

**Flushing Sav. Bank, FSB v East 115th St. Assoc.,
LLC**

2010 NY Slip Op 30829(U)

April 9, 2010

Supreme Court, NY County

Docket Number: 600235/2009

Judge: Carol R. Edmead

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

JUDGE: **HON. CAROL EDMEAD**

PART 35

Index Number: 600235/2009

FLUSHING SAVINGS BANK, FSB

vs EAST 115TH ST. ASSOCIATES, LLC

Sequence Number : 003

VACATE DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE 4/2/10

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No

APR 13 2010

Upon the foregoing papers, It is ordered that this motion

NEW YORK COUNTY CLERK'S OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of defendant's motion to renew is denied, except that to the extent defendant seeks to reargue, reargument is granted; and it is further

ORDERED that upon reargument, the Court's order dated January 7, 2010 is hereby vacated as to defendant Nourallah Baroukhian and the default judgment against defendant Nourallah Baroukhian is hereby vacated; and it is further

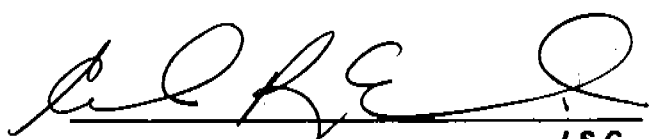
ORDERED that the branch of defendant's motion to vacate the default judgment against East 115th Street Associates, LLC is denied; and it is further

ORDERED that the branch of defendant's motion for sanctions against Jaskan Schlesinger, LLP, Antonia Donohue, Keith M. Corbett and Joannn L. Weiss is denied; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 4/9/10


J.S.C.

HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
FLUSHING SAVINGS BANK, FSB,

Plaintiff,

Index No. 600235/2009

-against-

EAST 115th STREET ASSOCIATES, LLC,
NOURALLAH BAROUKHIAN, MANOCHER
MALEKAN, and YOUSEF YAHUDAIL,

Defendants.
-----X

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

This is an action to repossess business equipment relating to the premises known as 79 East 115th Street, New York (the "premises"), when JNP Group Inc. d/b/a Park Avenue Laundromat and Nektarios Karagianes, defaulted on a Note that was secured by the Security Agreement executed on or about May 7, 2007. According to the Complaint, defendants, Nourallah Baroukhian ("defendant"), Manocher Malekan and Yousef Yahudaii, are principals of defendant, East 115th Street Associates, LLC, and refused to tender possession of the equipment at the premises.

Defendant now moves to renew its prior motion to vacate the default judgment against him and East 115th Street Associates, LLC ("East 115th"). Defendant also seeks sanctions against Jaspan Schlesinger, LLP, Antonia Donohue, Keith M. Corbett and Joannn L. Weiss for misleading the Court.

Factual Background

By order dated June 18, 2009, this Court granted a default judgment against East 115th Street Associates, LLC and defendant, jointly and severally, and directed an assessment of

damages.

On or about November 27, 2009, defendant moved to vacate the default judgment and for sanctions against plaintiff's counsel. By order dated January 7, 2010, this Court denied defendant's motion (the "January 7, 2010 Order"), which is the subject of defendant's instant renewal motion, and directed an assessment on damages on February 22, 2010.

Defendant now argues that he was unaware of the February 22, 2010 hearing date and that the Court did not review his Reply Affidavit in the underlying motion.

Defendant argues that since plaintiff's counsel Joan L. Oweis ("Oweis") sent him the letter rescheduling the hearing on February 22, 2010, the earliest he would be able to receive the letter would be on February 23, 2010 at 10:00 a.m., and therefore he would not be able to attend any hearing on February 23, 2010 at 9:30 a.m. Defendant attests that on February 25, 2010, he received a letter from Oweis indicating that the hearing that was scheduled for Monday, February 22, 2010 at 9:30 a.m. was adjourned to Tuesday, February 23, 2010 at 9:30 a.m.. Defendant called Oweis and asked her, *inter alia*, why she did not send a letter before the hearing on Monday February 22, 2010. Oweis told defendant that she faxed the letter to counsel for East 115th, at which time, defendant reiterated to Oweis that, *inter alia*, East 115th is not owner of the property and that she had to send all correspondence to defendant's attention "because this case is prose. [sic]"

On March 3, 2010 defendant received another letter from Oweis dated February 25, 2010 which indicated that the Court "made her decision on January 07, 2010." Defendant became aware of this decision almost two months after the Court issued its decision, instead of within the 20-day period ordered by the Judge. Defendant maintains that Oweis "wants to keep me in [the]

dark . . . so that I can not act in a timely manner . . .” If defendant was aware of the Court’s January 2010 decision, defendant would have promptly taken action on that date instead of in March. Defendant went to Court on March 3, 2010 and discovered that his Reply Affidavit filed with the Court on January 6, 2010 (Exhibit DD) had been stamped on January 8, 2010 (Exhibit CC) and was not in the file at the time of the Court’s decision. Thus, defendant requests that the Court consider defendant’s Reply Affidavit and then render a new decision.

Defendant also asserts that neither he nor East 115th, Manocher Malekan or Yousef Yahudaii own the premises.

In opposition, plaintiff argues that defendant fails to set forth a basis for renewal under CPLR Rule 2221(e) as defendant has failed to present any new facts or change in the law to support a motion to renew. Although defendant claims that the Court could not have considered his Reply Affidavit because the Order at issue was dated January 7, 2010, the January 7, 2010 Order indicates that the Court considered the Reply Affidavit in making its determination. The January 7, 2010 Order clearly indicates that the "Motion Date" was "1/6/10." It appears that plaintiff’s underlying Notice of Motion dated November 27, 2009 in this matter, which indicates that the motion was returnable on December 16, 2009, was adjourned by the Court *sua sponte* to January 6, 2010 to accommodate the Reply Affidavit. Even if the Court did not consider such Reply Affidavit, it was well within its purview to do so as the defendant not only failed to demand any time to submit such Reply Affidavit, in accordance with CPLR 2214(b), and such Reply Affidavit was submitted three weeks after the December 16, 2009 return date. Defendant’s Notice of Motion made no demand pursuant to CPLR 2214(b). In turn, as such Reply Affidavit was submitted three weeks after the notice on return date, and the record does not reflect that

Defendant sought any adjournment in order to submit such Reply; the Court may have properly rejected consideration of such submission. Defendant provides no justification for either his failure to demand an opportunity to submit the Reply or the extensive delay in its filing.

Even assuming, the information supplied by defendant can be considered "new" and he has made the requisite showing as to why it was not presented in the first instance, this information is neither material nor relevant to the instant case. The only thing that the Court may consider as "new" could be defendant's allegation as to the Affidavit of Service sworn to on February 10, 2009. While defendant correctly points out that the process server could not have attempted to serve process on February 27, 2009 if the Affidavit of Service was filed with the Court on February 13, 2009, this argument also fails. As stated in the accompanying affidavit of Lisa Montefusco ("Montefusco") sworn to on March 11, 2010, this was merely a typographical error and service was attempted on January 27, 2009, not February 27, 2009. Thus, service was effectuated on defendant within the parameters of CPLR 308(4) and plaintiff has submitted an Amended Affidavit of Service which reflects the corrected date.

As to defendant's notice on February 22, 2010 of the damages hearing, on the morning of February 22, 2010, plaintiff's counsel's office was contacted by J.H.O. Ira Gammerman's chambers as no parties had appeared for the scheduled hearing. Plaintiff's counsel explained that it was unaware of the Court's January 7, 2010 Order and had no knowledge of the scheduled hearing. The Court instructed plaintiff to appear the following day for the hearing. Plaintiff's counsel's office immediately informed defendant of the hearing by way of letter and facsimile; the letters were addressed to defendants "c/o Lackey & Steinberg, PC" and their PO Boxes, and faxed to Lackey & Steinberg, PC.

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In reply, defendant questions plaintiff's counsel's familiarity with this action, and adds that plaintiff's opposition papers were stamped by the IAS Motion Support Office on December 15, 2009 (Exhibit 2) and should have been submitted on December 16, 2009 to room 130; however, it was not filed until January 8, 2010. Defendant states "It is impossible for this to be a coincidence where both papers (my January 6, 2010 Reply and Plaintiff's Affirmation [in opposition] to Motion to Vacate Default Judgment) were put off to be filed until January 8, 2010. If I did not have my copy stamped on January 6, 2010 (which was the date of filing Reply given to me on December 16, 2009 in room 130) the plaintiff would have attempted to argue that all papers just happened to be filed that day, so if someone was to look at the papers later on they would think that all the papers were filed correctly on January 8, 2010 rather than on January 6, 2010. Defendant insists that since the Court issued its decision on January 7, 2010 "and Reply papers were filed January 8, 2010," it was not possible for the Court to have reviewed his Reply Affidavit. Plaintiff attempts to leave defendant in the dark by sending all correspondents to the vacant Park Ave. Laundromat address of 79 East 115th Street, New York, NY, rather than to defendant's correct address.

Defendant also argues that plaintiff will discover that at the time of its loan to Park Ave Laundromat, the age of the subject washers and dryers was more than ten years and were worthless, and no honest loan processor would accept the machinery as collateral. The Park Ave Laundromat was not defendant's tenant or the owner of washers and dryers. Even if Park Ave Laundromat was defendant's tenant, plaintiff only had 30 days to take equipment. Instead they came seven (7) months after the store became vacant.

Further, plaintiff's opposition indicates that defendant was served on February 9, 2009

[* 7]

and February 13, 2009, which are different than the times stated in Alvin Gonzalez's Affidavit of Service (February 27, 2009 and February 7, 2009 and February 9, 2009). If Gonzalez had gone to the premises on January 27, 2009, the original Affidavit of Service is supposed to be dated January 27, 2009 and not February 9, 2009. And, Montefusco's Affidavit is false, contains numerous discrepancies, and is thus worthless.

Discussion

A motion for leave to renew under CPLR 2221 "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion."

The motion to renew, when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v Wolf*, 194 Misc 2d at 133, 751 NYS2d 707; D. Siegel New York Practice § 254 [3rd ed. 1999]). A motion to renew, "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*Belny v Wynyard*, 132 AD2d 190, 522 NYS2d 511, lv. dismissed 71 NY2d 994, 529 NYS2d 277).

To the extent defendant argues that the Court failed to consider his Reply Affidavit prior to issuing its January 7, 2010 Order, defendant requests leave to renew. Defendant's claim in this regard is based on the fact that his Reply Affidavit was stamped "filed" on January 8, 2010, *after* the Court issued its determination. However, defendant's conclusion that this Court could

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not have read his papers is flawed.

Defendant's contention that the Court could not have reviewed his Reply Affidavit is based on the erroneous belief that the filing of such papers on "January 8" indicates that the Court did not previously review them. Defendant is unaware of the process by which motion papers are processed for Court determination.

The stamp by the County Clerk's Office is not to be confused by the stamp placed on the papers by the Motion Support Office (*i.e.*, room 130), which places such stamp on papers prior to their submission to the Court for review. The Motion Support Office's stamp on defendant's Reply Affidavit, indicating "Received January 6, 2010" clearly demonstrates that the Motion Support Office received defendant's Reply Affidavit for submission to the Court and that the Court had in its possession such Reply Affidavit at the time it rendered its decision.

It is not until *after* the Court issues its decision, that all of the motion papers reviewed by the Court as well as the resulting Order, are returned to the County Clerk's Office and stamped by the County Clerk's Office as received by that office. Thus, once the Court completed its determination, all of the papers submitted to it by the Motion Support Office were then returned to the County Clerk's Office the following day, *i.e.*, January 8, 2010, which explains the January 8, 2010 date stamp on defendant's Reply Affidavit. This is made evident by the fact that defendant's initial motion, which the Court must have had in order to issue its decision, is likewise stamped January 8, 2010, the day after the Court's decision. Surely, the Court had this document at the time it issued its decision. Thus, the County Clerk's Office stamp of January 8, 2010 on the Reply Affidavit does not establish that the Court did not consider these papers. Thus, that defendant's Reply Affidavit was not in the County Clerk Office's file until January 8,

2010 is inconsequential, since it is not the County Clerk that rendered the decision, but the Court. The Motion Support Office, which received defendant's Reply Affidavit on the day before the decision was issued, submitted defendant's Reply Affidavit to the Court along with the defendant's motion and plaintiff's opposition papers, which were all stamped by the Motion Support Office prior to January 6, 2010.

Therefore, plaintiff failed to establish that his Reply Affidavit constitutes new facts which were not considered by the Court.

Further, the documentary evidence including the Work Ticket prepared by the process server indicates that the first attempt at service upon defendant was made on January 27, 2009. Notably, appearing immediately under this date is a handwritten notation that additional service attempts were made on February 7 and 9, 2010. The Work Ticket coupled with Montefusco's affidavit explains the discrepancy on the original affidavit as to the service attempts made prior to the nail and mail service effected upon defendant on February 9, 2010. Therefore, leave to renew is denied.

However, to the extent defendant argues that the Court failed to consider or *overlooked* his Reply Affidavit, such argument sounds in reargument, and thus, reargument is granted.

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept] *lv. denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]).

Reargument is not designed to afford the unsuccessful party successive opportunities to reargue

issues previously decided (*Pro Brokerage v. Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588)" (*William P. Pahl Equipment Corp. v Kassis, supra*). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

Defendant's Reply Affidavit indicates that the additional mailing requirement under CPLR 3215 was effectuated by mailing the papers to defendant at an incorrect zip code. The notice and demand upon defendants indicate that the zip code for the premises is 10029. In his Reply Affidavit, defendant asserts that the papers were mailed to him and 115th Street at "79 East 115th Street, New York, New York 11793," and 11793 is the incorrect zip code (*see New York Housing Authority v Fountain*, 172 Misc 2d 784, 660 NYS2d 247 [N.Y. City Civ. Ct. 1997]) ("The purpose of the zip code system is to "facilitate efficient mail processing". . . . According to USPS, the lack of zip code is significant as "nondelivery of mail can result from ... (b) Incomplete, illegible, or incorrect address ...") *citing Avakian v De Los Santos*, 183 AD2d 687, 688, 583 NYS2d 275 [2d Dept 1992](an improperly addressed mailing does not comply with the CPLR 308 where the affidavit of service did not include the defendant's zip code)). Arguably, plaintiff was in possession of defendant's "correct address from [his] two different certified mail[ings]." (Reply Aff. p. 11). Further, the nailing and mailing of the summons and complaint was upon the gate of a vacant laundromat, which could not and was not defendant's "usual place of abode" as stated in the affidavit of service. According to defendant, there is no door at the premises, but a closed metal gate.

Further, defendant's Reply Affidavit indicates that neither JNP Group Inc. nor Park Avenue Landlord, the purported signatories to the Security Agreement giving rise to plaintiff's alleged interest in the equipment, were never defendant's tenants. In fact, argues defendant, plaintiff pursued a lawsuit against them under index no. "09/000509". Further, pursuant to his lease with his tenant, the tenant has up to 30 days to take the equipment from the premises. According to his lease with his last tenant, any merchandise, fixtures, or store equipment or any other property left in the demised premises after the premises have been vacated for 30 days shall become the property of the landlord/defendant. Defendant also challenges the sufficiency of the UCC-1 filing statement as incomplete.

Therefore, upon reargument, the Court vacates this Court's Order, dated January 7, 2010, and the default judgment against defendant Nourallah Baroukhian.

However, the 115th Street, a limited liability corporation, must appear by an attorney (CPLR § 321; *Jimenez ex rel. Disla v Brenillee Corp.* 48 AD3d 351, 852 NYS2d 94 [1st Dept 2008]) and defendant cannot assert any rights on East 115th Street's behalf.

As to defendant's request for sanctions, such request is denied. Part 130 of the Uniform Rules of the Chief Administrator (22 NYCRR 130-1.1 et seq.), permits the court to impose sanctions for conduct if it is found to be "frivolous," *i.e.*, if (1) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false (130-1.1[c]; *Solow v Bethlehem Steel Corp.*, 204 AD2d 227, 612 NYS2d 402 [1st Dept 1994]).

The facts alleged by defendant fail to establish that plaintiff's counsel's conduct was completely without merit in law or fact or was undertaking to delay this action or to harass or maliciously injure defendant.

Thus, sanctions are unwarranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of defendant's motion to renew is denied, except that to the extent defendant seeks to reargue, reargument is granted; and it is further

ORDERED that upon reargument, the Court's order dated January 7, 2010 is hereby vacated as to defendant Nourallah Baroukhian and the default judgment against defendant Nourallah Baroukhian is hereby vacated; and it is further

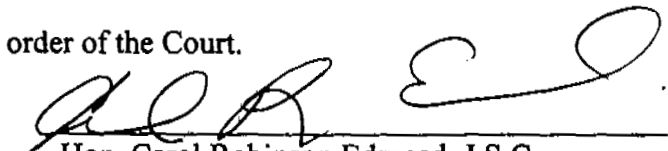
ORDERED that the branch of defendant's motion to vacate the default judgment against East 115th Street Associates, LLC is denied; and it is further

ORDERED that the branch of defendant's motion for sanctions against Jspan Schlesinger, LLP, Antonia Donohue, Keith M. Corbett and Joannn L. Weiss is denied; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 9, 2010



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
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