

<b>Medina v Merrimac Estates, Inc.</b>
2021 NY Slip Op 31778(U)
May 24, 2021
Supreme Court, New York County
Docket Number: 153340/2017
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH PART IAS MOTION 18EFM

Justice

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MAYRA MEDINA,

Plaintiff,

- v -

MERRIMAC ESTATES, INC.,

Defendant.

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INDEX NO. 153340/2017

MOTION DATE 04/09/2021

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 69, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for REARGUMENT/RECONSIDERATION

Upon the foregoing documents, defendant moves for leave to reargue this Court's decision and order dated November 16, 2020 (NYSCEF Doc. No. 65 [the Order]), granting plaintiff's motion to vacate prior orders that were granted in defendant's favor on plaintiff's default.

"A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law" (McGill v Goldman, 261 AD2d 593, 594 [2d Dept 1999]). "Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979]; see Anthony J. Carter, DDS, P.C. v Carter, 81 AD3d 819, 820 [2d Dept 2011]).

Defendants cite many cases in support of its contention that the Court misapplied well-settled case law as to the second prong of CPLR 5015(a)(1), i.e., that plaintiff must have demonstrated a potentially meritorious defense (see generally Order at 1-2, citing Embraer Fin. Ltd. v Servicios Aereos Profesionales, S.A., 42 AD3d 380, 381 [1st Dept 2007]; Tat Sang

Kwong v Budge-Wood Laundry Serv., Inc., 97 AD2d 691 [1st Dept 1983]; World O World Corp. v Anoufrieva, 163 AD3d 610, 611 [2d Dept 2018]).

However, the Court disagrees with defendant's interpretation of the application of the law — plaintiff had to demonstrate a “potentially meritorious opposition to [defendant's] *motion*” (World O World Corp. v Anoufrieva, 163 AD3d 610, 611 [2d Dept 2018] [emphasis added]; see Navarrete v Metro PCS, 137 AD3d 1230, 1231 [2d Dept 2016] [“To vacate the order . . . , which was entered upon the plaintiff's failure to appear at oral argument, the plaintiff was required to demonstrate a reasonable excuse for her default and a potentially meritorious opposition to the respondent's *motion*] [emphasis added]; Jackson v Kothuru, 183 AD3d 707, 708 [2d Dept 2020] [“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 the default as well as a potentially meritorious opposition to the *motion*”] [emphasis added]).

The cases defendant cites concern vacating defaults in appearing, such as with default judgments, or otherwise pertain to motions made as to the merits of the action, such as where a party fails to oppose a summary judgment motion. If there were no meritorious opposition to a *summary judgment motion*, the Court would agree that “[p]ermitting plaintiffs to proceed with their action would have been ‘an exercise in futility’” (QRT Assoc., Inc. v Mouzouris, 40 AD3d 326, 327 [1st Dept 2007], quoting Kikemborg v New York City Health and Hosps. Corp., 291 AD2d 281 [1st Dept 2002]). Here, however, defendant's counsel's affirmation in support of motion sequence no. 2 to dismiss the complaint, and the arguments made therein, were premised entirely upon a failure to meet discovery obligations and the subsequent order precluding plaintiff from offering evidence on damages (see NYSCEF Doc. No. 33, referencing CPLR

3126). Defendant never moved on the basis that it should not be held liable for the plaintiff's accident and/or that it is free from negligence on the merits (see id.).

Defendant failed to show that a plaintiff needs to affirmatively establish the merits of her claim upon defaulting on a *discovery motion*. This Court cannot find any case law supporting that position.

To the contrary, in Arroyo v Starrett City, Inc., the Appellate Division agreed “with the Supreme Court's determination that a potentially meritorious defense to the motion to strike existed based on, inter alia, the lack of a showing that the plaintiff's failure to comply with the defendant's discovery demands was willful and contumacious” (170 AD3d 929, 931 [2d Dept 2019]). Additionally, in Kramarenko v New York Community Hosp. the Appellate Division specifically found that the plaintiffs “adequately demonstrated a potentially meritorious opposition to the defendants' motions to dismiss the complaint for noncompliance with court-ordered disclosure” (134 AD3d 770, 772 [2d Dept 2015]).

Thus, the demonstration plaintiff had to show, which she did, was that she was able to oppose the discovery-related motion. Consequently, had that order not been issued, defendant would not be entitled to dismissal of the complaint on the simple procedural basis that plaintiff was precluded from offering damages. Accordingly, this Court went on to find that “it necessarily follows that plaintiff should be able to mount a meritorious opposition to the summary judgment motion if she is no longer precluded from offering evidence as to her damages” (Order at 3).

Accordingly, it is hereby ORDERED that leave to renew is granted and, upon reargument, the motion is denied and the Court adheres to its original determination; and it is further

ORDERED that, as set forth in the prior Order (Doc. No. 65), this matter is restored to active status; and it is further

ORDERED that the orders dated April 2, 2019 and July 25, 2019, resolving motion sequence nos. 1 and 2 (NYSCEF Doc. Nos. 31 and 47) are hereby vacated; and it is further

ORDERED that motion sequence no. 2 is denied without prejudice; and it is further

ORDERED that motion sequence no. 1 shall be restored to the IAS Part 18 motion calendar, along with a remote status conference, to be held via Microsoft Teams on June 23, 2021 at 10:00 am.

This constitutes the decision and order of the Court.

5/24/2021

DATE

ALEXANDER M. TISCH, 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