

**Matter of Konica Minolta Bus. Solutions U.S.A., Inc.
v City of New York**

2011 NY Slip Op 31668(U)

June 21, 2011

Supreme Court, New York County

Docket Number: 107485/2010

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 107485/2010
KONICA MINOLTA BUSINESS
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE 3/18/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2
3, 4-5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided by the annexed*
Memorandum decision + Order.

FILED

JUN 22 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 6/21/11

JANE S. SOLOMON c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----x
In the Matter of the Application of

KONICA MINOLTA BUSINESS SOLUTIONS
U.S.A., INC.,

Petitioner/Plaintiff,

For a Judgment Pursuant to Article 78
and § 3001 of the Civil Practice Law and Rules,

-against-

Index No.: 107485/10

THE CITY OF NEW YORK, acting by and
through the DEPARTMENT OF CITYWIDE
ADMINISTRATIVE SERVICES, FACSIMILE
COMMUNICATIONS INDUSTRIES INC. d/b/a
ATLANTIC BUSINESS PRODUCTS, T & G
INDUSTRIES INC. d/b/a TGI OFFICE
AUTOMATION, CANON BUSINESS SOLUTIONS,
INC. and the XEROX CORPORATION,

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Respondents/Defendants.

-----x
SOLOMON, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition. In motion seq. no. 002, respondent/defendant Xerox Corporation (Xerox) moves, pursuant to CPLR 2221, for leave to reargue that portion of this court's Order and Judgment dated January 19, 2011 which vacated awards to Xerox on Item 63 (Class 34), Item 65 (Class 36), and Item 67 (Class 38) of Bid No. 1000257 for the purchase and rental of multi-functional copy machines by the City of New York. In motion seq. no. 003, Xerox seeks the same relief pursuant to CPLR 5015. In response to this second motion, respondent/defendant Canon Business Solutions, Inc. (Canon) cross-moves for costs and attorneys' fees, contending that the second motion is frivolous within

the meaning of 22 NYCRR 130-1.1 (a). For the reasons set forth below, all three motions are denied.

Petitioner Konica Minolta Business Solutions, U.S.A., Inc. (Konica) commenced this hybrid Article 78/declaratory judgment action on June 8, 2010, seeking to have set aside awards by the City of New York, Department of Citywide Administrative Services (DCAS) to competing vendors under Bid No. 1000257. Konica filed an amended petition on July 30, 2010 adding the other bidders, including Xerox, as respondents/defendants. Only DCAS, Cannon and T & G Industries, Inc. answered the amended petition.

While upholding the majority of DCAS's awards to Xerox, Canon and the other winning bidders of Bid No. 1000257, the court vacated three awards to Xerox as non-responsive and remanded the matter to the City to award the contracts for these classes to the next lowest qualified bidder. It appears that Canon is the next lowest qualified bidder.

The judgment was entered on January 25, 2011; notice of entry was served by the petitioner on January 26, 2011. For unknown reasons, an amended notice of entry was served on February 5, 2011. On March 2, 2011, after seven months of inaction, Xerox served the parties with a notice of appeal and motion for leave to reargue. Both Canon and DCAS objected on the ground that Xerox had defaulted in answering the amended petition and could not seek reargument pursuant to CPLR 2221. Shortly thereafter, Xerox served the second motion for relief from the judgment pursuant to CPLR 5015.

Reargument is clearly improper. Because Xerox did not appear in this proceeding, submitted no papers and made no arguments in opposition to the amended petition, it is in default and, cannot seek leave to reargue the court's decision. *Parker v McMahon*, 53 AD2d 1034 (4th

Dept 1976) (“defaulting party may not appeal or move to reargue . . . “); accord *Kurth v Susskind*, 200 AD2d 572, 573-74 (2d Dept 1994). The fact that the court ruled on the merits of the amended petition based on the opposition papers submitted by DCAS does not justify an attempt by Xerox at this late stage to change the court’s mind. See *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992) (reargument is not designed to allow parties a second bite at the apple or to assert new arguments).

A party seeking to vacate a judgment pursuant to CPLR 5015 (a) (1), must show both a reasonable excuse for the default and a meritorious defense. *Benson Park Assoc., LLC v Herman*, 73 AD3d 464, 465 (1st Dept 2010); *Mutual Mar. Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417, 419 (1st Dept 2007). Xerox asks this court to excuse its previous default on the basis that Xerox made a strategic decision to rely on DCAS to represent its interests in this lawsuit. This is not an excusable default. See *Boyce v Rinehart*, 263 AD2d 377, 378 (1st Dept 1999) (vacatur of order denied where party’s decision not to oppose motion was a “strategic decision”). Indeed, the case law suggests that the default must be “unintentional” in order to be excusable. *Bell v Toothsavers, Inc.*, 213 AD2d 199, 200 (1st Dept 1995); *Lirit Corp. v Laufer Vision World*, 84 AD2d 704 (1st Dept 1981). If the court were to find an excusable default here, there would be no incentive for a private party in an Article 78 proceeding to appear and argue its position unless and until the government agency whose actions are being challenged is unsuccessful in upholding its determination. This type of piecemeal litigation should not be encouraged.

Nor has Xerox shown a meritorious defense. Xerox challenges the court’s ruling that the evidence petitioner offered in support of the amended petition demonstrated that at least one model successfully bid by Xerox for Classes 34, 36 and 38, namely the Xerox WorkCentre 5150

Copier/Printer, is a "Factory Produced New Model," and does not meet the bid solicitation requirement that the equipment be "standard new equipment." The bid solicitation defined "new equipment" as "equipment which is shipped from the place of manufacture to the city, . . . , the equipment and all of its parts, have not been used previously, the City being the first user." Judgment, at 10.

The product literature submitted by petitioner identified three types of Xerox equipment: (1) Newly Manufactured Equipment; (2) Factory Produced New Model; and (3) Remanufactured Equipment. Xerox Memo. of Law, Ex. 2. A Factory Produced New Model is "newly serialized equipment with new features and/or functions, it is disassembled to a Xerox predetermined standard and contains new, reprocessed and/or recovered parts that meet product specifications." *Id.*

Notably Xerox does not offer any proof that its WorkCentre 5150 does not contain any "reprocessed" or "recovered" parts. Instead, Xerox only claims in its brief that the its product literature establishes, at most, that a Factory Produced New Model *could* contain such parts because of the term "and/or." Unlike the definition of Newly Manufactured Equipment, it is clear that a Factory Produced New Model is not likely to be fully comprised of only new parts. Konica had alleged in its Verified Petition that "Xerox bid on Bid No. 1000257 using products that were not New Equipment under the Terms and Conditions" and that "Xerox's product literature concedes that its equipment contains 'reprocessed and/or recovered parts.'" Amended Petition, ¶¶ 25, 26. Xerox fails to submit to a verified answer denying or challenging these allegations, and they are deemed admitted. CPLR 3018.

Canon's request for costs and attorneys' fees pursuant to 22 NYCRR 130-1.1 is denied.

The motions may lack merit, but not to the extent that Xerox engaged in frivolous conduct as defined in 22 NYCRR 130-1.1 (c), warranting an award of costs and attorneys' fees to Canon.

For the foregoing reasons, it is hereby

ORDERED that the motion (seq. no. 002) of Xerox Corporation for leave to reargue the court's Order and Judgment dated January 19, 2011 is denied; and it is further

ORDERED that the motion (seq. no. 003) of Xerox Corporation for relief from the court's Order and Judgment dated January 19, 2011 is denied; and it is further

ORDERED that the cross motion of Canon Business Solutions, Inc. for an award of costs and attorneys' fees against Xerox Corporation is denied.


Dated: June 21, 2011

FILED

JUN 22 2011

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J.S.C.

JAMES G. SOLIMON