

Friedman v Voloshin
2008 NY Slip Op 31512(U)
May 28, 2008
Supreme Court, New York County
Docket Number: 0601128/2007
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT

PART _____

Index Number : 601128/2007
FRIEDMAN, WILLIAM S.
 VS.
VOLOSHIN, JOHN
 SEQUENCE NUMBER : # 004
 RENEW / RECONSIDERATION

Justice

INDEX NO. 601128-07
 MOTION DATE _____
 MOTION SEQ. NO. #004
 MOTION CAL. NO. _____

were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

JUN 03 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/29/08

WALTER B. TOLUB 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: IAS PART 15

-----x
WILLIAM FRIEDMAN

Plaintiff,

-against-

JOHN VOLOSHIN

Defendant.

Index No. 601128/07
Mtn Seq. 004

FILED
JUN 03 2008
COUNTY CLERK'S OFFICE
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-----x
WALTER B. TOLUB, J.:

This is a motion by the Defendant to renew, reargue or
vacate this court's March 13, 2008 decision which granted
Plaintiff a default judgment for Defendant's failure to comply
with a Special Referee's discovery order.

Facts

As stated int his court's prior order, Plaintiff brought the
underlying action to recover \$500,000 claiming that the Defendant
solicited a demand loan from the Plaintiff and that the Defendant
stopped payment of the check. The Defendant moved to dismiss the
complaint on the grounds of lack of jurisdiction. This court
referred the issue of jurisdiction to a Special Referee and held
the balance of the motion in abeyance pending a decision by the
Referee. The Special Referee in this matter directed Defendant
to provide specific documentary disclosure about his New York
contacts and to submit to a deposition in advance of the hearing
as to whether his Court has jurisdiction over the Defendant and
the claims at issue. The Defendant failed to comply with the

Special Referee's order and this court granted Plaintiff's motion for a default judgment pursuant to CPLR 3126(3) on March 13, 2008. Defendant seeks to vacate the order so that the matter may be decided on the merits.

Discussion

The only question on a motion to reargue is whether the court overlooked or misapprehended fact or law in determining a prior motion. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very same questions previously decided. (Foley v. Roche, 68 A.D.2d 558, 418 NYS2d 588, 593-94 [1st Dept. 1979]) citing Fosdick v. Town of Hempstead, 126 NY 651). Moreover, a motion for leave to reargue may not include "any matters of fact not offered on the prior motion." (CPLR §2221(d)(2)). Defendant has failed to show how this court either misapprehended fact or law in reaching its decision. Accordingly the portion of Defendant's motion to renew and reargue is denied.

CPLR §5015(a) provides, inter alia, that the court which rendered the judgment or order may relieve a party from such order upon such terms as may be just upon the ground of excusable default. Courts have routinely recognized that there is a strong preference for adjudicating matters on the merits rather than relying on procedural issues. (Campos v. New York City Health and Hospitals Corp., 307 AD2d 785 [1st Dept 2003]). Where the

party's default resulted from a mistake and an inadvertent assumption, courts have granted motions to vacate. (Connolly v. Tuan, 12 Misc.3d 1172(A) [Sup. Ct. NY Co. June 23, 2006]).

Here, Defendant argues that his non-compliance was excusable because of personal circumstances and medical conditions which are outlined in detail in Mr. Voloshin's Affidavit. Defendant's claim if illness does not readily explain or justify his repeated failures over many months to provide documentary disclosure about his New York contacts. Even though the Defendant could have been more thorough and diligent in managing his affairs while ill and dealing with other life circumstances, this court is inclined to vacate the March 13, 2008 Default Judgment so that the matter may be decided on the merits. However since Defendant's delay has caused plaintiff to waste time and money, and in order to prevent any prejudice to the Plaintiff, the default judgment entered against the Defendant is vacated on the condition that the Defendant post a \$500,000 bond.

Accordingly, it is

ORDERED that the portion of Defendant's motion seeking to renew and reargue the decision dated March 13, 2008 is denied; and it is further

ORDERED that the portion of Defendant's motion seeking to vacate the default judgment entered against it is granted on the condition that the Defendant post a \$500,000 bond; and it is

further

ORDERED that within 20 days from the date of service of a copy of this order with notice of entry, the Defendant will file with the Clerk of this Court and upon the attorneys for the Plaintiff a written notice of the bond; and it is further

ORDERED that Defendant is to comply with the Special Referee's order within 30 days from the date of service of a copy of this order with notice of entry; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Counsel for the parties are to contact the Special Referee to arrange for the completion of discovery with respect to the issue of jurisdiction which must be resolved so that the matter may proceed.

This memorandum opinion constitutes the decision and order of the Court.

Dated:

3/28/08

FILED
JUN 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

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HON. WALTER B. TOLUB, J.S.C.