

Dillman v City Cellar Wine

2014 NY Slip Op 33457(U)

February 2, 2014

Supreme Court, Nassau County

Docket Number: 1609/2012

Judge: James P. McCormack

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

_____ x
ROBERT DILLMAN,

TRIAL/IAS, PART 40
NASSAU COUNTY

Plaintiff(s),

Index No.: 1609/2012

-against-

Motion Seq. No.: 003
Motion Submitted: 11/25/13

CITY CELLAR WINE, BAR & GRILL,
WESTBURY TAVERN, LLC d/b/a CITY
CELLAR WINE, BAR & GRILL, CITY
CENTER RESTAURANT, BIG TIME
RESTAURANT GROUP, EB RACEWAY,
LLC, 4 B's REALTY CITY CELLAR, LLC
and MAJESTIC CLEANING,

Defendant(s).

_____ x

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....

Plaintiff moves this court for an Order restoring this action to the trial calendar as to the defendants City Center Restaurant and Majestic Cleaning. The defendants have not opposed the plaintiff's motion to restore the matter.

This action was originally commenced by the filing of a summons and verified complaint under index number 2604/11 on February 18, 2011, that matter was assigned to

Hon. R. Bruce Cozzens, Jr. Thereafter, for reasons which are entirely unclear to this court, and which caused unnecessary confusion, the plaintiff instituted a new action under index number 1609/12 and a summons and complaint was filed in that action on February 7, 2012, that matter was assigned to this court. On August 29, 2012, this court granted a motion for default judgment against defendants City Cellar Wine, Bar & Grill, Westbury Tavern, LLC d/b/a City Cellar Wine, Bar & Grill, City Center Restaurant, Big Time Restaurant Group, EB Raceway, LLC, 4B's Realty City Cellar LLC and Majestic Cleaning under the index number in the second action, index number 1609/12. At that time the court was unaware that the plaintiff had inexplicably started a second action, and moved for default in this second action, despite the fact that five out of the seven defendants had in fact appeared in the action and had been making appearances before Hon. R. Bruce Cozzens, Jr. under the original index number 2604/11.

On October 2, 2012, this court was presented with a stipulation agreeing to vacate the default judgment as to City Cellar Wine, Bar & Grill, Westbury Tavern, LLC d/b/a City Cellar Wine, Bar & Grill, Big Time Restaurant Group, EB Raceway, LLC, and 4B's Realty City Cellar LLC. The default against City Center Restaurant and Majestic Cleaning remained undisturbed.

The plaintiff had certain obligations that had to be fulfilled in order to have the matter proceed to inquest. Pursuant to this Court's Order dated August 29, 2012, "a copy of this order shall be served on the Calendar Clerk, accompanying notice of issue when

filed. The failure to file note of issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing” in addition, “the attorney for the movant shall serve a copy of this Order, with notice of entry, on the defendants, City Cellar Wine, Bar & Grill; Westbury Tavern, LLC d/b/a City Cellar Wine, Bar & Grill; City Center Restaurant; Big Time Restaurant Group; BE Raceway, LLC; 4B’s Realty City Cellar, LLC and Majestic Cleaners, by regular mail and by certified mail within twenty days of entry and shall notify the defendants once the note of issue has been filed of the date it first appears on the calendar in the Calendar Control Part by regular mail and certified mail”.

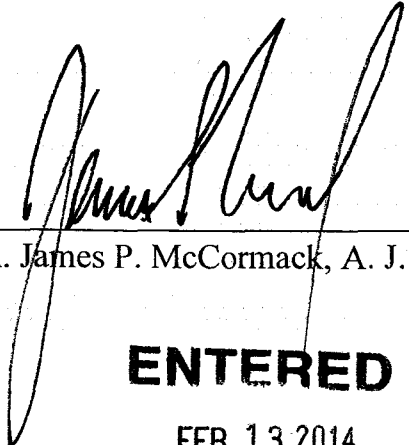
The plaintiff states that a pre-trial hearing was scheduled for this action on September 18, 2013, but that there was “miscommunication, misunderstanding and an administrative error due to the above-entitled action’s convoluted procedural history and pending appeal, and a result counsel failed to appear for the pre-trial conference and the action was marked disposed by the Court”.

However, plaintiff has failed to establish that he fulfilled the directives of the court Order dated August 29, 2012. The plaintiff has been unable to provide this court with proof that he abided by this court’s Order and timely served a copy of the August 29, 2012 Order and the Note of Issue on the Calendar Part and that he served a copy of the August 29, 2012 Order, with notice of entry, on the subject defendants, City Center Restaurant and Majestic Cleaners, by regular mail and by certified mail within twenty

days of entry and that they notified the defendants once the note of issue has been filed of the date it first appeared on the calendar in the Calendar Control Part by regular mail and certified mail. If the plaintiff has proof of proper service of this court's August 29, 2012 Order, this court will entertain a motion to renew. However, to the extent that the plaintiff has failed to provide this court with proof that it abided by the August 29, 2012 Order, the motion to restore the case is DENIED.

The foregoing constitutes the Decision and Order of the Court.

Dated: February 2, 2014
Mineola, N.Y.



Hon. James P. McCormack, A. J. S. C.

ENTERED
FEB 13 2014
NASSAU COUNTY
COUNTY CLERK'S OFFICE