

Amerimax Capital, LLC v Lotovsky
2021 NY Slip Op 30933(U)
March 26, 2021
Supreme Court, New York County
Docket Number: 153449/2020
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **IAS MOTION 14**

Justice

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AMERIMAX CAPITAL, LLC,

Plaintiff,

- v -

LEONID LOTOVSKY, NINEL LOTOVSKY

Defendant.

-----X

INDEX NO. 153449/2020

MOTION DATE N/A

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 130, 133, 134

were read on this motion to/for STAY.

The motion by defendants, brought via order to show cause, to reargue and renew is denied. As an initial matter, the Court denies the branch of the motion to reargue. Because the Court is not granting reargument, it adheres to its previous decision and need not offer additional justification.

In this action, the Court previously granted plaintiff a default judgment (NYSCEF Doc. No. 115). Defendants failed to oppose the motion. Defendants then moved to vacate that default and the Court denied the motion (NYSCEF Doc. No. 118). The Court reasoned that defendants failed to move to compel acceptance of their answer after it was properly rejected by plaintiff and that defendants failed to oppose the default judgment motion despite receiving notice about the motion.

The Court also observed that the parties had stipulated to extend defendants' time to answer and then defendants submitted a verified answer without a verification. The Court

stressed that defendants ignored the case until after plaintiff secured a default judgment. Now defendants move to reargue, renew, and vacate the Court's denial of their motion to vacate.

With respect to the portion of the motion to renew, defendants claim that defendant Leonid Lotovsky discovered a term sheet and evidence of a \$500 check defendants sent to plaintiff that triggered numerous disclosure requirements that plaintiff purportedly failed to comply with. They assert that these newly discovered items should be considered because they were recently located.

In opposition, plaintiff argues that defendants did not serve the motion papers in accordance with the order to show cause. It claims that no new facts were presented and the arguments presented do not support defendants' motion. Plaintiff points out that the \$500 check is from a non-party and has no clear bearing on this case. It also contends that the various regulations cited by defendants are irrelevant because they apply to residential mortgages and not to a commercial loan made for investment purposes (which is the loan at issue here).

The Court denies the branch of the motion to renew. There were no new facts presented that could not have been presented in the previous motion or that would change the Court's previous decision. Nothing before this Court compels the Court to overlook the fact that defendants signed a stipulation in which they were granted an extension of time to answer and they filed an answer without the proper verification. Then they did nothing when plaintiff rejected that answer or when plaintiff moved for a default judgment.

Contrary to defendants' claim that they missed only one court date, counsel for defendants ignored email after email about the notice of rejection (NYSCEF Doc. No. 23) plaintiff's motion for a default judgment (NYSCEF Doc. No. 24) and the Court's decision

granting that motion (NYSCEF Doc. No. 35). Only when the Court signed an order relating to legal fees (NYSCEF Doc. No. 41) did defendants decide to defend the case.

Counsel for defendants is correct that ordinarily, clients should not suffer because of law office failure. But that principle has limits; it would be wholly unfair to plaintiff if this Court were to let counsel for defendants make a mockery of this case by choosing when he wanted to defend the case regardless of plaintiff's timely efforts to prosecute its case. Every time plaintiff or this Court filed a document, counsel for defendants got an email about it. And he ignored the case until he decided it was time to litigate. Nothing in the papers submitted here shows a ground for renewal on the reasonable excuse element for vacatur.

Defendants did not state a basis to renew with respect to the meritorious defense element either. In the previous decision denying the motion to vacate, the Court noted that the regulations cited by defendants did not support their claim that a broker was barred from an exclusivity provision. Defendants cannot cite new regulations as a basis to renew (even assuming there was support for defendants' claim); all of the applicable case law was available to defendants in their previous motion and there is no claim that the law changed since the Court issued its previous decision. The chance to cite relevant case law was the previous motion to vacate.

The Court denies the request by plaintiff that defendants be sanctioned but it grants plaintiff's request for costs and fees related to this motion. The Court observes that counsel for defendants' email in which he stated that his clients were "judgment proof" and "all this will be an exercise in futility" is an embarrassment to the legal profession (NYSCEF Doc. No. 134). Counsel for defendants submitted an emergency affidavit in connection with this motion in which he stated, under penalty of perjury, that his clients would suffer irreparable harm if the judgment was not stayed. If his clients are, in fact, judgment proof, then the Court wonders what

harm they will suffer. Counsel for defendants is absolutely entitled to zealously represent his clients to the fullest extent of the law, which includes making multiple motions to vacate the default judgment. But that does not mean he can claim it is an emergency and then essentially admit that this motion will make little difference because his clients cannot afford to pay.

Moreover, the underlying agreement entitles plaintiff to legal fees and the Court has already awarded plaintiff legal fees prior to this motion. Plaintiff is directed to upload a request for legal fees in connection with this motion along with a proposed order (as Letter/Correspondence to Judge) by April 9, 2021. Defendants may upload opposition by April 13, 2021.

Accordingly, it is hereby

ORDERED that the motion by defendants to reargue and renew is denied in its entirety, and all stays are vacated immediately and plaintiff shall upload a request for additional reasonable legal fees related to this motion on or before April 9, 2021 and defendants may submit opposition on or before April 13, 2021.

3/26/2021

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE