[* 1]

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

PRESENT: HON. JOAN A. MADDEN PART 11

Justice

THE CADLE COMPANY

INDEX NO. : 111168/08

Petitioner,

MOTION SEQ NO: 002

- v -

WEIL CORNELL MEDICAL COLLEGE,

Respondent.

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 ____

Cross-Motion: [ ] Yes [x] No

Respondent moves, by order to show cause, pursuant to CPLR 2221(d) and CPLR 2221(e) for reargument and renewal of this court decision, order and judgment dated November 12, 2008 ("the original decision"), which granted the petitioner's application for contempt on default to the extent of ordering respondent to comply with a subpoena to produce certain pension plans documents. Petitioner opposes the motion.

Background

Petitioner is the assignee of a judgment that was entered on May 12, 1992 against non-party Robert Millman ("Millman) and his co-defendants in the sum of $240,292.54.[1] Millman is an employee of respondent and is a member of its faculty. By subpoena dated February 26, 2008,

[1]It appears from the papers that after deducting moneys received by Millman's co-defendants in settlements, $125,000 of the judgment remains unpaid.

petitioner directed respondent to produce on March 28, 2008 "[a]ll plan documents and applications relating to the 401k and/or other pension plans or accounts in which Robert Millman...is a participant or otherwise involved, including but not limited to plans administered by TIAA-CREF[2] [and] [a]ll documents, including but not limited to statements, checks paid, deposits, withdrawals, wire transfers, etc., relating to the plans and/or accounts as set forth above."

Respondent did not provide the documents sought by the subpoena, and on August 15, 2008, petitioner commenced this proceeding seeking to hold respondent in contempt. Respondent did not respond the petition for contempt and in its original decision, the court granted the petition on default to the extent of directing respondent to produce the documents demanded in the subpoena at the offices of petitioner's counsel on or before December 15, 2008. Prior to the date that it was required to produce the documents, respondent presented this court with the instant order to show cause seeking leave to reargue and renew the original decision, which the court signed on December 10, 2008 and made returnable on December 23, 2008.

Respondent argues that leave to reargue and/or renew the original decision should be granted and, upon granted such leave, the contempt motion should be denied. In particular, respondent argues that its failure to answer the subpoena was not wilful or deliberate and that it did not respond to the motion for contempt since it was unaware of it, and that it was not properly served with motion. In addition, respondent asserts that the same subpoena is being challenged in a related matter, and that to demonstrate its good faith, respondent will deliver the documents to the office of Marc Elliot ("Elliot"), who is Millman's counsel.

In support of its application for relief, respondent submits the affidavit of its Deputy University Counsel James R. Kahn ("Kahn") who admits receiving the subpoena but states that it was his "understanding" from speaking to Millman's counsel, that Millman did not want the materials produced, and that Elliot would respond to the subpoena (Kahn Aff. ¶ 2). Kahn further states that in November he received the original decision and was unable "after diligent inquiries among office staff to determine who, if anyone, at [respondent] was served with Cadle's

---

[2]TIAF-CREF is the funding vehicle for retirement plans of institutions of higher education.

motion," and that " I was unable to confirm that respondent was served with the motion, [and that] it was not personally served on me" (Id.,¶ ¶ 3,5). He also states that he spoke to Elliot who indicated that he had moved against an information subpoena in a related case but that the court had not ruled on the request.

In opposition to the motion, petitioner asserts that Millman's objection to the subpoena does not obviate respondent's obligation to respond and notes that it informed Kahn of this fact in a letter from its counsel to Kahn dated April 7, 2008. Petitioner also submits an affidavit of service showing that respondent was served personally with the contempt motion on August 25, 2008 at its office by service on respondent's cashier, an authorized person to accept process (See CPLR 311(a)(1)). In addition, petitioner contends that Millman did not challenge the subpoena in a separate case but cross moved to dismiss a separate unrelated action, and in any event, that relief was denied by decision and order of Justice Emily Jane Goodman dated October 16, 2008.

Following oral argument, the parties made a further submission regarding the issue as to whether the documents were subject to discovery since they related to Millman's retirement funds. Respondent argues that Millman's retirement annuities were exempt from execution not under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") ERISA and New York's College Retirement Equities Fund (CREF) Enabling Act, § 9 (providing that "no money provided or renderd by [CREF] shall be subject to assignment pledge or be liable to attachment...to pay any debt or liability of such person). Petitioner counters that it is not seeking to attach or execute upon Millman's retirement assets but only the production of documents related to such assets. Moreover, petitioner asserts that without the documents there is no way to determine if the funds are exempt from execution, for a number of reasons, including fraud, which would void otherwise exempt funds.

Discussion

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp.

successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part, 80 NY2d 1005 (1992) .

"A motion for leave to renew is intended to bring to the court's attention new facts or additional evidence which, although in existence at the time the original motion was made, were unknown to the movant and were therefore not brought to the court's attention." Tishman Constr. Corp. of New York v. City of New York, 280 AD2d 374, 376 (1st Dept 2001)(citations omitted).

Here, as respondent did not oppose the contempt motion which was then granted on default, a motion for reargument or renewal is not the appropriate remedy and, instead, respondent should have moved to vacate the original decision. However, to avoid further motion practice, the court will deem respondent's motion as one to vacate the original decision under CPLR 5015(a)(1).

The courts of this state have "adopted a liberal policy with respect to opening defaults so that the parties may have their day in court." Bellomo v. Shiffman, 157 AD2d 590 (1st Dept 1990); see also, Andino v. DeJesus, 15 AD3d 259, 259-260(1st Dept 2005). In furtherance of this policy, a party may obtain relief from an order or judgment granted on default where it is shown that there is a reasonable excuse for the default, and a meritorious claim or defense. CPLR 5015(a)(1);Bellomo v. Shiffman, 157 AD2d at 590; N& J Foods, Inc. v. Shopwell Plaza Corp., 63 AD2d 899 (1st Dept 1978).

In this case, while the unrefuted affidavit of service submitted by petitioner demonstrates that personal jurisdiction was acquired over respondent, Kahn's sworn statement that he was not aware of the contempt motion provides a reasonable excuse for respondent's default.

The next question is whether respondent has a meritorious basis for opposing the contempt motion. Under CPLR 5251, the "[r]efusal or willful neglect of any person to obey a subpoena ...issued [is] punishable as a contempt of court." The issue of whether contempt sanctions under CPLR 5251 should be applied rests in the sound discretion of the court. See, Dickson v. Ferullo, 96 AD2d 745 (4th Dept 1983). However, in order to find that a refusal or failure to obey a subpoena is a basis for contempt, it must be show that the conduct is intentional or willful. See CPLR 5251; Kanbar v. Quad Cinema Corp., 195 AD2d 412, 414-415 (1st Dept

1993).

Here, based on Kahn's statements in his affidavit that he believed Millman's attorney was objecting to the subpoena in a related case, it cannot be said that respondent's failure to respond to the subpoena constituted an intentional refusal or willful neglect such that contempt sanctions are appropriate. Accordingly, the original decision is vacated.

That being said, however, the court notes that it appears from the record that the relief sought by Millman in the separate case did not directly address whether respondent was required to produce documents in response to the subpoena and that while Millman sought to vacate the restraining notice in the subpoena and sanction petitioner for seeking to restrain the pension assets in subpoena such relief was denied.[3] In addition, while the pension assets that are the subject of the subpoenas may ultimately be found to be exempt from execution under ERISA or New York law, documents related to these assets are discoverable since they are relevant to whether or not the assets are protected under ERISA or State law. See Seidman v. Merchants Bank of New York, 214 AD2d 109, 114 (1st Dept 1995)(noting that documentary evidence confirmed that certificate of deposit was a pension asset protected under ERISA). Notably, none of the cases relied on by respondent hold otherwise.

Accordingly, respondent is directly to comply with the subpoena as directed below, or shall be held in contempt. Moreover, while respondent indicated that it would deliver the documents to the Elliot's law office, assuming that it has done so, respondent is not relieved of its obligation to comply with the subpoena and this decision, order, and judgment.

Conclusion

In view of the above, it is

ORDERED that the court's decision, order and judgment dated November 12, 2008 is hereby vacated and rescinded; and it is

---

[3]In her decision and order dated October 6, 2008, Justice Emily Jane Goodman denied Millman's cross motion to dismiss petitioner's application for contempt based on a lack of standing, granted petitioner's motion to amend, and directed that a hearing be held before a Special Referee with respect to the issue of whether Millman should be held in contempt for failing to make installment payment as directed by the court. The decision did not address plaintiff's request to vacate the restraining notice or for sanctions.

ORDERED and ADJUDGED that respondent shall comply with the Subpoena Duces Tecum for Document Production dated February 26, 2008 by producing the documents demanded in the subpoena at the offices of petitioner's counsel, Vlock & Associates, P.C., 230 Park Avenue, New York, NY 10169 on April 29, 2009 at 10:00 am; and it is further

ORDERED and ADJUDGED that upon proof of respondent's non-compliance with this decision, order and judgment, the court will issue an order holding respondent in contempt and imposing an appropriate sanctions, including costs and penalties.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

DATED: April 17, 2009

J.S.C.

J.S.C.

Check One: [x] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION