Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
**Justice**

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AUBURN REALTY, LLC and
RICHMOND YANO, LLC,

Index No.: 703992/2018

Motion
Date: February 27, 2019

Plaintiffs,

Motion Cal. No.: 2

-against-

Motion Sequence No.: 3

RUPNARAIN SURUJDYAL,

Defendant.

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The following efile papers numbered 68-76 and 78-86 submitted and considered on this motion by defendant Rupnarain Surujdyal (hereinafter referred to as "Defendant") seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 2221 granting Defendant reargument of its prior Order to Show Cause, vacating the judgment and order granted on default pursuant to CPLR 5015, permitting the Defendant to file a late answer pursuant to CPLR 2004 and/or CPLR 3012(d) excusing the Defendant's default, granting the Defendant leave to interpose a late answer and compelling plaintiffs' Auburn Realty, LLC and Richmond Yano, LLC (collectively referred to as "Plaintiffs") acceptance of Defendant's late answer, and for such further relief deemed just and proper and Plaintiffs' cross motion for sanctions pursuant to Court Rule 130-1.1 and for such further relief deemed just and proper.

| | Papers Numbered |
|---|---|
| Notice of Motion- Exhibits..... | EF 68-76 |
| Cross Motion- Exhibits -Memorandum of Law..... | EF 78-84 |
| Reply-Opp to Cross..... | EF 85 |
| Reply..... | EF 86 |

Plaintiffs commenced the underlying action by the filing of a Notice of Pendency and Summons and Complaint with the Office of the Queens County Clerk on March 16, 2018 by electronic court filing. Plaintiffs own a multiple dwelling building located at 86-21/27 112th Street,

Queens, New York. Plaintiffs seek to permanently enjoin Defendant's obstruction of a recorded right of way easement that is the only means of ingress and egress to free standing parking garages Plaintiffs' own as part of Plaintiffs property. Plaintiffs allege among other things, that the Defendant on or before October 31, 2017, erected a barrier to Plaintiffs access to their right of way, a lockable gate that crosses the easement and refused to provide Plaintiffs with keys to the locks and three rectangular steel poles thereby making the right of way, as a driveway, impassable to or from 112th Street by persons in vehicles, and depriving Plaintiffs' tenants, visitors and utility people their lawful right to pass over said lane. Although it was requested, Plaintiffs' allege Defendant has refused to remove the barrier, and it is interfering with their property rights.

On May 16, 2018, plaintiffs filed a motion seeking a default judgment, which was returnable on June 20, 2018. The Honorable Chereé A. Buggs granted Plaintiffs a Judgment on default on June 20, 2018.

Shortly thereafter, Defendant filed an Order to Show Cause seeking an Order vacating the judgment and order granted on default, permitting the Defendant to file a late answer pursuant to CPLR §2004 and/or CPLR §3012(d) excusing the defendant's default; restraining the plaintiff and their agents from removing, altering or otherwise interfering with the fence/gate in question. Defendant stated that counsel was retained who failed to serve an answer due to law office failure, because the matter was improperly calendared. Defendant also stated that he has a potentially meritorious defense. Defendant alleged, Plaintiffs' own exhibit which was used to obtain the judgment demonstrated that Plaintiffs have either destroyed or violated the right of way, and disregarded the restriction and covenants contained therein. The agreements of record give instruction both as to how the right of way should be used, set forth restrictions and/or reservations with respect to the buildings or structure which could be erected on the premises. Thus, Defendant alleged, it would be unfair to grant Plaintiffs a permanent easement or even to allow a right of way without careful consideration of the full agreements, covenants and restrictions contained in the agreements. The right of way addresses nuisance and annoyance, which, in its Affidavit, Defendant asserted existed. Defendant alleged the actions of the Plaintiffs or their predecessors in interest have terminated or violated any right of way. Defendant maintained that it would be irreparably harmed, as Plaintiff's would be given a permanent easement or right of way not in contemplation of an original easement by the respective parties' predecessors in interest. In an Order dated December 10, 2018 the Court found that Defendant failed to set forth a reasonable excuse for his default and determined it did not need to address whether he had a meritorious defense.

Now, Defendant seeks reargument of the aforementioned Order to Show Cause, an order vacating the default and an opportunity to file a late answer compelling Plaintiffs acceptance of the same.

**Reargument**

CPLR 2221 states:
(a) A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it, except that:

(d) A motion for leave to reargue:
1. shall be identified specifically as such;
2. 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; and
3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

Despite what is stated in Defendant's motion papers it is clear Defendant is not seeking to reargue. A motion for reargument pertains to an assertion that the Court overlooked or misapprehended matters of fact. Here, Defendant in the Attorney Affirmation states "This motion for re-argument is made in an effort to present certain facts and law to the Court, which were not presented to the Court at the time the prior mation [(motion)] and therefore were not consider by the Court when its determination was made". Therefore, what the Defendant seeks is a motion to renew its argument. In paragraph 20 of the Attorney Affirmation the Defendant presented case law relevant to leave for renew.

Therefore, this Court will treat Defendant's motion as a motion for leave to renew. The relevant part of CPLR 2221 states:

(e) A motion for leave to renew:
1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion.

In *Blumstein v. Menaldino,* the Second Department affirmed a prior Order granting defendants motion for leave to renew and denied plaintiff's appeal. (*Norman Blumstein v. Ernest Menaldino et al.*, 144 A.D.2d 412 [2nd Dept 1988]). The motion for leave to renew was based on additional proof submitted by defendant. The additional proof was an affidavit from the defendant reaffirming a prior assertion made by its counsel that the defendant did not reside at the address where service was made.(*Id* at 413). The Second Department held the proof was appropriate in support of defendant's motion to renew despite the fact that it was based on facts available to the

defendant when the prior motion was made. (*Id*).

Similarly, In *Daniel Perla Assoc. v. Ginsberg*, The appellants original motion was mislabeled a reargument and the Supreme Court, Nassau County denied the mislabeled motion. (*Daniel Perla Assoc. v. Fred Ginsberg*, 256 A.D.2d 303 [2nd Dept 1998]). The Second Department acknowledged that the motion was mislabeled but held the Supreme Court, Nassau County should have granted the motion. (*Id*). The Second Department reasoned the motion should have been considered as one for renewal.(*Id*). Furthermore, despite the fact that the proof produced was available to the appellant when the first motion was made "[t]he requirement that a motion for renewal be based upon newly discovered-facts is a flexible one, and a court in its discretion, may grant renewal upon facts known to the moving party at the time of the original motion." (*Id*).

The Defendant presents the following new information in further support of its argument that law office failure caused Defendant's default:

1. Plaintiff's Affidavit of Service showing substituted service was effected on March 27, 2018.
2. Defendant's check to a Mr. Messena (prior counsel) dated April 9, 2018, to prove that Defendant timely retained counsel to appear for this action.
3. Updated Affidavit from Mr. Messena providing further detail about the law office failure, to prove the default was in no way caused by Defendant.

Similar to the defendant in *Blumenstein*, here the proof produced by the Defendant seeks to reaffirm prior counsel's assertion that the reason for the default was based on law office failure. To reiterate "[t]he requirement that a motion for renewal be based upon newly discovered-facts is a flexible one, and a court in its discretion, may grant renewal upon facts known to the moving party at the time of the original motion." (*Ginsberg* at 303). Defendants' motion pursuant to CPLR 2221 is granted in so far as it will be treated as a motion for leave to renew.

**Vacate the Judgment**

Plaintiff argues it will be prejudiced if the default judgment is vacated because it believes the Defendant will immediately obstruct Plaintiffs' right of way during the pendency of the action.

CPLR 5015 states the following:

> (a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
> 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or

In *Friedman v Crystal Ball,* the defendant moved pursuant to CPLR 5015 to vacate a default judgment entered against it. (*Rosalie Friedman v. Crystal Ball Group, Inc.*, 2005 WL 6050842 *1 [Sup Ct, Kings County, September 15, 2005, No. 8851/05]). Defendant's cited law office failure, specifically that a secretary failed to serve an answer. (2005 WL 6059842, *1). Supreme Court, NY County stated "... law office failure must not be based upon conclusions, devoid of factual allegations" and determined that defendant's excuse was "undetailed and uncorroborated" and denied the defendant's motion. (2005 WL 6059842, *1).

The Second Department reversed reiterating that to vacate a default pursuant to CPLR 5015 (a)(1) the movant must demonstrate both a reasonable excuse for the default and the existence of a meritorious defense. (*Rosalie Friedman v. Crystal Ball Group, Inc.*, 28 A.D.3d 514 [2nd Dept 2006]). The appellate court determined that the defendant established that the default was not willful but due to law office failure on the part of its counsel. (*Id* at 515). Furthermore, the Second Department determined that the defendant demonstrated a meritorious defense thereby entitling defendant to vacatur of the judgment. (*Id*).

Plaintiffs argue not enough information is known. That different results may have been reached in *Friedman* because it may be procedurally and/or factually distinguishable from this case.

However, this Court does not agree with Plaintiffs' argument. While not much is known as it relates to what type of proof was submitted in *Friedman* i.e. affidavits, emails, letters, etc. we have enough information in this matter to determine whether the Defendant's assertion of law office failure is "based upon conclusions, devoid of factual allegations". (2005 WL 6059842, *1)

Defendant has provided the Court with a copy of the Affidavit of Service coupled with a check in order to illustrate to this Court that the Defendant acted in a timely manner to retain counsel to participate in this action.

Plaintiff argues the retainer check without more does not conclusively establish when the Defendant retained his prior attorney. However, the Defendant also submits an Affidavit from the prior attorney, Mr. Massena (hereinafter referred to as "Massena Affidavit") who does not dispute that Defendant retained the firm in a timely manner.

Instead, the Massena Affidavit illustrates that his former secretary, a Karen Ramirez, improperly entered the file information and dates into the office's file management system, which resulted in improper calendaring. Due to these errors, the firm was unable to receive alerts related to the filing of a notice appearance.

The Defendant has provided more than a "conclusory and unsubstantiated claim of law office failure". (*La Salle v. Brian Lor Russo et al.*, 155 A.D.3d 706, 707 (2nd Dept 2017). In *LaSalle*, the defendant moved pursuant to CPLR 5015 (a)(1) citing law office failure. (*Id*). In support of its

motion, one defendant stated "he was under the impression that this case 'would be properly and actively litigated,' and that he 'mistakenly put faith in the ability of said former counsel to properly handle this matter.'" (*Id*). The court held that defendant's claim was conclusory and unsubstantiated and did not constitute a reasonable excuse for their default. (*Id*).

Here, this Defendant has certainly presented more evidence than the defendants in *LaSalle*. therefore, Defendant has provided a reasonable excuse for his default.

**Meritorious Defense**

Plaintiffs' assert that Defendant's motion is procedurally improper because Defendant raises the affirmative defense of adverse possession but made no mention of such a defense in the underlying papers.

Plaintiffs cite *Foley v. Roche,* a First Department case involving personally injury sustained from a car accident. (*Foley v Roche*, 68 A.D.2d 558, 590 [1st Dept 1979]). The defendants' motion was deemed inappropriate for renewal where defendants asserted a new affirmative defense. (*Id* at 594). According to the court, renewal is not available "where a party has proceeded on one legal theory on the assumption that what has been submitted is sufficient, and thereafter sought to move again on a different legal argument merely because he was unsuccessful upon the original application." (*Id*). The court found, because no additional material facts were alleged and the defendant failed to put forth an excuse such as a claim of mistake, inadvertence or excusable neglect the motion could not be considered one to renew. (*Id*).

In paragraph 21 of his Affidavit in Support of Defendants Order to Show Cause the Defendant stated "[i]t is my meritorious defense that the actions of the Plaintiffs or their predecessors in interest have violated and/or terminated any right of way". It seems the closest Defendant gets to referencing adverse possession is in paragraph 20 of his Affidavit in Support of Defendants Order to Show Cause where he attempts to argue away the Plaintiffs claim that Defendant should be collaterally estopped from arguing adverse possession due to a prior decision involving defendant and the driveway at issue, see *113 Patners. Inc. v. Rupnarian Surujdyal,* 2007 WL 9364501 *1 [Sup Ct, NY County, February 8, 2007, No. 10335/07]; affirmed 50 A.D.3d 988 [2nd Dept, 2008]. This Court also consider that the Defendant failed to include all papers submitted on the prior Order, specifically the Plaintiff's opposing papers in violation of CPLR 2214 ( c).

This Court and the parties have an interest in a decision on the merits. Plaintiff correctly asserts that this is the first time in this case that the Defendant has asserted an affirmative defense of adverse possession. However, the Court finds no prejudice to Plaintiff, Plaintiffs referenced *113 Parnters. Inc.,* where the Defendant in this action asserted a claim for adverse possession upon the driveway at issue. In fact, Plaintiff anticipated such an argument, even though it was not made in Defendant's Order to Show Cause when, in Opposition, Plaintiff asserted the Defendant was collaterally estopped from making such a claim. In *Strong v Brookhaven Memorial,* the Second Department held "While it is generally true that a motion to renew must be based on newly-

discovered facts, courts have discretion to grant this relief in the interest of justice, although not all requirements for renewal are met". (*Strong v. Brookhaven Memorial Hosp. Medical Center*, 240 A.D.2d 726 [2nd Dept 1997]). This Court in its discretion will make a determination on the merits as to whether the Defendant's claim is meritorious

Defendant claims it has a good faith affirmative defense of adverse possession because it maintained a locked gate on the property since 2004. The Court of Appeals stated in *Spiegel v Ferraro,* an easement may be extinguished by adverse possession. (*Jerry Spiegel v. Stephan P. Ferraro et al.*, 73 N.Y.2d 622, 625 [1989]). "[T]he party seeking to extinguish the easement must establish that the use of the easement has been adverse to the owner of the easement, under a claim of right, open and notorious, exclusive and continuous for a period of 10 years." (*Id).*

In support of its claim the Defendant cites to the holding in *113 Parnters Inc.*, in which the court partially held that the Defendant's claim for adverse possession would have began to run as of 2004 when Defendant satisfied the element of hostility. (2007 WL 9364501 *3). However, the Defendant failed to reference an Order entered under the same Index No. 10335/07 on November 4, 2005 by the Honorable Allan B. Weiss that stated "pending the final determination of this action or until further Order of this Court Defendant....are directed to remove the chain and lock from the subject gate and are enjoined and restrained from blocking the driveway in any way behind their property;". Subsequently, the aforementioned Order was entered and the plaintiff 113 Partners Inc.'s motion was granted, as later noted by the Second Department, 113 Partners Inc. also moved for a permanent injunction, which the Supreme Court NY County granted and the Second Department affirmed. Defendant has not and cannot suggest that the aforementioned Order is unrelated to the driveway at issue in this action, such an argument would fail. The very assertion that Defendant has a claim for adverse possession suggests the Defendant did not comply with the prior Order of permanent injunction. Compliance with that Order would eliminate Defendant's ability to satisfy the hostility prong. Defendants' claim of adverse possession fails.

Next, Defendant claims that the Plaintiff's extinguished the easement. This Court has been presented with several copies of the easements and has attempted to read them to no avail. The earliest having been recorded in 1913 and the latest 1923, the papers are understandably in poor condition. However, interpretation of the easement is unnecessary here where we find that the Plaintiff has an easement by necessity.

In *Asche v. Land and Building,* plaintiffs' claimed they were entitled to permanent easement over a portion of the defendants' property, the portion had been used by plaintiffs' and their predecessors as a driveway since 1951. (*Ron Asche v. Land and Building known as 64-29 232nd Street etc., et al.,* 12 A.D.3d 386, 387 (2nd Dept 2004). The Second Department stated to establish an easement by necessity or easement by implication the movant must prove that their use of the disputed strip was absolutely necessary for the beneficial enjoyment of their property and for the latter that their use was reasonably necessary for such enjoyment. (*Id*). The Second Department held the plaintiffs' failed to show the disputed use would provide anything more than convenience taking into account lack of a garage in the rear. (*Id*).

This case is distinguishable from *Asche*, in that the Plaintiffs are seeking access to their garages. In fact, Plaintiffs allege Defendant has obstructed "the only means of ingress and egress to free standing parking garages Plaintiffs own as a part of Plaintiffs' Property."At the very least, Plaintiff has established their use of the disputed strip is "reasonably necessary for their beneficial enjoyment of their property" (*Id*). Plaintiffs have sufficiently established use of the disputed strip is "absolutely necessary" to their enjoyment of their property. Therefore, this Court finds that Plaintiffs have an easement by necessity. Defendant has failed to establish a meritorious defense. Therefore it is,

**ORDERED**, that while Defendant has presented a reasonable excuse, it has failed to set forth a meritorious defense therefore, Defendant's motion is denied. The Parties shall comply with the prior Judgment on Default entered on June 20, 2018 by Justice Buggs; and it is further,

**ORDERED**, that Plaintiffs Cross Motion is denied.

The foregoing constitutes the decision and order of the Court.

Dated: April 9, 2019

**Hon. Chereé A. Buggs, JSC**

FILED
MAY -7 2019
COUNTY CLERK
QUEENS COUNTY