

|  |
|--|
| <b>East 17th LLC v Kacimi</b>  |
| 2020 NY Slip Op 32765(U)   |
| August 25, 2020  |
| Supreme Court, New York County   |
| Docket Number: 155103/2019   |
| Judge: Kathryn E. Freed  |
| 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  
NEW YORK COUNTY**

**PRESENT:** HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

*Justice*

-----X

**INDEX NO.** 155103/2019

EAST 17TH LLC

Plaintiff,

**MOTION SEQ. NO.** 003

- v -

ISMAIL MOHAMED KACIMI,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

In this dispute concerning a residential apartment, defendant Ismail Mohamed Kacimi moves to renew and reargue the decision and order of this Court dated and entered May 12, 2020. Plaintiff East 17<sup>th</sup> LLC opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND:**

The facts giving rise to this action are set forth in detail in the decision and order of this Court dated and entered May 12, 2020 which, inter alia, denied defendant's motion to dismiss the complaint (motion sequence 002) and directed him to serve an answer to the complaint. Doc. 39. Any additional relevant facts are set forth below.

By notice of motion filed June 19, 2020, plaintiff moved (motion sequence 003), pursuant to CPLR 2221(d), for "reversal of the [o]rder [of this Court entered and] dated May 12, 2020." Doc. 42. Although CPLR 2221(d) pertains to motions to reargue, defendant and his attorney state

in their affidavit and affirmation in support of the motion, respectively, that the motion is one for renewal and reargument of defendant's prior motion. Docs. 42-43. Thus, this Court will deem defendant's motion as such.

### **LEGAL CONCLUSIONS:**

CPLR 2221(f) provides as follows:

(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.

Given the foregoing provision, this Court will address the branches of defendant's motion to renew and reargue separately.

### **Defendant's Motion To Reargue**

CPLR 2221(d) provides as follows:

(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.

In moving for reargument, defendant argues that this Court erred in denying that branch of his motion seeking to dismiss plaintiff's causes of action for waste and public and private nuisance. In refusing to grant dismissal of the said claims, this Court reasoned that "[t]o the extent [d]efendant argues that the complaint fails to plead the elements necessary to sustain claims for nuisance or waste, defendant failed to raise these arguments in his initial moving papers and it is improper to raise them for the first time in reply." Doc. 42. It is well-settled "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." *Dannasch v. Bifulco*, 184 A.D.2d 415, 417 (1st Dept 1992); *see also Matter of Erdey v City of New York*, 129 AD 3d 546 (1st Dept 2015). Since it is evident that this Court did not overlook or misapprehend the facts or the law in making this determination, that branch of defendant's motion seeking reargument is denied.

### **Defendant's Motion To Renew**

CPLR 2221(e) provides as follows:

(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.

Defendant argues that he is entitled to renewal of his motion to dismiss on the ground that his prior attorney committed law office failure. Specifically, he claims that his prior attorney

waited until the submission of the reply papers in connection with the prior motion to argue that plaintiff's claims for waste and public and private nuisance were subject to dismissal.

"While a court has discretion to entertain renewal based on facts known to the movant at the time of the original motion, the movant must set forth a reasonable justification for the failure to submit the information in the first instance" (*Professional Offshore Opportunity Fund, Ltd. v Braider*, 121 AD3d 766, 769; *see Deutsche Bank Trust Co. v Ghaness*, 100 AD3d 585, 585-586). "When no reasonable justification is given for failing to present new facts on the prior motion, the Supreme Court lacks discretion to grant renewal" (*Zelouf Intl. Corp. v Rivercity, LLC*, 123 AD3d 1116, 1116; *see Cioffi v S.M. Foods, Inc.*, 129 AD3d 888, 891; *Sobin v Tylutki*, 59 AD3d 701, 702).

"Law office failure can be accepted as a reasonable excuse in the exercise of the court's sound discretion" (*Nwauwa v Mamos*, 53 AD3d 646, 649; *see CPLR 2005; Castor v Cuevas*, 137 AD3d 734, 734; *Gordon v Boyd*, 96 AD3d 719, 720). "Although a court has the discretion to accept law office failure as a reasonable excuse, a conclusory, undetailed and uncorroborated claim of law office failure does not amount to a reasonable excuse" (*Eastern Sav. Bank, FSB v Charles*, 103 AD3d 683, 684, quoting *White v Daimler Chrysler Corp.*, 44 AD3d 651, 651 [citation omitted]; *see People's United Bank v Latini Tuxedo Mgt., LLC*, 95 AD3d 1285, 1286; *Piton v Cribb*, 38 AD3d 741, 742).

*Bank of NY Mellon Trust Co., N.A. v Talukder*, 176 AD3d 772, 773-774 (2d Dept 2019) (citations omitted).

Here, as plaintiff argues, defendant's "bare allegation of law office failure was conclusory and wholly unsubstantiated. The plaintiff did not proffer an affidavit from anyone with personal knowledge of the purported law office failure and failed to provide any details regarding such failure." *Deutsche Bank Natl. Trust Co. v Fishbein*, 179 AD3d 768, 770 (2d Dept 2020) (citations omitted). Therefore, the branch of defendant's motion seeking renewal is must be denied.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendant’s motion is denied in its entirety; and it is further

ORDERED that, if counsel can agree on a discovery schedule, they are directed to enter into a so-ordered discovery stipulation prior to September 24, 2020, leaving the dates for the next compliance conference and the deadline for filing the note of issue blank, and emailing the same to jjudd@nycourts.gov to be so-ordered; and it is further

ORDERED that, if counsel cannot stipulate to a discovery schedule, then they are to participate in a telephonic compliance conference on September 24, 2020 at 4:30 p.m. (counsel are to provide the court with a dial-in number and access code for the call OR are to have all parties on the line and then patch the court in at (646) 386-5655); and it is further

ORDERED that this constitutes the decision and order of the court.

KATHRYN E. FREED, J.S.C.

8/25/2020  
DATE

CHECK ONE:

|                          |                            |  |
|--------------------------|----------------------------|--|
| <input type="checkbox"/> | CASE DISPOSED              |  |
| <input type="checkbox"/> | GRANTED                    | <input checked="" type="checkbox"/> DENIED |
| <input type="checkbox"/> | SETTLE ORDER               |  |
| <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN |  |

|                                     |                       |                                    |
|-------------------------------------|-----------------------|------------------------------------|
| <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |                                    |
| <input type="checkbox"/>            | GRANTED IN PART       | <input type="checkbox"/> OTHER     |
| <input type="checkbox"/>            | SUBMIT ORDER          |                                    |
| <input type="checkbox"/>            | FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |

APPLICATION:

CHECK IF APPROPRIATE: