

**Brown v City of New York**

2011 NY Slip Op 32804(U)

October 24, 2011

Sup Ct, NY County

Docket Number: 102871/09

Judge: Barbara Jaffe

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

PRESENT: JAFFE  
*Justice*

PART 5

Index Number : 102871/2009  
**BROWN, DOUGLAS**  
vs.  
**CITY OF NEW YORK**  
SEQUENCE NUMBER : 005  
REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for reargue

PAPERS NUMBERED

1  
2  
3

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

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DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED  
OCT 26 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/24/11

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 : PART 5

-----X  
DOUGLAS BROWN and KAREN BROWN,  
individually and as mother and natural guardian of RAVEN  
BROWN,  
Plaintiffs,

Index No.: 102871/09

Mot. Date: 8/9/11  
Mot. Seq. No.: 005

**DECISION AND ORDER**

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants.

-----X  
BARBARA JAFFE, J.S.C.:

**For plaintiffs:**  
Andrew B. Siegel, Esq.  
Goidel & Siegel, LLP  
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**For defendants:**  
Peter C. Lucas, ACC  
Michael A. Cardozo  
Corporation Counsel  
100 Church St., 4<sup>th</sup> fl.  
New York, NY 10007  
212-788-0466

By notice of motion dated June 1, 2011, defendants City of New York and New York City Police Department (NYPD) move for an order granting them leave to reargue or renew a prior decision and order dated April 27, 2011. Plaintiffs oppose.

I. PERTINENT BACKGROUND

In this action, plaintiffs assert claims against defendants for deprivation of their civil rights, false imprisonment, assault, battery, negligence, and malicious prosecution based on defendants' alleged conduct during the execution of a search warrant in plaintiffs' apartment on June 20, 2008. (Affirmation of Andrew B. Siegel, Esq., dated June 7, 2011 [Siegel Aff.]).

By so-ordered stipulation dated March 6, 2010, plaintiffs withdrew their motion to strike defendants' answer upon their agreement to search for the following documents: (1) a copy of the

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warrant pursuant to which NYPD entered plaintiffs' apartment on June 20, 2008; (2) copies of all affidavits submitted in connection with the warrant application; (3) the names, shield numbers, and last known addresses of the police officers who participated in the search; (4) copies of memobook entries made by NYPD personnel involved in the search; and (5) copies of all NYPD records related to the search, including UF-61s, DD-5s, unusual occurrence reports, and follow-up records. If no records were found, defendants agreed to produce an affidavit describing the search. (Affirmation of Peter C. Lucas, ACC, dated June 1, 2011 [Lucas Aff.], Exh. A).

By compliance conference order dated June 22, 2010, defendants were ordered to provide, before July 22, 2010, the last known address of the retired officer involving in leading the execution of the warrant and to produce for a deposition a witness with knowledge of the execution of the warrant. Having failed to comply, by compliance conference order dated July 27, 2010, defendants were ordered to produce all of the documents set forth in the prior orders by September 1, 2010 and upon failing to comply, they would "be precluded from entering evidence at the trial respecting the subject search, entry into plaintiffs' apartment, subsequent processing at Central Booking, or other circumstances of the entry involved herein." (*Id.*).

By notice of motion dated September 30, 2010, defendants moved for an order vacating or amending the March 6, June 22, and July 27 orders to the extent that they directed the production of the officers' last known addresses, alleging that they could not determine their identities apart from that of the arresting officer, Michael Stiskin, and that the release of the addresses constituted a violation of Civil Rights Law § 50-a. (*Id.*). Defendants also alleged that they had otherwise complied with the orders, providing the affidavit of Lieutenant John Pranzo, dated September 1, 2010, in which he states that he fruitlessly searched for the documents set

\* 4]  
forth in the orders. (*Id.*).

By decision and order dated April 27, 2011, I denied defendants' motion, finding that at oral argument held on March 1, 2011, they acknowledged having failed to provide the required discovery and thus did not oppose preclusion per the July 2010 order.

## II. CONTENTIONS

Defendants seek to reargue the April 27, 2011 order on the ground that I overlooked Pranzo's affidavit and the fact that they were unable to locate the court-ordered documents, and upon reargument, find that they have set forth a reasonable excuse for not providing the documents. They also seek to renew based on Stitskin's deposition which they claim was previously unavailable having been taken on February 23, 2011, and which they allege sets forth a meritorious defense to plaintiffs' claims. (Lucas Aff.).

Plaintiffs argue that the July 27 order is self-executing and became absolute when defendants failed to comply with it, and that defendants fail to demonstrate any ground upon which to relieve them of their default. They contend that Pranzo's affidavit is insufficiently specific as to his search for the documents, and that defendants' failure to locate the documents does not excuse their default. They also maintain that Stitskin's deposition testimony is irrelevant to whether defendants possess the documents or failed to produce them. (Siegel Aff.).

In reply, defendants assert that they have provided plaintiffs with all of the relevant documents in their possession. (Reply Affirmation, dated July 21, 2011).

## III. ANALYSIS

It is well-settled that a self-executing conditional order becomes absolute upon a party's failure to comply with it. (*Wilson v Galicia Contr. & Restoration Corp.*, 10 NY3d 827 [2008];

*AWL Indus., Inc. v QBE Ins. Corp.*, 65 AD3d 904 [1<sup>st</sup> Dept 2009]). However, a party may be relieved from the consequences of a failure to comply upon a showing of a reasonable excuse for the failure and the existence of a meritorious claim or defense. (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010]; *Tejada v 750 Gerard Properties, Inc.*, 272 AD2d 124 [1<sup>st</sup> Dept 2000]).

As it is undisputed that defendants failed to comply with the July 27 order by September 1, 2010, it became absolute. (*Keenan v Fiorentino*, 84 AD3d 740 [2d Dept 2011]; *McKanic v Amigos del Museo del Barrio*, 74 AD3d 639 [1<sup>st</sup> Dept 2010], *lv denied* 16 NY3d 849 [2011]). While they now assert that they failed to comply with the order because they could not locate the required documents, they do not explain their failure to comply with the March and June 2010 orders, whether they attempted to locate the documents before the deadline, or why they were unable to provide Pranzo's affidavit by September 1. Rather, they waited until the deadline had passed and the order became absolute, and then belatedly moved to amend or vacate it.

And, as stated by the Appellate Division, First Department in *Henderson-Jones v City of NY*:

An affidavit regarding the unavailability of documents that are the subject of a discovery order must document a thorough search conducted in good faith. It should include details such as "where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, [and] whether a search [was] conducted in every location where the records were likely to be found"

(87 AD3d 498 [2011], *quoting Jackson v City of New York*, 185 AD2d 768 [1<sup>st</sup> Dept 1992]).

Here, Pranzo's affidavit includes insufficient details as to defendants' search and does not reflect a good faith effort to search for the documents before September 1, 2010. They thus fail to establish a reasonable excuse for the failure to comply with the order.

Moreover, defendants' reference to Stitskin's deposition does not establish a meritorious

defense to plaintiffs' claims absent defendants' identification of the pertinent portions of it. (*See Ortiz v 3115 Broadway Dev. Fund*, 73 AD3d 540 [1<sup>st</sup> Dept 2010] ["Defendant's citing to a 63-page deposition without identifying any particular testimony is insufficient to satisfy its obligation to provide 'the required evidentiary facts, in admissible form,' that would establish a meritorious defense"]).

And, having failed to appeal the three orders directing the release of the officers' names, defendants waived any objection thereto. (*See Henderson*, 87 AD3d at 506 [defendants were directed to disclose names of officers involved in execution of warrant on plaintiff's apartment and could have, but did not, appeal from orders, and thus failure to provide names, among other failures, warranted striking of answer]). Moreover, nothing in Stitskin's deposition bears any relevance to defendants' search for the documents.

For all of these reasons, defendants have not demonstrated that the prior orders should be vacated. (*See Kirkland v Fayne*, 78 AD3d 660 [2d Dept 2010] [as so-ordered conditional stipulation became binding upon defendant's failure to comply, court should not have vacated it absent reasonable excuse for default and existence of potentially meritorious defense]; *Ensley v Snapper, Inc.*, 62 AD3d 403 [1<sup>st</sup> Dept 2009] [plaintiff failed to comply timely with three prior discovery orders and failed to set forth reasonable excuse or merit of claim when moving to vacate final, conditional order]).

#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants City of New York and New York City Police Department's motion for leave to reargue is denied, and their motion for leave to renew is granted but upon

renewal, their motion is denied.

ENTER:

  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
J.S.C.

DATED: October 24, 2011  
New York, New York

**FILED**

**OCT 26 2011**

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