| **SLM Capital Corp. v Hemmitt D5H, LLC** |
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| 2009 NY Slip Op 32798(U) |
| November 19, 2009 |
| Supreme Court, New York County |
| Docket Number: 603821/07 |
| Judge: Richard B. Lowe |
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SCANNED ON 12/1/2009

[* 1]

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

PRESENT: HON. RICHARD B. LOWE III, Justice

PART 56

Index Number : 603821/2007

**SLM CAPITAL**

VS.

**HEMMITT D5H, LLC**

SEQUENCE NUMBER : 002

RESTORE ACTION TO CALENDAR

INDEX NO. ____

MOTION DATE 9/23/09

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

n 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

[illegible] WITH ACCOMPANYING MEMORANDUM DECISION

FILED
DEC 01 2009
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: NOV 19 2009

HON. RICHARD B. LOWE, III
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------------------------------------------------------------------X
SLM CAPITAL CORP.,

Plaintiffs,

Index No. 603821/07

-against-

HEMMITT D5H, LLC; RUDOLPH HEMMITT, SR.; RUDOLPH HEMMITT JR., DEBBIE J. HEMMITT; EUGENE DARVIS HEMMITT; RANDLE MATTHEW HEMMITT; and RONALD WAYNE HEMMITT,

Defendants.
----------------------------------------------------------------------X

FILED
DEC 01 2009
NEW YORK
COUNTY CLERK'S OFFICE

**Hon. Richard B. Lowe, III:**

Plaintiff SLM Capital Corp. ("SLM") moves pursuant to 22 NYCRR §208.14(c) and CPLR §§ 2005 AND 5015(a) for an order restoring this case to the calendar.

**Background**

This action was commenced to recover amounts allegedly due under certain loan documents executed in July 2004 for accounts receivable financing plaintiff provided the defendants. Defendant Hemmitt D5H, LLC ("D5H") defaulted under the loan agreement. The individual defendants each executed a guaranty which guaranteed D5H's obligations.

Most of the defendants have never appeared in this action. Individual defendant Rudolph Hemmitt Sr ("Hemmitt") did serve papers on the plaintiff pro se and attempted to answer the complaint on behalf of all of the defendants. Plaintiff, however, filed a motion for a default judgment arguing that Hemmitt, who is not an attorney, could not represent defendants other than himself in this action. It further argued that if the court found Hemmitt's papers sufficient, then the court should award plaintiff summary judgment.

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In a decision dated January 9, 2009, this court denied the motion for either a default judgment or for summary judgment. First, the court found that Hemmitt's submission was sufficient to make an appearance on behalf of himself. As to the other defendants, the decision held that plaintiff did not submit an appropriate affidavit in support of its motion and that the relevant agreements lacked "important information, including the interest rates on advances from SLM to D5H, and the rates to be applied after maturity of the note" (Decision p 8). The motion was therefore denied and the case continued.

At the time of the filing of the complaint and filing of the motion, SLM was represented by the firm of Resiman, Peirez & Reisman, LLP. ("RPR"). Shortly after this court issued its January 9, 2009 decision, RPR affirms it was advised that the firm of Cullen Dykman Bleakley Platt, LLP ("Cullen Dykman") would be taking over the case.

A series of conferences between the court and Cullen Dykman purportedly on behalf of SLM were held. The first conference was held on March 10, 2009. Defendants did not appear. Cullen Dykman indicated it considered filing a motion to renew and/or reargue this court's January 9, 2009 decision. The motion was never filed. Another conference was then scheduled for May 19, 2009. Defendants again failed to appear. Cullen Dykman, having still not decided how to proceed, requested a one month adjournment to decide whether to discontinue the action or whether to go forward with a motion to renew and reargue. The court again adjourned the matter to June 23, 2009. On June 23, 2009, Cullen Dykman appeared and requested yet another adjournment. Counsel indicated that the former attorney (presumably, RPR) had not been willing to turn over the file in this matter. Cullen Dykman was directed to file the anticipated motion to reargue/renew on or before July 14, 2009 and to file a motion to compel against RPR

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on or before June 30, 2009.

As of July 14, 2009, neither motion had been filed. On July 21, 2009, this court's part clerk contacted the firm who was registered with the court through the filing of a notice of appearance as counsel for SLM. This turned out to be RPR. RPR was contacted and advised that an appearance on July 28, 2009 was necessary. The next day, this court also contacted Cullen Dykman and they were directed to appear on July 28, 2009.

On July 28, 2009, Cullen Dykman appeared and RPR did not. To explain the failure to proceed in this action, the firm argued that RPR would not turn over the file in this case and they could not retrieve any records. Furthermore counsel stated that " . . .we were supposed to be substituted and I have been following up with the firm that we were supposed to sign the substitution. They haven't done it. In fact, our records now reveal that we have no business being in this case and we want to give it back to the original firm" (Tr. 7/28/09 4: 121-23). Thereafter, this court dismissed this action due to plaintiff's failure to proceed. (Tr. 7/28/09 5: 6-7).

Now, SLM, through RPR, has filed a motion to vacate the dismissal and to restore the action to the calendar. RPR affirms that SLM definitively wants RPR to represent it. RPR affirms that, after it thought Cullen Dykman took over representation, it always made its files immediately available to the firm (Reisman Affirmation ¶ 3). RPR also recognizes that Cullen Dykman never entered the case as plaintiff's counsel of record and RPR has always been plaintiff's counsel of record (Reismann Affirmation ¶ 4).

Hemmitt has submitted opposition to this motion.

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## Discussion

Plaintiff relies upon 22 NYCRR § 208.14[c] which reads

> [a]ctions stricken from the calendar may be restored to the calendar only upon stipulation of all parties so ordered by the court or by motion on notice to all other parties, made within one year after the action is stricken.

This action was not stricken from the calendar, but rather it was dismissed for failure to comply with the court's orders to proceed with the matter. Therefore, this provision does not apply.

Plaintiff also moves pursuant to CPLR §§ 2005 and 5015(a) which allow the court to relieve a party from a judgment based upon an excusable default. Such excusable default may include law office failure.

"The underlying principle of excusing delays and defaults based on law office failure is that counsel's isolated neglect should not deprive the party of his/her day in court in the absence of prejudice to the opponent" (*CPLR 2005 Commentaries; citing Pollack v Eskander* 191 AD2d 1022, 1023 [4th Dept 1993]; *Jones v RSR Corp*, 135 AD2d 900, 201 [3 rd Dept 1987]). Isolated mistakes due to law office failure may be overlooked, but serious patterns of neglect will not (*see e.g. Chery v Anthony*, 156 AD2d 414, 417 [ 3rd Dept 1989]).

For over six months, several conferences were conducted whereby the court gave numerous directives in an attempt to have the case proceed. During each conference, the "supposed" newly appointed counsel, Cullen Dykman, indicated that it needed more time to decide whether to discontinue or whether to file a reargument/renewal motion. Presumably, this consideration was given in consultation with the plaintiff. It is now apparent that Cullen

Dykman never had authority to appear before this court and to make representations.

RPR claims to have no knowledge that it was never substituted. Cullen Dykman seems to support this because it repeatedly affirmed that it represented to RPR it was appearing on behalf of plaintiff during the firm's attempts to retrieve the file from RPR. On several occasions, Cullen Dykman represented to the court that it could not proceed because RPR would not cooperate. While this lack of knowledge by RPR may be accurate, it is not excusable.

RPR, now seeks to step "back into" the case, have it restored, and to move it forward. In fact, RPR never properly stepped out and has been responsible for this case from the beginning. The proper Notice of Substitution was never filed, therefore RPR was never replaced and Cullen Dykman was appearing without authority. Therefore, there was a failure of properly appointed counsel to appear at court conferences going back as far as March 2009. The failure of this case to proceed timely and in accordance with this court's directives lies at the doorstep of RPR, as it does Cullen Dykman, and the client. However, more than any other RPR is accountable as it acknowledges that "RPR has always been plaintiff's counsel of record" (Resiman Affirmation ¶ 4). This conduct is more than an "inadvertent oversight" (Id ¶ 5).

Generally, it is "undesirable to punish plaintiffs for the failure of their counsel" (*Carven Associates v American Home Assurance Corp.* 84 NY2d 927 [1994]). "But what is undesirable is sometimes also necessary, and is often necessary, as it is here to hold parties responsible for their lawyers failure . . ." (*Id).* The delay in this case due to purported accidental failures of counsel is approaching one year. Numerous hours of the court have been taken up conferencing a matter with counsel which the court now finds out had no authority to even be appearing. Furthermore, the delays are particularly prejudicial as one defendant, Hemmitt, is acting pro se.

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Another defendant is currently stationed in Iraq and the court has concerns as to his ability to respond to this action. Therefore, irregularities and substantial failures by plaintiffs counsel such as those that have occurred in this action cannot be easily overlooked.

Furthermore, the Court of Appeals has held "[i]f the credibility of court orders and the integrity of the judicial system are to be maintained, a litigant cannot ignore court orders without impugnity" (*Kihl v Pfeffer* 94 NY2d 118, 123 [1999]). "[C]ourt-ordered time frames are not options, they are requirements, to be taken seriously by the parties. Too many . . .hours of the courts, are taken up with deadlines that are simply ignored" (*Miceli v State Farm Mutual Automobile Insurance Company* 3 NY3d 725, 726 [2004]).

The above cases are somewhat distinguishable in that they involve a failure by counsel to comply with discovery orders of the court or time lines for filing summary judgment motions. However, the underlying principles are the same and apply in the instant matter. Parties and their lawyers are expected to conduct themselves responsibly and to meet obligations and expectations of the court in order to allow a matter to properly proceed. The idea that RPR never properly had itself substituted as counsel, allowing counsel who had no authority to appear for over six months, is simply not acceptable.

**Conclusion**

Therefore, based on the foregoing, the motion to restore this action to the calendar is

denied and the complaint remains dismissed.

The Clerk of Court is directed to enter judgment accordingly.

Dated: November 19, 2009

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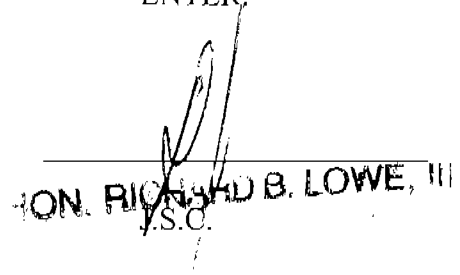

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