

Grogan v Gamber Corp.
2009 NY Slip Op 30393(U)
February 19, 2009
Supreme Court, New York County
Docket Number: 112008/03
Judge: Judith J. Gische
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

HON. JUDITH J. GISCHE

PRESENT: _____
Justice

PART 10

Index Number : 112008/2003

GROGAN, DEBRA

INDEX NO. _____

vs

GAMBER

MOTION DATE _____

Sequence Number : 008

MOTION SEQ. NO. _____

RESTORE ACTION TO CALENDAR

MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

3

STENO RECORD

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

FEB 24 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/18/09

HON. JUDITH J. GISCHE *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 10**

-----x
Debra Grogan and Dana Grogan,
Plaintiffs,

DECISION/ORDER

Index No.: 112008/03
Seq. No.: 008

-against-

Present:
Hon. Judith J. Gische
J.S.C.

Gamber Corporation d/b/a Milford
Plaza, Phil Stravino, and Phil
Stravino d/b/a/ PAC Extermination
Services,
Defendants.

FILED
FEB 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----x
Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers

Pltf's n/m (restore) w/HG and JM affirms, exhs	1
Def's Gamber/Milford opp w/AJF affirm, exhs	2
Pltf's reply w/HG affirm	3

-----x
Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for monetary damages arising from allegations by the plaintiffs that they were bitten by bedbugs while they were guests at defendant's hotel. Plaintiffs have now settled with the other named defendant, the hotel's exterminator.

Following motions by each side for summary judgment, the court found triable issues of fact (see Decision, Gische J., 3/26/08). The court ordered plaintiffs to serve a copy of its decision on the Office of Trial Support so the case could be scheduled for trial.

The parties were notified to appear before Hon. Ira Gammerman, the judicial hearing officer presiding over the trial assignment part. At that appearance on September 10, 2008 plaintiffs' counsel made an oral application for an adjournment of at least one month because their trial expert (an entomologist) could not be reached,

plaintiffs' trial counsel was out of the country on vacation, and plaintiffs themselves resided out of state (in Maryland). After hearing the application, Judge Gammerman granted a one week adjournment to September 16, 2008 at which time he expected the parties to proceed with jury selection and the trial.

On September 16th, plaintiffs' counsel was admittedly not ready for trial. However, according to Attorney Merola who has provided his affirmation in support of this motion, Judge Gammerman's courtroom staff was told that another lawyer, Attorney Greenberg, was at the Appellate Division, First Department trying to obtain a stay of the trial. Judge Gammerman dismissed this case for failure to prosecute. He stated on the record that he believed plaintiff had: "intentionally failed to show up today hoping that the case would be dismissed and that she could then make a motion to vacate the dismissal. That's the technique that she is employing to get an adjournment that I denied last week." Tr. 9/16/08 p.3. Hon. Jacqueline W. Silbermann (the administrative judge) so-ordered the transcript of the court minutes which specifically instructed the clerk to enter judgment in favor of the remaining defendant dismissing the action.

Plaintiffs' counsel now moves to vacate the order of Judge Gammerman and have this case restored to the active calendar. Plaintiffs' counsel state that the day before the trial was to start they presented Hon. Martin Schoenfeld with an order to show cause asking for a stay of the trial. Judge Schoenfeld declined to sign the OSC after hearing both sides. Order, Schoenfeld, 9/15/08. Plaintiffs then filed an appeal of the denial of the TRO and they were notified to appear in court on September 16th to address the merits of their motion for a stay of the trial. Thus, according to plaintiffs it was an abuse of power for Judge Gammerman to dismiss the case. The lawyers contend their clients

* 4]
have a meritorious case and that it should be restored to the calendar in the interest of justice.

Discussion and Court's Decision

Plaintiffs have not specified the section of the CPLR they are moving pursuant to. Assuming their application is based upon CPLR § 5015, plaintiffs are required to show they have an excusable default and a meritorious claim. This motion, however, consists entirely of attorneys' affirmations; the plaintiffs have not provided sworn affidavits to support the motion. Carroll v. Nostra Realty Corporation, 54 AD3d 623 (1st Dept 2008).

Even if plaintiffs' failure to provide their sworn affidavits of merit is not necessarily determinative of this motion [see Minter v. Carl M. Loeb, Rhodes and Co., 10 AD2d 27 (1st Dept 1960)], there are other problems with this motion which warrant denial of the relief sought.

Judge Gammerman's decision to dismiss the case for want of prosecution is based upon the plaintiffs not appearing ready for trial on September 16, 2008. Not only was this within his discretion, but his decision and recommendation was made an order of the court by Judge Silbermann, the then presiding Administrative Judge. Thus, plaintiffs are not challenging the judicial hearing officer's decision and recommendation, but Judge Silbermann's order of dismissal and entry of judgment dismissing the case.

Although this court may decide whether a party is entitled to relief from an order or judgment on the basis of an excusable default, the order and judgment at issue is by a court of coordinate jurisdiction (Judge Silbermann, now retired). This motion can also be viewed as a reargument of the order of dismissal. Plaintiffs did not seek relief from Judge Silbermann's order at the time she made it. That order has now been reduced to

a final judgment which was entered September 19, 2008 and served by defendant with notice of its entry. Therefore, the judgment is/was appealable as of right pursuant to CPLR § 5513. It is unrefuted that plaintiffs have filed a Notice of Appeal of Judge Silbermann's order and the issues raised herein will be fully reviewed on appeal.

The could treat this as a motion for leave to reargue pursuant to CPLR § 2221. Such motions are such motions addressed to the court's discretion. Foley v. Roche, 68 AD2d 558, 567 (1st Dept. 1979). Notwithstanding that Judge Silbermann is now unavailable to hear this motion, the court declines to exercise its discretion to hear reargument on a decision made by a justice of coordinate jurisdiction since the plaintiffs have the right to be heard on appeal.

Whether, as defendant claims, the Appellate Division's decision denying the stay sought on September 15, 2008 is determinative of this motion is for the Appellate Division to decide, if it chooses to.


Conclusion

Plaintiffs' motion to restore this case to the trial calendar is denied in its entirety for the reasons stated.

Any relief requested that has not been addressed has not been considered and is hereby expressly denied.

This constitutes the decision and order of the court:

Dated: New York, New York
February 19, 2009

FILED
FEB 24 2009
COUNTY CLERK'S OFFICE
NEW YORK
So Order

Hon. Judith J. Gische, J.S.C.