

**Allegiant Partners Inc. v Manor E. of Massapequa,  
LLC**

2008 NY Slip Op 33761(U)

June 9, 2008

Supreme Court, Nassau County

Docket Number: 011148/2007

Judge: Ira B. Warshawsky

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This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,**

**Justice.**

**TRIAL/IAS PART 10**

**ALLEGIANT PARTNERS INCORPORATED,**

**Plaintiff,**

**INDEX NO.: 011148/2007  
MOTION DATE: 05/28/2008  
MOTION SEQUENCE: 006**

**-against-**

**MANOR EAST OF MASSAPEQUA, LLC  
d/b/a MANOR EAST, 201 JERUSALEM AVENUE,  
MASSAPEQUA, LLC and JOHN DEJOHN,**

**Defendants.**

The following papers read on this motion:

Order to Show Cause, Affirmation & Exhibits Annexed .....	1
Plaintiff's Memorandum of Law in Opposition to Defendants' Motion Brought by Order to Show Cause .....	2
Affirmation of Robert J. Nahoum in Support of Plaintiff's Memorandum of Law in Opposition to Defendants' Motion Brought by Order to Show Cause & Exhibits Annexed .....	3

Defendants move for an order pursuant to CPLR 5015(a)(4) vacating the underlying judgment entered in favor of defendants Manor East of Massapequa, LLC and 201 Jerusalem Avenue and an order dismissing the above captioned action, or for an order pursuant to CPLR § 8501 directing plaintiff to deposit the sum of \$267,120.37 into court before proceeding on the case, for a further order staying enforcement of the aforesaid underlying judgment, and for an order declaring the Financing Agreement entered into by the parties void.

Defendant contends that the above captioned action and the default judgment entered against defendant Manor East is void in its entirety insofar as the Court lacks subject matter jurisdiction and Plaintiff lacks standing to bring the action.

This action has been the subject of several motions and familiarity with the facts is presumed. Briefly stated in November of 2006 plaintiff promised to finance the purchase of equipment to be used in defendant's catering business in exchange for a security deposit of \$5,195.15 and the promise of payment of the balance in 60 monthly installments of \$5,195.15. Plaintiff also holds a security interest in the equipment and allegedly took an interest in real property to collateralize the loan.

In April of 2007 the defendant became delinquent in the aforesaid monthly payments and plaintiff demanded a personal guarantee of John DeJohn, the principal of the judgment debtor. Plaintiff refused to accept any further monthly payments and DeJohn did not proffer a personal guarantee.

On June 26, 2007, plaintiff commenced this action to recover the entire balance due on the Agreement and in so far as defendants were in default of pleading, this court entered judgment on August 22, 2007 in favor of plaintiff Allegiant Partners, Inc. and against Manor East of Massapequa, 201 Jerusalem Avenue and John DeJohn.

Defendants moved to vacate the default judgment on October 31, 2007 (Motion Sequence 002). They asserted a meritorious defense and excusable default, usury and lack of personal jurisdiction. In an Order dated January 3, 2008, the application was denied as to meritorious defense and excusable default, (based upon law office failure) and usury.

After a Traverse hearing the judgment was vacated for lack of personal jurisdiction against the individual defendant, DeJohn, although judgment enforcement is proceeding pursuant to CPLR Article 52. Judgment was entered in favor of plaintiff against Manor East of Massapequa, LLC in the amount of \$267,120.37.

In the motion sub judice defendants again move to vacate the default judgment entered against Manor East of Massapequa on the grounds that plaintiff is a foreign

corporation not licensed to do business in the State of New York, and that plaintiff's sales-finance agreement is unenforceable in this State since plaintiff is not licensed to enter into such transactions without a license from the New York State Banking Department, Banking Law § 492. Defendant also points to one clause of the underlying Agreement which provides that the law of the State of California shall govern any dispute between the parties. Finally, it is submitted that law office failure is attributable to the defendants' default.

Defendants' application for vacatur of the default based on law office failure is frivolous. Defendants have already moved to vacate their default pursuant to CPLR 5015(a)(1) based upon lack of personal jurisdiction. A traverse hearing was held in which an employee of Manor East stated on the record that he enjoyed "sparring" and that he is a "player" when being questioned about his having represented to the process server that he was DeJohn. Defendants argued then that they were in default based on law office failure, and had a meritorious defense. The defense is precluded from being raised under the doctrine of res judicata, which is held applicable to a judgment taken by default which has not been vacated, as well as to defenses raised in the prior action or which, though not raised, could have been. 119 Rosset Corp. v. Blimply of New York Corp., 65 AD2d 683 (1st Dep't 1978).

Defense counsel states: Considering the prosecution of the within matter by Plaintiff against Defendants is pursuant to the laws of the State of New York, contrary to the party's agreement, the Plaintiff's action must be dismissed and the judgment vacated and declared a nullity. Affirmation in Support, ¶ 46.

The foregoing notwithstanding, the record reflects that whether or plaintiff is a foreign corporation licensed to do business in the State of New York, that a violation of BCL §1312 is not an impediment to bringing suit but only a requirement that any outstanding or delinquent fees be paid. In addition the failure to raise the defense in the answer or a CPLR 3211 motion to dismiss results in a waiver.

Second, even if defendants were understood to argue that the court incorrectly

applied New York State law instead of California law - rather than asserting an oblique argument involving forum selection merged with a choice of law clause - they have not demonstrated any misapplication of California law or prejudice resulting therefrom.

Finally, the court has reviewed NY State Banking Law §§ 161, 349, and 492 and finds it has no relevance to the business of plaintiff. Section 491(7) defines a sales finance company as a person "engaged... [in] acquiring retail installment contracts, obligations or credit agreements made by and between other parties." See also Personal Property Law § 413(11) (further defining those entering retail installment credit agreements with buyers under Banking Law § 491 as a third-party financing agency engaged in entering into credit agreements with retail buyers or retail sellers).

On the basis of the foregoing it is the decision and order of the court that the motion is denied. Moreover it is ORDERED that any restraint against judgment enforcement by the Sheriff of which ever county in which the equipment on which plaintiff has a security interest is found is vacated as of the date of this order.

Dated: June 9, 2008

*J. B. Warshawsky*  
J.S.C.

**ENTERED**

JUN 11 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE