof of service. The application also sought a temporary restraining order ("TRO") restraining collection efforts on the judgment. This court declined to sign the TRO and directed a traverse hearing on the improper service issue. A

¹ The defendants do not specifically designate their motion as one for either "reargument" or "reconsideration" as required by CPLR 2221(d)(1) and (e)(1).

traverse hearing is presently scheduled for May 15, 2008.

Thereafter, on April 11, 2008, defendants presented a second order to show cause asking for essentially the same relief. The order to show cause requested this court to issue an order which would lift the restraints on the defendants' bank accounts. In support the defendants argued improper service of the complaint as well as likely success on the merits. It also contained a request for a TRO lifting the restraints on the defendants' bank accounts until the return date of the application. This court declined to sign the order to show cause and the TRO. Rather, it issued an order directing that the restraints on the bank accounts be lifted upon the defendants posting of a bond in the amount of the judgment. (Gelber Affirmation, Ex C.)

Defendants now bring this third application asking the court to reconsider the denial of the prior to applications to vacate the default judgment.

Discussion

A motion to reargue "shall be based upon matters of fact or law either 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." (CPLR § 2221(d)(2). In this instant matter, the defendants do no assert the court overlooked either any matters of fact or law in its previous denials. Rather, the previous arguments already considered by the court are again propounded and presented. A motion to reargue cannot be used as a vehicle for the unsuccessful party to argue once again the very questions previously decided. (*see Foley v Roche*, 68 AD2d 558, 567 [1 st Dept 1979]).

In addition to raising many of the same service arguments which were referred to a traverse hearing in the court's prior order, the defendants also argue that the plaintiffs filed their

affidavits of service of the complaint outside the 20-day period required by the CPLR. (See CPLR § 308(2).) Therefore, according to defendants, their time to answer has not yet run until this court issues a *nunc pro tunc* order which will cure the delayed filing of the affidavits of service. As such, the defendants argue the default judgment must be vacated and the restraints on defendants' bank accounts lifted.

First, the court notes again this is a new argument and these facts were never raised before this court in the prior two motions to vacate. The defendants present no reason why it neglected to present it to the court on the prior two motions. Therefore, the motion is denied on this ground. (CPLR 2221(e)(3); *Crawford v Sorkin*, 41 AD3d 278 [1st Dept 2007].)

Furthermore, the CPLR 308(4) requirement to file an affidavit of service within twenty days is one which "pertains solely to the time within which a defendant must answer, and does not relate to the jurisdiction acquired by service of summons. (*Penachio v Penachio*, 27 AD23d 540 [2ndDept 2006].) The requirement of filing "pertains solely to the time within which the defendant must answer, and does not relate to the jurisdiction acquired by service of summons. (*Lancaster v Kindor*, 98 AD2d 300 [1st Dept 1984].)

A court need not issue a *nunc pro tunc* order to cure the filing defect. Rather, a court may exercise its discretion to cure the defect. (See *The Reporter Company v Tomicki* 60 AD2d 947 [3rd Dept 1978].) In *The Reporter Company*, the plaintiffs cross moved for a *nunc pro tunc* order. The motion court did not rule on the motion, but on its own motion cured the defect and validated the filing of the proof of service.

The service affidavits presented to this court when the plaintiff sought a default judgment were file stamped October 30, 2007 (Gelber Affirmation Ex G). Fifty days later, on December

[* 5]

20, 2007 the plaintiff presented to the court an application for a default judgment. There was no prejudice to the defendant, and in fact, he had more time to answer the complaint than had the plaintiff promptly filed the proof of service. Therefore, this court does not believe it was an abuse of discretion when it granted the default judgment.

Conclusion


Therefore, based on the foregoing, it is hereby

ORDERED that the motion to reargue is denied.

This shall constitute the Order and Decision of the Court.

Dated: May 5, 2008

ENTER:


HON. RICHARD B. LOWE, III

J.S.C.

FILED
MAY 13 2008
NEW YORK
COUNTY CLERK'S OFFICE