

Mateo v Vargas

2014 NY Slip Op 30276(U)

January 28, 2014

Supreme Court, New York County

Docket Number: 602043/09

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

Fernando Matis and Stella Matis

INDEX NO. 602043-09

MOTION DATE _____

- v -

Henry Vargas, Ackerman Senterfitt and Madison Realty, Inc.

MOTION SEQ. NO. 016

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 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>
<u>2</u>
<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed memorandum opinion.*

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
JAN 31 2014
NEW YORK
COUNTY CLERK'S OFFICE

Dated: Jan 29, 14

Anil C. Singh
HON. ANIL C. SINGH J.S.C.
SUPREME COURT JUSTICE

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: PART 61

-----X
FERNANDO MATEO and STELLA MATEO,

Plaintiffs,

-against-

HENRY VARGAS, AKERMAN SENTERFITT and
MADISON REALTY, INC.,

Defendants.

-----X
HENRY VARGAS,

Third-Party Plaintiff,

-against-

PETER SKYLLAS,

Third-Party Defendant.

-----X

HON. ANIL C. SINGH, J.:

FILED

JAN 31 2014

NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence 016 and 017 are consolidated for disposition.

In motion sequence 016, defendant/third-party plaintiff Henry Vargas ("Vargas"), pro se, moves by order to show cause pursuant to CPLR 2221(e) and 5015 for leave to vacate and renew his prior motion for default judgment on the third-party complaint and permit him to file late proof of service. Third-party defendant Peter Skyllas opposes the motion and cross-moves to dismiss the third-party complaint pursuant to CPLR 3211(a)(8), contending that the third-party summons and complaint was not properly served.

In motion sequence 017, Vargas moves by order to show cause pursuant to CPLR 2221(d) for leave to reargue his prior motion for leave to renew or vacate and dismiss plaintiffs' cause of action against him and plaintiffs' cross-motion for summary judgment. Plaintiffs oppose the motion.

The rule that "a motion for renewal be based upon newly discovered evidence is a flexible one, and a court, in its discretion, may grant renewal even where the additional facts were known to the party seeking renewal at the time of the original motion, provided the moving party offers a reasonable justification for the failure to submit the additional facts on the original motion" (Grantat v. Walbaum's Inc., 289 AD2d 289, 290 [2nd Dept. 2001] (other citations omitted)).

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application. It may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion." (Foley v. Roche, 68 A.D.2d 558, 567-568 [1st Dept., 1979]).

After careful consideration, the Court finds that both the motion to reargue and the

motion to renew are completely meritless.

We turn next to the cross-motion to dismiss the third-party complaint.

Third-party defendant Peter Skyllas states in a sworn affidavit that he never received a copy of the third-party summons and complaint from Vargas. Mr. Skyllas contends further that he never submitted a signed acknowledgment of receipt of the complaint.

A third-party plaintiff has 120 days from the date on which it files a third-party complaint to serve a third-party defendant (CPLR 1007). A third-party plaintiff may use any of the service methods set forth in Article 3 of the CPLR (CPLR 307 through 316). Proof of service of the third-party summons and complaint must be filed within the 120-day period, though this requirement is not jurisdictional (CPLR 306-b(a)). The failure to properly serve a third-party summons necessitates dismissal of a third-party complaint (Rosenblum v. 170 West Village Associates, 175 A.D.2d 702 [1st Dept., 1991]).

Here, the third-party plaintiff exhibits a letter from his attorney dated June 16, 2012, which states that “Mr. Jeremy Roth was served with the third party action on behalf of Mr. Skyllas” (Order to Show Cause, exhibit B). An affidavit of service annexed to the letter states that the third-party complaint was served by mail upon “Turek, Roth and Spiegel, LLP, Attn: Jeremy Roth, Esq.” (Motion to Vacate and Renew, exhibit B).

In, the Court finds that there is no issue that the third-party summons and

complaint was not properly served pursuant to CPLR 312-a based upon the sworn affidavit of Peter Skyllas; the affidavit of service; and the absence of a signed acknowledgment of receipt.

Accordingly, it is

ORDERED that the motion of defendant for leave to renew his motion for default judgment is denied; and it is further

ORDERED that the motion of defendant for leave to reargue his motion to dismiss the cause of action against him and the cross-motion for summary judgment is denied; and it is further

ORDERED that the cross-motion to dismiss the third-party summons and complaint is granted without prejudice to serve the third-party summons and complaint in full compliance with the service provisions of the CPLR; and it is further

ORDERED that the Clerk is directed to place the matter on the appropriate calendar for a jury trial.

The foregoing constitutes the decision and order of the court.

FILED

Date: JAN 28, 14
New York, New York

JAN 31 2014

**NEW YORK
COUNTY CLERK'S OFFICE**

ACC

Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE