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

PRESENT: BARBARA JAFFE Jaffe J.S.C. Justice PART 5

Index Number : 111551/2007

POGROSZEWSKI, ADAM

VS.

AFONG REALTY

SEQUENCE NUMBER : 006

RENEWAL

CAL # 81

INDEX NO. 111551/07

MOTION DATE 4/19/11

MOTION SEQ. NO. 006

MOTION CAL. NO. 81

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

JUL 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/8/11
JUL 07 2011

BARBARA JAFFE J.S.C.
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 5

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ADAM POGROSZEWSKI,

Plaintiff,

-against-

AFONG REALTY CORP. and THE CITY OF NEW YORK,

Defendants.

----------x

Index No.: 111551/07

Motion Date: 4/19/11
Motion Seq. No. 006
Motion Cal. No. 81

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

For plaintiff:
Marcelo A. Buitrago, Esq.
The Law Offices of Jeffrey B. Melcer, PLLC
39 Broadway, Suite 2230
New York, NY 10006
212-980-8470

For defendant Afong:
Youngmin Campbell, Esq.
Malapero & Prisco, LLP
295 Madison Avenue, 4th Floor
New York, NY 10017
212-6661-7300

By notice of motion dated January 24, 2011, plaintiff moves pursuant to CPLR 2221 for an order vacating an order of the court dated October 26, 2010, restoring his complaint as to defendant Afong Realty Corporation (Afong), and permitting him to file a note of issue. Afong opposes.

I. BACKGROUND

On April 19, 2007, plaintiff tripped and fell on a raised and uneven sidewalk in front of 53-27 Metropolitan Avenue in Maspeth, New York, premises owned by Afong. (Affirmation of Marcelo A. Buitrago, Esq., dated Jan. 24, 2011 [Buitrago Aff.], Exhs. B. C).

On August 20, 2007, plaintiff served Afong with a summons and complaint, asserting claims for negligence. (*Id.*, Exh. B). Afong joined issue with service of its answer on October 15, 2007. (*Id.*, Exh. A). On October 31, 2007, plaintiff served Afong with a verified bill of particulars (*id.*, Exh. C), and on June 24, 2008, an examination before trial (EBT) of plaintiff was

conducted (*id.*, Exh. F).

Plaintiff also asserted negligence claims against City arising from his accident by summons and verified complaint dated June 12, 2008.

On December 26, 2008, plaintiff filed a note of issue in his suit against Afong. (Buitrago Aff., Exh. G). By notice of motion dated December 31, 2008, Afong moved to vacate it on the ground of outstanding discovery, and by order dated March 18, 2009, the motion was granted and a compliance conference ordered. (*Id.*, Exh. H). By order dated April 13, 2009, plaintiff was granted leave to re-serve the note of issue, having provided the outstanding discovery. (*Id.*, Exh. I).

By order dated September 16, 2009, plaintiff's suit against Afong was consolidated with his suit against City. (*Id.*, Exh. J). On November 24, 2009, a compliance conference was held, during which a stipulation was signed requiring plaintiff to appear for an EBT on December 10, 2009. (Affirmation of Youngmin O. Campbell, Esq. in Opposition, dated Feb. 18, 2011 [Campbell Aff. in Opp.], Exh. A). On February 23, 2010, another compliance conference was held, during which I so ordered a stipulation requiring plaintiff to appear for an EBT on April 15, 2010, as he had failed to appear for it on December 10, 2009. (*Id.*, Exh. B). A third compliance conference was held on April 20, 2010, and as plaintiff had failed to appear for an EBT again, I signed an order requiring him to do so on June 3, 2010 and providing that this date is final and that "[f]ailure to appear will be deemed willful and contumacious conduct which may result in sanctions, including the striking of pleadings or preclusion." (Buitrago Aff., Exh. K). On June 15, 2010, during a fourth compliance conference, I signed an order requiring plaintiff to appear for an EBT on October 4, 2010 and providing that "[i]f [plaintiff] fails to appear for EBT, [his]

complaint is dismissed (per last CC order dated 4/20/10)." (*Id.*, Exh. L).

By order dated July 20, 2011, I granted plaintiff's counsel leave to withdraw, required "any new attorney retained by plaintiff to file a notice of appearance with the Clerk of the Trial Support Office (Room 158) and the Clerk of the Park within 60 days from the date the notice to retain new counsel is mailed," and ordered the parties to attend a previously scheduled compliance conference on October 5, 2010. (Campbell Aff. in Opp., Exh. C). Plaintiff's counsel mailed to plaintiff the order and a notice of entry dated July 23, 2010. (*Id.*).

Court records reflect that City moved to dismiss plaintiff's claims against it by notice of motion dated September 30, 2010.

Plaintiff appeared at neither the October 4, 2010 EBT nor the October 5, 2010 compliance conference (Campbell Aff. in Opp.), and court records reflect that the conference was adjourned to October 26, 2010. On October 26, 2010, prospective counsel appeared on plaintiff's behalf even though he had not filed a notice of appearance as required by my July 20, 2010 order. (Campbell Aff. in Opp.). By order dated October 26, 2010, pursuant to my June 15, 2010 order, I dismissed plaintiff's complaint for failure to appear at the October 4, 2010 EBT. (*Id.*, Exh. D). By letter dated October 26, 2010, Afong's counsel mailed to plaintiff's last known address a copy of the order. (*Id.*).

By order dated November 29, 2010, City withdrew its September 30, 2010 motion to dismiss, given my October 26, 2010 order. (*Id.*, Exh. E). At plaintiff's current counsel's request, on January 3, 2011, counsel sent him a copy of the order. (*Id.*, Exh. F).

Plaintiff served the instant motion by mail on January 24, 2011, specifying a return date of February 16, 2011. (Notice of Motion; Affidavit of Migdalia Rosas, dated Jan. 24, 2011).

Court records reflect that the motion was adjourned twice, first to March 2, 2011, and next to April 19. 2011. Afong served its opposition by mail on February 18, 2011 to "The Law Office of Jeffrey B. Melcer, Attorney for Plaintiff, 150 East 58th Street, Floor 23rd, New York, New York 10155," an address different from that specified on plaintiff's notice of motion. (Affidavit of Brenna Sanabria, dated Feb. 18, 2011; Notice of Motion). Plaintiff served his reply by mail on April 15, 2011, responding to the opposition on its merits. (Affidavit of Migdalia Rosas, dated Apr. 15, 2011).

II. CONTENTIONS

Plaintiff claims that my order of October 26, 2010 should be modified to dismiss only his complaint against City, as all discovery was complete in his action against Afong, and my June 15, 2010 order required him to appear for an EBT conducted by City only. (Buitrago Aff.). He contends that these facts were not considered at the time the order was signed because there was no pending motion, and thus, no oral argument, and he was unaware of the conference and any subsequent decisions of the court, as he had yet to obtain his file from his previous lawyer and speaks only Polish. (*Id.)*.

In opposition, Afong argues that my order does not require that only City conduct the EBT, and thus, plaintiff's default on a court-ordered proceeding involving both defendants requires dismissal of the entire complaint. (Campbell Aff. in Opp.). Moreover, it contends that plaintiff should not be granted leave to renew, as he provides no reasonable excuse for his failure to appear at the October 26, 2010 conference. (*Id.*). Additionally, Afong claims that plaintiff is not entitled to restoration of his complaint, as he has provided neither an affidavit of merit nor a reasonable excuse for his default at both his EBT and the October 26, 2010 conference. (*Id.*).

In reply, plaintiff claims that Afong's opposition should not be considered because it was

initially sent to an incorrect address and thus was improperly served. (Affirmation of Marcelo A. Buitrago, Esq. in Reply, dated Apr. 15, 2011). However, he does not provide the date on which he received it. (*Id.*). He also maintains that Afong did not properly serve him with copy of my October 26, 2010 order. (*Id.*).

III. ANALYSIS

A. Consideration of opposition

Pursuant to CPLR 2214(b) and 2103(b), when a motion is served by mail at least 21 days before the return date, opposing papers must be served at least 7 days before the return date. However, pursuant to CPLR 2214(c), a court may consider untimely papers if there is no prejudice to the nonmoving party. (*Matter of Jordan v City of New York*, 38 AD3d 336, 338 [1st Dept 2007]). Therefore, a party waives his objection to late service of papers by opposing them on the merits. (*Jones v LeFrance Leasing Ltd. Partnership*, 81 AD3d 900, 903 [2d Dept 2011]; *Piquette v City of New York*, 4 AD3d 402, 403 [2d Dept 2004]; *Adler v Gordon*, 243 AD2d 365, 365 [1st Dept 1997]).

Here, as plaintiff mailed his motion papers 21 days before the initial return date of February 16, 2011, and as the return date was adjourned to April 19, 2011, Afong was required to mail its opposing papers by April 12, 2011. Afong did so, but to the wrong address. Assuming that this error delayed plaintiff's receipt, the opposition is nonetheless considered, as plaintiff waived his right to contest late service by replying on the merits. (*See, eg, Jones*, 81 AD3d at 903 [untimely cross motion properly considered, as non-moving party opposed it on its merits]; *Piquette*, 4 AD3d at 403 [untimely motion properly considered, as non-moving party opposed it on its merits]).

B. Reargument and renewal

A motion for leave to reargue "shall 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." (CPLR 2221[d][2]). In contrast, a motion for leave to renew "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 a reasonable justification for the failure to present such facts on the prior motion." (CPLR 2221[e][2], [3]). Although renewal may be granted on the basis of facts known to the moving party at the time the original decision was made, "'[r]enewal is granted sparingly . . .; and it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation.'" (*Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010]). Pursuant to CPLR 2221(f), a combined motion for leave to reargue and leave to renew "shall identify separately and support separately each item of relief sought."

Here, although denominated as a combined motion for leave to reargue and renew, plaintiff argues only that certain facts were not considered during the October 26, 2010 conference as a result of his failure to appear and that his complaint would not have been dismissed had they been considered. Therefore, the portion of this motion seeking leave to reargue and renew shall be treated as a motion for leave to renew only. (*See Bd. of Educ. v Shapiro,* 85 AD2d 763 [3d Dept 1981] [court properly treated as motion to renew motion denominated as motion to renew and reargue where movant relied upon new proof]; *Turkel v I.M.I Warp Knits, Inc.,* 50 AD2d 543 [1st Dept 1975] [same]; *cf Weiss v Deloitte & Touche, LLC*, 63 AD3d 1045 [2d Dept 2009] [motion denominated as motion for leave to renew and reargue

properly treated as motion for leave to reargue, as it was based on assertion that court misapprehended facts, and not on new facts]).

Pursuant to CPLR 3126(3), the court may issue an order striking a party's pleading if he wilfully and contumaciously refuses to comply with a discovery order. (*Rock City Sound, Inc. v Bashian & Farber, LLP,* AD3d , 2011 NY Slip Op 2861 [2d Dept, Apr. 5, 2011]; *Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492 [1st Dept 2010]). "The willful and contumacious character of a party's conduct can be inferred from the party's repeated failure to comply with discovery demands or orders without a reasonable excuse." (*Commisso v Orshan,* AD3d , 2011 NY Slip Op 5219 [2d Dept, June 14, 2011]; *see also Daniels v City of New York*, 78 AD3d 883 [2d Dept 2010]; *Pirro Group, LLC v One Point St., Inc.*, 71 AD3d 654 [2d Dept 2010]).

Plaintiff claims that his complaint against Afong would not have been dismissed had he or his counsel been present at the October 26, 2010 conference and explained that Afong had already examined him and that discovery in his case against Afong was already complete. However, as my orders do not provide that only City is entitled to examine plaintiff, and as my April 20, 2010 order provided that his failure to appear for an EBT would be considered "willful and contumacious conduct," absent any explanation for why he ignored four court orders or why his prospective counsel failed to enter an appearance pursuant to my July 20, 2010 order before appearing at the conference, he has demonstrated neither that he attempted to comply with the orders diligently and in good faith nor that his failure to appear at his October 4, 2010 EBT and the October 26, 2010 compliance conference was not wilful and contumacious. (*See Commisso,* AD3d , 2011 NY Slip Op 5219 [plaintiff's willful and contumacious conduct warranting dismissal of complaint inferred from repeated failure to appear for court-ordered deposition absent reasonable excuse]; *Daniels*, 78 AD3d 883 [defendant's answer stricken on basis of

repeated failure to comply with court orders enforcing plaintiff's discovery requests]; *Pirro*, 71 AD3d 654 [2d Dept 2010] [same]). Therefore, plaintiff has failed to establish that new facts warrant an order vacating my October 26, 2010 order.

C. Restoration

Pursuant to CPLR 5015(a)(1), in order to restore a dismissed action, the moving party must demonstrate both a meritorious cause of action and a reasonable excuse for his or her default. (*Cato v City of New York*, 70 AD3d 471 [1st Dept 2010]; *Campos v New York City Health & Hosps. Corp.*, 307 AD2d 785 [1st Dept 2003]).

Here, plaintiff has failed to provide an affidavit of merit. (*Wild v Target Corp.*, 74 AD3d 799 [2d Dept 2010] [motion to vacate dismissal and restore properly denied for moving party's failure to demonstrate meritorious cause of action by competent proof]; *Frangione v Daniels*, 44 AD3d 708 [2d Dept 2007] [same]; *DeRosario v New York City Health & Hosps. Corp.*, 22 AD3d 270 [1st Dept 2005] [same]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion to renew and reargue the dismissal of his complaint, to restore his complaint against Afong Realty Corporation, and for leave to serve a note of issue is denied in its entirety.

ENTER:

Barbara Jaffe, JSC

DATED: July 7, 2011
New York, New York