At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, Brooklyn, New York, on the 3rd day of November 2008.

P R E S E N T:

HON. BERNADETTE BAYNE

Justice.

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MERKOS L'INYONEI CHINUCH, INC.,

Plaintiff,

-and-

AGUDAS CHASSIDEI CHABAD of UNITED STATES, joined as a Necessary and Indispensible Party Plaintiff,

- against -

MENDEL SHARF, YAACOV THALER, BENTZION FRISHMAN and "JOHN DOE" 1-30, the names of "John Doe" 1-20 being fictitious as their names are unknown to the plaintiff, and CONGREGATION LUBAVITCH, INC., a New York Not-For-Profit Corporation,

Defendants.

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**DECISION AND ORDER**

Index No. 40288/04

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| The following papers numbered 1 to 5 read on this motion: | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause<br>Affidavits (Affirmations) Annexed | 1-2; 4 |
| Affirmations in Opposition | 3; 5 |

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This action involves a dispute between the parties over the use and control of property

located at 770 and 784-88 Eastern Parkway in Brooklyn, New York. Defendant YAACOV THALER (hereinafter THALER) and defendant CONGREGATION LUBAVITCH, INC. (hereinafter CLI) both move the Court for relief via separate motions.

In the first motion, defendant THALER moves this Court by Order to Show Cause seeking an Order vacating the portions of Justice Ira Harkavy's June 16, 2006 Order which held or noted that defendant THALER was in default and also vacating that portion of the aforementioned Order that granted injunctive relief against defendant THALER, including a temporary restraining Order, and for a further Order dismissing the action as against defendant THALER.

In the second motion, defendant CLI moves this Court, also by Order to Show Cause, for an Order directing the plaintiff to disclose to defendant CLI a copy of the "security plan" accepted by the plaintiff in connection with an award granted to the plaintiff by the New York State Department of Homeland Security, and for a further Order directing the plaintiff to conceal any video cameras that are installed relative to the aforementioned "security plan", and further directing that the plaintiff only have limited access to surveillance video recorded in certain portions of the premises, that defendant CLI be granted access to all exterior video recordings, that defendant CLI be given an opportunity to *confirm* that the plaintiff has *no access* to any interior video recordings, that no recording of prayer services be conducted on the sabbath and holidays, except for law enforcement purposes, and lastly, that any video recordings be maintained by the plaintiff for a reasonable period of time and that said recordings be used solely for security against terrorism and investigation of security interests.

In opposition to defendant THALER's motion, the plaintiffs argue that defendant

THALER failed to move to vacate Justice Harkavy's June 19, 2006 Order, and that by virtue of the fact that counsel for defendant THALER entered into a stipulation that acknowledged the portion of Judge Harkavy's Order that restrained defendant THALER from entering the subject premises, defendant THALER has appeared in the action, and has waived his right to move to dismiss the complaint pursuant to CPLR §3215(c). The plaintiffs further argue that even if the Court determines that defendant THALER did not appear in the action, sufficient cause exists for excusing the plaintiffs' failure to move for a default judgement within one year, and defendant THALER fails to claim or demonstrate any prejudice resulting from the plaintiffs' failure to move for the default within the one year period.

In opposition to the motion by defendant CLI, the plaintiff argues that by virtue of decisions rendered by Justice Harkavy, it has been determined that the plaintiffs have "all right, title and interest in the premises", and that as a result of said rulings, the moving defendant has no legal right to the premises, and more specifically, no right to interfere with the "security plan" being instituted on the premises by the plaintiff.

**Discussion**

Despite defendant THALER's contentions to the contrary, this Court is of the opinion that his motion is inaccurately labeled, and is in reality, nothing more than a motion to renew and reargue the June 19, 2006 Order issued by Justice Harkavy. The issue of defendant THALER's default was obviously part of the argument that was before Judge Harkavy when he issued the June 16, 2006 decision. Even if the plaintiffs inaccurately portrayed defendant THALER as being in default in their argument before the Court, defendant THALER had every opportunity at that time to object and raise the issue of the plaintiffs' alleged failure to take a default within the

one year period set forth in the statute. As such, the issues of the timeliness and/or the failure of the plaintiff to seek a default judgement Order within one year of the actual default pursuant to CPLR §3215(c) are moot as the moving defendant had full and fair opportunities to raise these issues before Justice Harkavy, but apparently failed to do so. Not only did defendant THALER have an opportunity to raise any issues regarding service, jurisdiction and/or failure to comply with CPLR §3215(c) before Justice Harkavy issued his decision dated June 19, 2006, but defendant THALER also had an opportunity to make a motion to renew or reargue before Judge Harkavy, but never made such a motion. In addition, defendant THALER had yet another opportunity to raise the aforementioned issues at a hearing conducted before Justice Harkavy on December 20, 2006, but again failed to do so.

It is well settled that a party who seeks to stay, vacate or modify an Order may seek to have the unfavorable decision reconsidered in several ways: by appealing the order to a higher court, by making a motion for leave to renew, or by making a motion to reargue. Both motions for leave to renew and to reargue are governed by CPLR §2221 and must be made to the same judge who issued the order being challenged.

A motion to reargue must be made within thirty days after service of a copy of the order determining the prior motion, the same time period provided for taking an appeal. The motion to reargue must be based upon matters of law or fact which were allegedly overlooked or misapprehended by the court in arriving at its determination of the prior motion. Thus, the moving party should be able to point out where in the papers submitted on the original motion the overlooked or misapprehended fact was asserted or the overlooked or misapprehended argument was made. A motion to reargue may not include or be based on any facts not offered

on the prior motion.

A motion to renew is not subject to any specific time limitation. The motion to renew must be based upon new facts not offered on the prior motion that would change the prior determination or upon a change in the law that would alter the prior determination. A motion to renew should not seek new or different relief. Sodano v. Faithway Deliverance Center, Inc., 18 A.D.3d 534, 795 N.Y.S.2d 313, (2nd Dept., 2005). If the adversary can show that the "new" facts were previously alleged in the papers submitted on the original motion by the party now seeking renewal, the motion to renew will fail. The motion to renew will also fail if the party seeking renewal cannot offer a reasonable explanation of the failure to present the "new" facts on the prior motion. If, in the exercise of due diligence, the "new" evidence could have been discovered and presented on the original application, the motion to renew will be denied. Yarde v. New York City Transit Authority, 4 A.D.3d 352, 771 N.Y.S.2d 185, (2nd Dept., 2004).

In this instance, the June 19, 2006 decision that is the subject of this motion was decided by Justice Ira Harkavy prior to his retirement. Although, as a result of his retirement, this Court is empowered to hear reargument of motions that Justice Harkavy previously decided, it is loathe to alter his prior decisions without compelling proof demonstrating that Justice Harkavy either overlooked or misapprehended matters of law or facts relevant to the within case.

In this instance, there is no proof that Judge Harkavy either overlooked or misapprehended matters of law or facts relevant to this case. Indeed, in his decision, Justice Harkavy concluded that defendant THALER was in default and explicitly stated so in his decision. Defendant THALER's claim that the issue of his default was presented to Judge Harkavy as if it was a fact and not a question, is not relevant because that argument would have

needed to have been made in the papers that were submitted to Justice Harkavy prior to his rendering of the June 19, 2006 decision, or in a motion to renew or reargue the June 19, 2006 decision. Defendant THALER failed to make a motion to reargue within the 30 day time period set forth in the CPLR, and the within motion cannot be considered a motion to renew because it has not been clearly labeled as such, and more importantly, because no reasonable justification has been offered as to why these arguments were not presented to Justice Harkavy initially and no new facts, which were previously unavailable, have been presented to this Court.

Moreover, at a hearing conducted before Justice Harkavy on December 20, 2006, the parties, including defendant THALER, personally appeared before Justice Harkavy to argue a motion that sought to hold defendant THALER in contempt. At no time did defendant THALER or anyone representing defendant THALER present any defense or argument to Justice Harkavy based upon either service or jurisdiction.

Despite the fact that information contained in defendant THALER's arguments was available to him prior to both the issuance of Justice Harkavy's June 19, 2006 Order and the hearing conducted before Justice Harkavy on December 20, 2006, defendant THALER only raises these arguments now, almost two years after the June 19, 2006 decision and more than one year after the December 20, 2006 hearing. The fact that defendant THALER fails to annex complete copies of the underlying motion papers and exhibits that were the basis for the June 19, 2006 decision, to support his contention that he should not have been held in default, further serves to convince this Court that Justice Harkavy's Order should not be disturbed. This Court is of the opinion that Justice Harkavy heard and correctly interpreted the facts before him when he determined that defendant THALER was in default, and in so finding, Justice Harkavy apparently

found reasonable the plaintiffs' explanation and/or excuse as to why the default was not taken within the one year period set forth in the statute. As such, defendant THALER's motion is denied in all respects.

The other motion, made by defendant CLI, seeks an Order directing the plaintiff to disclose to defendant CLI a copy of the "security plan" accepted by the plaintiff in connection with an award granted to the plaintiff by the New York State Department of Homeland Security, and for a further Order directing the plaintiff to conceal any video cameras that are installed relative to the aforementioned "security plan", and further directing that the plaintiff only have limited access to surveillance video recorded in certain portions of the premises, that defendant CLI be granted access to all exterior video recordings, that defendant CLI be given an opportunity to *confirm* that the plaintiff has *no access* to any interior video recordings, that no recording of prayer services be conducted on the sabbath and holidays, except for law enforcement purposes, and lastly, that any video recordings be maintained by the plaintiff for a reasonable period of time and that said recordings be used solely for security against terrorism and investigation of security interests.

After hearing the oral arguments of the parties and reviewing the papers submitted both in support and in opposition to the motion, this Court is compelled to abide by the prior decisions of Justice Harkavy, who, by Order dated June 19, 2006, determined that plaintiff "Merkos" is the owner of and has all right, title and interest to the premises located at 784-788 Eastern Parkway, in Brooklyn, New York, and that plaintiff "Agudas" is the owner of, and has all right, title and interest to the premises located at 770 Eastern Parkway, in Brooklyn, New York. Justice Harkavy went on to state that "defendant CLI is not the owner of and has no right, title or interest

in either property". Indeed in a further Order, dated December 27, 2007, Justice Harkavy determined that "final judgement of possession of the synagogue space, located at 770 and 784-788 Eastern Parkway, Brooklyn, New York, including, but not limited to, the ground floor, mezzanine, basement and sub-basement of the premises, all of which constitute a portion of the synagogue, is granted to the plaintiffs Agudas Chassidei Chabab and Merkos L'Inyonei Chinuch, Inc.".

Aside from the self serving arguments contained in their affirmations in support of their motion, defendant CLI fails to cite any statutes or cases that support their position. Indeed, nothing has been presented that would, in any way, demonstrate how the moving defendant is entitled to any of the relief requested. The moving defendant has no ownership interest in the property, has no lease and is not a tenant, and as such, has no right to give any input regarding the design, installation or operation of the security system in question. Even if it were determined that, as a result of their long period of occupancy, the moving defendant does have *some* interest in the property, the rights and interests of the property owners in securing and maintaining the security and safety of both their premises and persons upon their premises, outweighs any arguments made by the moving defendant regarding their alleged interest in the installation, implementation and execution of security plan by the plaintiffs. As such, defendant CLI's motion is denied in its entirety.

**Conclusion**

Accordingly, it is

**ORDERED**, that defendant THALER's motion to vacate portions of Justice Ira Harkavy's Order dated June 19, 2006 and for an Order of dismissal, is denied in its entirety, and

it is further

**ORDERED**, that defendant CLI's motion to grant defendant CLI certain rights and to compel the plaintiff to carry out specific actions relating to a "security plan" being implemented by the plaintiff pursuant to a grant issued by the New York State Department of Homeland Security, is denied in its entirety.

This constitutes the Decision and Order of the Court.

E N T E R

Bernadette Bayne

HON. BERNADETTE BAYNE
J. S. C.

HON. BERNADETTE BAYNE