

Barnett v Diamond Fin. Co., Inc.
2019 NY Slip Op 30127(U)
January 8, 2019
Supreme Court, Kings County
Docket Number: 514544/2015
Judge: Genine D. Edwards
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At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 8th day of January, 2019.

PRESENT:

Hon. Genine D. Edwards
Justice, Supreme Court

-----x
EUGENIE J. BARNETT,

Plaintiff,

Index No. 514544/2015

-against-

DECISION/ORDER

DIAMOND FINANCE COMPANY, INC.,

Defendant.
-----x

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/ Cross Motion and Affidavits (Affirmations) Annexed.....	1-2
Opposing Affidavits (Affirmations).....	3-4
Reply Affidavits (Affirmations).....	5-6

Plaintiff commenced this action for, inter alia, conversion and fraud against defendant.

On January 25, 2018, this Court entered an order, on default, in favor of defendant. Plaintiff now moves to vacate the default order and extend her time to serve and file opposition to defendant's motion to reargue, dated November 21, 2017. Defendant cross-moves for an order granting its cross-motion to quash, condition or modify the non-party subpoena issued by plaintiff.

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Factual and Procedural Background

Plaintiff initiated this action on November 30, 2015. Defendant was duly served via New York Secretary of State on December 29, 2015. Having received no response from defendant, plaintiff filed a proposed judgment and an affidavit. The clerk filed the executed judgment on February 5, 2016. In June 2017, plaintiff commenced garnishment procedures against defendant. By August 2, 2017, the New York City Marshall issued a check to plaintiff, representing the funds garnished from defendant's bank account. On the same date, defendant filed a proposed order to show cause to vacate the default judgment. Defendant's application was denied by Justice Leon Ruchelsman.

Defendant filed a second order to show cause seeking to vacate the default judgment. On August 7, 2017, Justice Debra Silber executed the second order to show cause, but denied the defendant's application for interim relief and refused to issue a stay. On August 16, 2017, defendant amended his second order to show cause. This Court denied defendant's amended order to show cause, which sought to vacate the default judgment.

On November 22, 2017, defendant filed a motion seeking to reargue this Court's order. Defendant's motion contained a demand pursuant to CPLR 2214(b) that "answering papers, if any, are required to be served at least 7 days before the return date." The motion was initially returnable December 22, 2017, but was later adjourned to January 25, 2018. However, plaintiff asserts that she received conflicting information regarding the adjourn date.

On January 25, 2018, defendant appeared for oral argument before this Court. Plaintiff failed to appear. An order granting reargument was entered, on default. On March 6, 2018, plaintiff received a copy of that order.

Plaintiff now moves to vacate the January 25, 2018 order. Defendant cross-moves to quash, condition or modify the non-party subpoena issued by plaintiff upon defendant's bank, Signature Bank.

Discussion

Motion to Vacate a Default


"In order to vacate a default in opposing a motion pursuant to CPLR 5015(a)(1), the moving party is required to demonstrate a reasonable excuse for his or her default and a potentially meritorious opposition to the motion." *Rollins v. Rollins*, 135 A.D.3d 736, 22 N.Y.S.3d 880 (2d Dept. 2016). This Court is persuaded that plaintiff established the elements for vacatur.

Motion to Quash

Pursuant to CPLR 3120(2), "the notice or subpoena duces tecum shall specify the time, which shall be not less than twenty days after service of the notice...". In this instance, the time specified in the notice was ten days after the date on which the notice was filed. As such the subpoena is facially defective. Plaintiff's second subpoena is equally defective. Moreover, the subpoena omitted the notice requirement, which "obligates the subpoenaing party to state, either on the face of the subpoena or in a notice accompanying it, 'the circumstances or reasons such disclosure is sought or required.'" *Matter of Kapon v. Koch*, 23 N.Y.3d 32, 39, 988 N.Y.S.2d 559 (2014), quoting CPLR 3101 (a)(4); *Bianchi v. Galster Management Corp.*, 131 A.D.3d 558, 15 N.Y.S.3d 189 (2d Dept. 2015).

Accordingly, plaintiff's motion to vacate this Court's January 25, 2018 order and defendant's cross-motion to quash the subpoena is granted.

This constitutes the decision and order of the Court.

ENTER,

HON. GEMINE D. EDWARDS
J. S. C.

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