

**Case Constr. Co., Inc. v Teams Hous. Dev. Fund Co.,  
Inc.**

2011 NY Slip Op 30196(U)

January 25, 2011

Supreme Court, New York County

Docket Number: 115211/2007

Judge: Paul G. Feinman

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

PRESENT: FEINMAN PAUL G. FEINMAN  
Justice

PART 12

CASE CONSTRUCTION

- v -

TEAMS HOUSING

INDEX NO. 115211/07  
MOTION DATE 1/17/10  
MOTION SEQ. NO. 2  
MOTION CAL. NO. \_\_\_\_\_

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 \_\_\_\_\_

PAPERS NUMBERED
<u>1</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

~~NOTED TO BE FILED IN ACCORDANCE WITH THE RULES OF THE SUPREME COURT OF THE STATE OF NEW YORK~~

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

**FILED**

JAN 27 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/25/2011

[Signature]

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: CIVIL TERM: PART 12

-----X

CASE CONSTRUCTION CO., INC.,  
Plaintiff,

Index Number 115211/2007  
Submission Date Nov. 17, 2010  
Mot. Seq. No. 002

-against-

TEAMS HOUSING DEVELOPMENT FUND COMPANY,  
INC., HARLEM TEAMS FOR SELF-HELP, INC.,  
HOWARD LOEWENTHIEL, INC., UNITED STATES  
DEPARTMENT OF HOUSING AND URBAN  
DEVELOPMENT, NEW YORK STATE WORKER'S  
COMPENSATION BOARD and NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD,  
Defendants.

**DECISION & ORDER**

-----X

**For Plaintiff:**  
Certilman Balin Adler & Hyman, LLP  
By: James A. Rose, Esq.  
90 Merrick Avenue, 9<sup>th</sup> Floor  
East Meadow, NY 11554  
516-296-7000

**For Defendants:**  
no appearance

**FILED**  
JAN 27 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

Papers considered in review of this motion for a default judgment:

Papers	Numbered
Order to Show Cause and Annexed Affidavit and Exhibits.....	1

**PAUL G. FEINMAN, J.:**

Plaintiff Case Construction Co., Inc. moves for an order pursuant to CPLR 2221 (f) to reargue and/or renew this court's decision and order dated March 10, 2009, which granted plaintiff's motion for a default judgment as to defendants Teams Housing Development Fund Company, Inc., Harlem Teams for Self-Help, Inc., and the New York City Environmental Control Board and denied it as to defendant Howard Loewenthiel, Inc. ("Loewenthiel"). Upon renewal or reargument, plaintiff seeks to enter a default judgment against Loewenthiel, foreclose on a lien pursuant to New York Lien Law § 48 (NY CLS Lien § 48) against defendant, and to

have this matter referred to a referee to compute the sum due to plaintiff.<sup>1</sup> The motion is unopposed. For the reasons provided below, the motion is denied in its entirety.

**Background**

In this action seeking to foreclose on a mechanic’s lien, plaintiff moved for a default judgment against defendants Teams Housing Development Fund Company, Inc., Harlem Teams for Self-Help, Inc., Howard Loewenthal, Inc., and the New York City Environmental Control Board (Plaintiff’s Affirm. ¶ 5). By a decision and order dated March 10, 2009, and filed March 11, 2009, this court granted the motion as to all defendants, except Loewenthal. As to Loewenthal the court observed that the copy of the affidavit of personal service submitted in support of the motion was not properly notarized because it lacked the notary’s full name, license, and seal (Decision & Order at 2). Furthermore, although plaintiff also attached another affidavit indicating that service had been made through the Secretary of State, plaintiff failed to attach any proof demonstrating compliance with the additional notice requirements of CPLR 3215 (g) (4) (Decision & Order at 2).

More than 18 months later, on November 8, 2010, plaintiff moved by order to show cause for leave to reargue or renew the prior motion (Plaintiff’s Order to Show Cause). Plaintiff argues that the court “overlooked and/or misapprehended critical facts in the case such that if duly considered, along with the new facts of the case not offered on the prior motion,” would have changed the court’s decision (Plaintiff’s Affirm. ¶ 24). Plaintiff argues that the affidavit of service was in fact properly notarized but “[i]t is possible that the copy provided to the Court

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<sup>1</sup>Plaintiff also moves to extend the notice of pendency related to this action for three years from November 14, 2010. By order dated November 9, 2010, this court extended the notice of pendency until further order of the court (Doc. 1, Order to Show Cause).

[\* 4]

contained in plaintiff's Default Judgment Motion was not clear enough and/or dark enough for the Court to properly read the affidavit and the notary's information" (Plaintiff's Affirm. ¶ 30). In support plaintiff attaches a copy of the affidavit of service, which bears a date-stamp from the County Clerk's Office indicating that the document was filed December 20, 2007 (Plaintiff's Affirm., Ex. G). Unlike the affidavit of service submitted on the prior motion (Plaintiff's Original Motion, Ex. D), the notary's name and license number is included, but the presence of a different date stamp from the County Clerk's Office suggests that the affidavit of service attached to the instant motion is not merely a better copy of the document originally submitted, but instead is a different document altogether.

Plaintiff further argues it complied with the additional notice requirements of CPLR 3215 (g) (4) on December 10, 2008, proof of which was filed on December 15, 2008 (Plaintiff's Affirm. ¶ 33 and Ex. H). According to the affirmation of plaintiff's attorney in support of this motion, plaintiff neglected to include proof of additional notice on the original motion because plaintiff's attorney's "understanding of the law that such was not required in the context of a motion for a default judgment, but was only required to be filed at least twenty (20) days prior to the entry of a judgment" (Plaintiff's Affirm. ¶ 34). However, it should be noted that the address provided in the affidavit of mailing of additional notice provides a different zip code than that provided in plaintiff's affidavit of personal service.

#### *Analysis*

Pursuant to CPLR 2221 (d) (2), a motion for leave to reargue must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." A motion

\* 5]

nominally seeking both renewal and reargument that is not supported by facts unavailable at the time of the original motion is merely a motion for reargument (*Rosado v Home Depot*, 4 AD3d 204, 205 [1<sup>st</sup> Dept 2004]; *Lichtman v Mount Judah Cemetary*, 269 AD2d 319, 320 [1<sup>st</sup> Dept 2000]; *Williams v City of New York*, 19 AD3d 251, 252 [1<sup>st</sup> Dept 2005]). Under CPLR 2221 (e), an “application to renew must be based upon additional material facts which existed at the time that the prior motion was made but which were not then known to the party seeking leave to renew....” (*Cuccia v City of New York*, 306 AD2d 2, 2-3 [1<sup>st</sup> Dept 2003]). A request for renewal should be rejected when the moving party fails to offer a reasonable excuse for not submitting the new material on the previous motion (*Chelsea Piers Mgt. v Forest Elec. Corp.*, 281 AD2d 252, 252 [1<sup>st</sup> Dept 2001]) (“Renewal is not available as a ‘second chance’ for parties who have not exercised due diligence in making their first factual presentation”). “While the statutory prescription to present new evidence need not be applied to defeat substantive fairness, such treatment is available only in a rare case, such as where liberality is warranted as a matter of judicial policy, and then only where the movant presents a reasonable excuse for the failure to provide the evidence in the first place” (*Henry v Peguero*, 72 AD3d 600, 602 [1<sup>st</sup> Dept 2010] [*internal citations omitted*]).

Plaintiff seeks both reargument and renewal employed the combined motion procedure set out in CPLR 2221 (f), which requires the movant to identify separately and support separately each item of relief sought. Although the plaintiff has failed to adhere to this statutory directive, the court will nonetheless address each type of relief as if the motions had been made separately (CPLR 2221 [f]).

**1. *Reargument***

In support of reargument, plaintiff incorrectly argues that the court, in its March 10, 2009, order, misapprehended the facts in holding that plaintiff failed to submit a properly notarized affidavit of personal service in support to defendant Howard Loewenthal, Inc. and misapprehended the law in holding that proof of mailing of additional notice under CPLR 3215 (g) (4) must be submitted in support of an application for a default judgment. Accordingly, plaintiff's motion is denied with respect to its request for reargument.

**2. Renewal**

Plaintiff argues that renewal should be granted on the basis of facts provided by the revised affidavit of personal service and affidavit of mailing of additional notice under CPLR 3215 (g) (4) for defendant Howard Loewenthal, Inc. Although each of these documents contains facts that, by plaintiff's own admissions, were available at the time of the original motion for default judgment, plaintiff has not offered a sufficient reasonable justification for failing to include these with its original motion papers (*see Henry v Peguero*, 72 AD3d at 602). The multiple omissions from plaintiff's initial filings, along with its acknowledged misunderstandings of the applicable law, demonstrate a lack of due diligence in making its initial fact presentation. This lack of diligence extends even to papers submitted in support of the instant motion, where plaintiff has attached an affidavit of mailing of additional notice pursuant to CPLR 3215 (g) (4) indicating that the notice was sent to an incorrect address. As such, this is not a "rare case" where substantial fairness allows the court to take a relaxed position towards CPLR 2221 (e)'s requirements by permitting renewal on the basis of facts which should have been submitted with the initial motion. Rather, this is an example of a movant looking for a second chance because it failed to exercise due diligence in bringing the motion the first time.

Accordingly, it is:

ORDERED that the motion of plaintiff for leave to renew and/or reargue its motion for default judgment is denied in its entirety.

Dated: January 25, 2011  
New York, New York

*Saul A. Gennaro*  
J.S.C

**FILED**

JAN 27 2011

NEW YORK  
COUNTY CLERK'S OFFICE