

<b>Frank v Rock Scaffolding Corp.</b>
2018 NY Slip Op 33576(U)
March 12, 2018
Supreme Court, Queens County
Docket Number: 700293/2014
Judge: Salvatore J. Modica
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS: PART 37  
-----X

MITCHELL FRANK,

Plaintiffs,

-- against --

ROCK SCAFFOLDING CORP., et al. , et al.,

Defendants.  
-----X

**DECISION AND ORDER**  
Index No. 700293/2014  
**HON. SALVATORE J. MODICA**

Motion Sequence Number 7

The following papers numbered E69 to E79, E81, E84 to E92 read on this application by plaintiff, seeking an order of judgment against Prabhjit Singh and Simranpal Singh, pursuant to Judiciary Law section 773, and an order of commitment, pursuant to Judiciary Law section 772, and a cross motion by Prabhjit Singh and Simranpal Singh for an order to, among other things, vacate the instant order to show cause, and the order for contempt, entered May 24, 2017, pursuant to CPLR 2221(c) and/or CPLR 5015.

	<u>Papers Numbered</u>
Order to Show Cause - Affirmation - Exhibits .....	E69-E79, 81
Cross Motion - Affidavits.....	E84-E89
Reply Affirmation and Opposition - Exhibit .....	E90-E92

**SALVATORE J. MODICA, J.:**

Upon the foregoing papers, it is ordered that plaintiff's order to show cause, and the Singhs' cross motion, are determined as follows:

Plaintiff commenced this action to recover monetary damages for personal injuries sustained on a public sidewalk in front of where defendant, Rock Scaffolding Corp. ("RSC") had erected scaffolding. Plaintiff was granted a default against RSC in January 2015, and held an inquest in January 2016. Plaintiff obtained a judgment against RSC in the amount of \$69,193.70, which was entered on February 26, 2016, and remains unpaid. In July 2016, plaintiff served a subpoena duces tecum and restraining notice on "R.S.C. of NY Corp. f/k/a Rock Scaffolding Corp., c/o Prabhit Singh, President" and on "Rock Group NY Corp." by serving Simranpal Singh. Both entities failed to comply with said subpoenas, by failing to appear for post-judgment depositions, and plaintiff's motion for contempt was granted by this court on May 3, 2017, ordering that the Singhs were each fined the sum of \$10,000.00

H:\February-March 2018 Decisions\Frank v. Rock Scaffolling Corp.wpd

to be paid to counsel for plaintiff-judgment creditor, and further permitting the purging of said contempt by payment of the fines and compliance with the subpoenas within a specified period of time. The Singhs failed to pay the fines or appear for deposition, and plaintiff made the instant application.

The Singhs cross-moved to discharge the instant order to show cause and to renew a motion to vacate the sanctions/contempt, alleging that RSC was not served initially; and that Rock Group NY Corp. and RSC had “no common ownership between (them) ... and Rock Group NY Corp. had no connection, contractually or otherwise” with the accident site. Further, Prabhjit Singh contends he appeared in court on the contempt motion, tried to get RSC’s insurance carrier involved in the case, and retained counsel, all in time to oppose the instant application.

As the order for summary judgment was granted on default, the branch of the Singhs’ instant motion, made pursuant to CPLR 2221(e), is improper and is denied. *See Country Wide Home Loans, Inc. v. Dunia*, 138 AD3d 533 (1<sup>st</sup> Dept. 2016); *see also Atl. Radiology Imaging, P.C. v. Metro. Prop. & Cas. Ins. Co.*, 2016 WL 1064657 (App. Term 2016); Siegel 2016 Supplemental Practice Commentaries, McKinney’s Cons Law of NY, Book 7B, CPLR 2221, at C2221:4.

The proper vehicle for the relief sought is pursuant to CPLR 5015 (a) (1) and (2). *See Id.* CPLR 5015 (a) permits a motion to vacate a judgment or order on several grounds, including, as asserted here, (1) excusable default or (2) newly-discovered evidence.

“Whether a proffered excuse is reasonable is a sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits” (*Fried v Jacob Holding, Inc.*, 110 AD3d 56, 60 [2d Dept 2013], quoting *Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 876-877 [2d Dept 2005]; *see, Kramarenko v New York Community Hosp.*, 134 AD3d 770 [2d Dept 2015]; *Brinson v Pod*, 129 AD3d 1005 [2d Dept 2015]).

In the case at bar, defendants are not entitled to the discretionary vacatur of the default judgment finding them in civil contempt, as they failed to set forth a reasonable excuse for same (*see, Youngstown Tube Co. v Russo*, 120 AD3d 1409 [2d Dept 2014]). The mere statement that the process was not received was insufficient to rebut the presumption of proper service created by the affidavit asserting service on the Secretary of State (*see, Bank of Am., N.A. v Moody*, 147 AD3d 712 [2d Dept 2017]; *Duran v Milord*, 126 AD3d 932 [2d Dept 2015]). Also, defendants have failed to proffer any facts justifying said default in support of their cross motion, and “mere neglect is not accepted as a reasonable excuse”

(*Nakollofski v Kingsway Properties, LLC*, 157 AD3d 960, 960 [2d Dept 2018] quoting *Ogunmoyin v 1515 Broadway Fee Owner, LLC*, 85 AD3d 991, 992 [2d Dept 2011]; see *El-Dehdan v El-Dehdan*, 26 NY3d 19 [2015]).

Said defendants have failed to demonstrate “circumstances warranting the court’s exercise of discretion to grant” the requested vacatur (*K.A. v Wappingers Cent. Sch. Dist.*, 151 AD3d 828 [2d Dept 2017]; see, *Mollica v Ruzza*, 151 AD3d 714 [2d Dept 2017]; *NYCTL 1998-2 Trust v Ocean Gate Estate Homeowners Ass’n, Inc.*, 143 AD3d 683 [2d Dept 2016]). Further, defendants failed to proffer any “newly discovered evidence which ... would probably have produced a different result” (CPLR 5015 [a] [2]; see, *Greene v Rachin*, 154 AD3d 818 [2d Dept 2017]; *IMC Mtge. Co. v Vetere*, 142 AD3d 954 [2d Dept 2016]).

Consequently, the cross motion by the Singhs has failed to demonstrate their entitlement to “vacate the punitive and monetary sanctions set forth in the Order to Show Cause entered August 7, 2017 and the Order for Contempt of May 24, 2017,” and such cross motion is denied.

However, in revisiting the appropriateness of the amounts of the contempt fines levied in the Order entered on May 24, 2017 herein, the court finds that an amendment of such amounts is warranted. “The aim of civil contempt is to vindicate a party’s right to the benefits of a judicial mandate or to compensate that party for the interference by the contemnor” (*Banks v Stanford*, – AD3d –, 2018 NY Slip Op. 00829 [2d Dept 2018]).

Any such fine must be limited to either the actual loss or injury produced by reason of the such misconduct, or, if there has been no actual damages demonstrated, the statutory amount of \$250.00, plus legal costs and expenses, if proven (Judiciary Law § 753, 773; *State of New York v Unique Ideas*, 44 NY2d 345 [1978]; *Banks v Stanford*, – AD3d –, 2018 NY Slip Op. 00829). Here, plaintiff had previously shown that there may have been prejudice to his rights as a result of defendants’ contemptuous conduct, but no actual loss or injury was demonstrated or proven. As such, the fine set in said contempt Order was not warranted and is set aside and amended by imposing separate fines of \$250.00 on defendants Prabhjit Singh and Simranpal Singh. Consequently, the Order of this Court, dated May 3, 2017 and entered on May 24, 2017, is amended solely to the extent that Prabhjit Singh and Simranpal Singh are each fined the sum of two hundred fifty (\$250.00), in place and instead of the previous fine of “ten thousand dollars (\$10,000.00),” for their civil contempts.

Additionally, the Singhs may be purged of their contempts by paying the sum herein fined within ten (10) days of service of a copy of this decision and order, with notice of entry, upon their counsel, and by complying with the earlier subpoena by appearing for deposition on a date, and at a time and place, to be designated by counsel for plaintiff, upon nine (9)

**FILED: QUEENS COUNTY CLERK 04/13/2018 10:17 AM**

NYSCEF DOC. NO. 93

INDEX NO. 700293/2014

RECEIVED NYSCEF: 04/13/2018

days' written notice of same, but, in no event, later than April 20, 2018.

The Court forbids any adjournments of the deposition date beyond April 20, 2018, without the prior and written consent of the Court.

Plaintiff's application for an order directing judgment against the Singhs in the amount of \$10,000.00 each, and further directing the arrest and commitment of said individuals, is denied, based upon the foregoing determination, and taking into consideration the strong public policy favoring resolution of cases on the merits (*see Wax ex rel. Wax v 716 Realty, LLC*, 151AD3d 902 [2d Dept 2017]).

Should the Singhs fail to comply with the instant decision and order, thereby failing to purge the amended contempt Order, they will be subject to a renewed application by plaintiff, without the necessity of further notice to said respondents, for a warrant of arrest and commitment of said individuals.

The Court has considered all moving parties' remaining contentions and arguments, and finds they are either without merit, or they need not be addressed in light of the foregoing determinations.

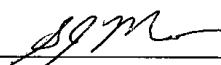
Accordingly, plaintiff's order to show cause for, among other things, an order directing arrest and commitment of the Singhs is denied.

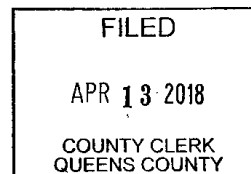
The Singhs' motion seeking, among other things, vacatur of the default judgment and contempt orders, is denied.

The contempt Order of May 23, 2017 is amended as aforesaid, and, as amended, shall remain in full force and effect in this action.

The foregoing constitutes the decision, order, and opinion of the Court.

Dated: Jamaica, New York  
March 12, 2018

  
\_\_\_\_\_  
Honorable Salvatore J. Modica  
J.S.C.



H:\February-March 2018 Decisions\Frank v. Rock Scaffolding Corp.wpd