

Matter of Chen v Aim Tutoring Academy, Inc.

2018 NY Slip Op 31347(U)

May 21, 2018

Supreme Court, Queens County

Docket Number: 711267/2016

Judge: Leonard Livote

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote IAS TERM, PART 33
Acting Supreme Court Justice

In the matter of the Application of Thomas Chen
Petitioner,
Index No: 711267/2016

-- against -- Motion Date: 4/3/18

For the Judicial Dissolution of Aim Tutoring Academy, Inc., Respondent.
Seq. No: 3

The following papers numbered 1 to 4 were read on this motion by Respondent for an Order granting leave to renew and upon renewal, vacate the December 18, 2017, short form order, which granted a so-ordered subpoena for a deposition, and set a new date for same.

PAPERS
NUMBERED

- Notice of Motion, Affirmation, Affidavits and Exhibits... 1 - 4
Answering Affirmations, Affidavits and Exhibits...
Reply Affirmations, Affidavits and Exhibits...
Other...

Upon the foregoing papers, the motion for leave to renew is granted without opposition as more fully set forth below.

Petitioner commenced this action for the Respondent Corporation to be dissolved and liquidated under Business Corporation Law § 1104-a. Petitioner contributed \$300,000 for the purchase of one-third interest in the Corporation for which stock was issued. Petitioner avers that he was locked-out of the premises and deprived of any and all profits. The Petitioner has not been employed by the Corporation, nor consulted by the officers and directors concerning any aspect of the business. Petitioner has been denied access to and an examination of the books and records of the corporation, and has been barred from

the premises of the Corporation.

Mr. Fink, Attorney for the Petitioner, moved to depose Bo-Hsiang Chen, President of the Corporation. The motion was served on September 13, 2017, by mail delivered to 36-21 Prince Street, Flushing, New York 11354. Respondent avers that he never received a copy of the notice because the address was the former business location of the Corporation before it closed down in 2010. Previous documents, such as a December 5, 2016, affirmation, were sent to Respondent's home address. Respondent avers that he never filed any papers because he did not know of the motion.

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. The Court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination." Accordingly, when part of the relief sought by a 2221(f) motion, is by application for leave to reargue, those parts must not only be separately identified, as per above, but must also comply with CPLR 2221(d), which provides that those parts, "...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."

The statute further defines each motion. CPLR § 2221(d) states 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." CPLR § 2221 (e) states that a motion for leave to renew: "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . [and] shall contain reasonable justification for the failure to present such facts on the prior motion." But, "[t]he requirement that a motion for renewal be based on new facts is a flexible one, and it is within the court's discretion to grant renewal upon facts known to the moving party at the time of the original motion 'if the movant offers a reasonable excuse for the failure to present those facts on the prior motion.'" *Gonzalez v Vigo Const. Corp.*, 69 AD3d 565, 566 [2d Dept 2010].

The Respondent's motion is based on new facts: that Aim Tutoring Academy has not been operating in the address that Petitioner sent the notice, and that Bo-Hsiang Chen did not have a chance to respond. Thus, the motion shall be for leave to renew under CPLR § 2221(e). Previous service on Bo-Hsiang Chen was sent


to his home address at 50-55 Cloverdale Road, Bayside, New York 11364. But, the notice of the deposition was sent to the address of the former business which has been closed for 8 years. Respondent did not receive a copy of the notice and was unable to respond. The Respondent could not have presented these facts to on the prior motion because he never received notice; thus, he has met the reasonable excuse requirement.

Accordingly, the motion to leave to renew is granted on the grounds that the address in question where the notice was served has been closed for 8 years , and it is

ORDERED that the order dated December 18, 2017, is vacated and the parties may set a new date for the deposition.

This constitutes the Order of the Court.

Dated: May 21, 2018


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Leonard Livote, A.J.S.C.

FILED
MAY 31 2018
COUNTY CLERK
QUEENS COUNTY