ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

FILED
APR - 4 2014
COUNTY CLERK
QUEENS COUNTY

Present: HONORABLE BERNICE D. SIEGAL IA Part 19
Justice

Ada Oparaji, Maurice Oparaji, x

Plaintiffs,

245-02 Merrick Blvd., LLC; ESH Management, Robin Eshaghpour, Elena Eshaghpour, Sutphin Management Corp., Sutphin Tiana Realty LLC; Sutphin Hampton Realty LLC; Sutphin Moriches Realty LLC; Sutphin Hollis Realty LLC; ESH Acquisitions LLC; 90-57 Sutphin Realty LLC; 90-59 Sutphin Realty LLC; Superior Concrete & Masonry Corp.; Steven B. Rabinoff Architect, P.C., et al.,

Defendants.
x

Index Number 19294 2012

Motion Date November 15, 2013

Motion Cal. Number 65

Motion Seq. No. 10

RECEIVED
JUN - 3 2014
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 12 read on this motion for an order granting reargument pursuant to CPLR 2221 of its Order to Show Cause to vacate the Default Judgment entered and to vacate the Note of Issue in this matter and upon reargument vacating the Default Judgment and the Note of Issue.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1 - 4
Affidavit in Opposition	5 - 9
Reply Affirmation	10 - 12

Upon the foregoing papers it is ordered that the Order to Show Cause is determined as follows:

FILED
APR - 4 2014
COUNTY CLERK
QUEENS COUNTY

Defendant, Superior Concrete & Masonry Corp. ("Superior") moves for an Order reargue its Order to Show Cause to vacate its default judgment which was denied by Order dated September 20, 2013.

Background

Maurice Oparaji is the owner of property located at 245-11 133 Road, Rosedale, NY 11422, Block 13209 and Lot 80 ("plaintiff's property"). Defendant 245-02 Merrick Blvd, LLC ("Merrick") is the owner of premises known as 245-02 Merrick Boulevard, Rosedale NY Block 13209 and lots 50 and 60 ("Merrick property"). Merrick purchased the property with the intention to construct a CVS drug store. The New York City Building Department issued a directive requiring defendants to erect a perimeter construction fence on the Merrick property. Merrick constructed an 8 foot wooden fence based upon a survey of Merrick's property dated August 13, 2012.

The complaint alleges that on September 15, 2012, defendants trespassed on Oparaji's property, removed the fence and damaged and destroyed two vehicles "loaded with electronics, machines, appliances, and books destined for export; destroyed plantings and other property."

Superior contends that it first learned of the within action one and a half months ago when it received an Order to Show Cause to be relieved as counsel. Superior contends that it was originally assured by Robin Eshaghpour, the owner of Merrick, that he had engaged an attorney to defend all of the Defendants. However, Superior now questions Merrick's statement. Subsequently, Superior received a copy of the March 28, 2012 decision wherein the Plaintiff obtained a default judgment as against Superior.

The affidavit of service upon Superior states that on October 22, 2012, Prince Oparaji personally delivered the Summons and Complaint to Camille Torregrossa ("Torregrossa"), known to Prince as the office manager of Superior.

Kenneth Ferst ("Ferst"), the President of Superior, states that he was never served.

Analysis

CPLR §2221(d)(2) provides, in pertinent part, that: "[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 . . . ." "A motion for reargument is addressed to the discretion of the court." (*Frisenda v. X Large Enterprises, Inc.*, 280 A.D.2d 514, 515 [2d Dep't 2001]; *see also V. Veeraswamy Realty v. Yenom* , 71 A.D.3d 874, 874 [2d Dep't 2010]; *Barnett v. Smith*, 64 A.D.3d 669, 670 [2d Dep't 2009]; *E.W. Howell Co., Inc. v. S.A.F. La Sala Corp.*, 36 A.D.3d 653, 654 [2d Dep't 2007].) In essence, the purpose of a motion for leave to reargue is to allow a party to either demonstrate that the court misapplied the law or misapprehended or overlooked the facts in its earlier decision. (*Mazinov v. Rella*, 79 A.D.3d 979, 980 [2d Dep't 2010]; *Barnett*, 64 A.D.3d at 670–71; *Pryor v. Commonwealth Land Title Insurance Co.*, 17 A.D.3d 434, 435–36 [2d Dep't 2005]; *Spatola v. Tarcher*, 293 A.D.2d 523, 524 [2d Dep't 2002]; *Murray v. City of New York*, 283 A.D.3d 560, 560–61 [2d Dep't 2001]; *Frisenda*, 280 A.D.2d at 515; *Diorio v. City of New York*, 202 A.D.2d 625, 626 [2d Dep't 1994].)

For the reasons set forth below, Superior's motion to reargue is denied.

Discussion

This court concluded in the September 20, 2013 Order that the mere conclusory denial by Ferst of the Summons and Complaint was insufficient to rebut the presumption of proper service created by the affidavit of service. (*Rosario v. Beverly Road Realty Co.*, 38 A.D.3d 875[2nd Dept 2007]; *General Motors Acceptance Corp. v. Grade A Auto Body, Inc.*, 21 A.D.3d 447 [2nd Dept 2005]; *Household Finance Realty Corp. of New York v. Brown*, 13 A.D.3d 340 [2nd Dept 2004].) This court also noted that Superior also failed to submit the affidavit of Torregrossa, the person allegedly served, rebutting the affidavit of service upon her.

Superior now contends that the court overlooked the fact that Ferst denied service and that Superior has a meritorious defense. However, a motion to reargue is not a vehicle which affords a party an additional opportunity to re-litigate issues that have been previously decided. (*McGill v. Goldman*, 261 A.D.2d 593 [2nd Dept 1999]; *William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22 [1st Dept 1992].) The court, in the September 20, 2013Order, acknowledged that Ferst denied service and acknowledged Superior's contention that it first learned of the within action one and a half months prior to their application to vacate their default. Accordingly, the court did not overlook facts in the prior Order as each of the facts set forth in the motion to reargue were properly addressed in the September 20, 2013 Order.

Furthermore, Superior's contention that the court failed to address its meritorious defense is without merit. It is well settled that a defendant seeking to vacate a default in appearing or answering must provide *both* a reasonable excuse for the default *and* demonstrate a potentially meritorious defense to the action. (Emphasis added)(CPLR 5015(a)(1); *Hill v. Stone*, 113 A.D.3d 595, 595 [2nd Dept 2014]; *Eugene Di Lorenzo, Inc. v.*

A.C. Dutton Lumber Co., Inc., 67 N.Y.2d 138 [1986].) Accordingly, as the movant was required to prove both a reasonable excuse and a meritorious cause of action, once the court concluded that Superior failed to establish a reasonable excuse the court did not need to address the merits of the case.

Conclusion

For the reasons set forth above, Superior's motion to reargue is denied.

Dated: March 28, 2014

Bernice D. Siegal, J.S.C.

FILED
APR - 4 2014
COUNTY CLERK
QUEENS COUNTY

FILED
APR - 4 2014
COUNTY CLERK
QUEENS COUNTY