

Chez Wid LLC v Philippe
2022 NY Slip Op 31478(U)
April 28, 2022
Supreme Court, Kings County
Docket Number: Index No. 509908/2018
Judge: Richard J. Montelione
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At DJMP of the Supreme Court of the State of New York, Kings County, on the _____ day of _____ 2022 ;

APR 28 2022

PRESENT: Hon. Richard J. Montelione, J.S.C. SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS: DJMP

DECISION AND ORDER

-----X

CHEZ WID LLC,

Index No.: 509908/2018

Mot. Seq. 6-8

Plaintiff(s),

-against-

JEAN PHILIPPE,

Defendant(s).

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The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered NYSCEF #
Plaintiff's Amended Notice of Motion for Contempt dated 6/17/2021 (NYSCEF # 138), Ira Tokayer Esq.'s Attorney Affirmation in Support of Motion Affirmed on 10/16/2020 (NYSCEF # 112), Exhibits (NYSCEF # 113-115), Affirmation of Service Affirmed (NYSCEF # 139) on 6/22/2021 (MS # 6).....	111-116, 138, 139
Defendant's Order to Show Cause Signed 10/21/2020 (NYSCEF # 117) Seeking to Vacate court's September 17, 2019 and May 15, 2020 orders, Affirmation of Service Affirmed on October 27, 2020 (NYSCEF # 137), Exhibits (NYSCEF # 92-106), Defendant Jean Philippe's Affidavit Affirmed on 9/3/2020, Nnenna Onua, Esq.'s Attorney Affirmation in Support of Order to Show Cause Affirmed on 9/21/2020 (NYSCEF # 108) (MS # 7).....	92-109; 117 137
Plaintiff's Notice of Cross-Motion dated 11/13/2020 (NYSCEF # 119), Ira Tokayer Esq.'s Attorney Affirmation in Opposition to Motion and in Support of Cross-Motion Affirmed on 10/13/2020 (NYSCEF # 120), Plaintiff's Affirmation in Opposition to Motion and in Support of Cross-Motion Affirmed by Widna Marc on 11/10/2020 (NYSCEF # 121) , Exhibits (NYSCEF #122-134), Plaintiff's Memorandum in in Opposition to Motion and in Support of Cross-Motion dated 11/13/2020 (NYSCEF # 135) (MS # 8).....	111-135

This is an action to rescind a lease, and for breach of contract, fraud and unjust enrichment. Plaintiff Chez Wid LLC ("plaintiff") moves this court for an order, pursuant to Judiciary Law 753, punishing defendant Jean Philippe ("defendant") for contempt, and for other just and proper relief, including fine, imprisonment or both according to law, for defendant's failure to comply with this court's May 15, 2020 order (Motion Seq. No. 6). Defendant moves this court, by order to show cause, for an order (a) vacating this court's September 17, 2019 order, entered by the Clerk on September 30, 2019, and its May 15, 2020 order, entered by the Clerk on May 20, 2020, pursuant to

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CPLR 5015(a)(1); (b) allowing defendant to reargue Motion Seq. No. 4 to renew and reargue defendants' motion to vacate the default judgment, which was denied by order dated May 15, 2020; (c) staying the enforcement of the September 17, 2019 and May 15, 2020 orders, including but not limited to the execution by the sheriff of any county, or any marshal in the City of New York, pending the outcome of this motion; and (d) granting defendant such other and further relief as the court may deem just and proper (Motion Seq. No. 7). Plaintiff cross-moves for an order advancing the hearing date of the above referenced contempt motion (Motion Seq. No. 8).

Plaintiff entered into an agreement with defendant to lease a store at 1323 Flatbush Avenue, Brooklyn, NY ("the premises"), beginning in March 2017. Plaintiff intended to use the leased premises as a restaurant. Due to violations of the New York City Health Code, plaintiff was unable to use the premises as a restaurant, as intended. Additionally, 1323 Flatbush Avenue Realty Corp. owned the subject premises and plaintiff did not. Plaintiff owns shares of 1321 Flatbush Avenue Realty Corp.

This action was commenced by filing a summons and complaint on May 14, 2018. Defendant failed to appear. By order dated January 15, 2019, Hon. Lawrence Knipel granted plaintiff's motion for default judgment against defendant (Motion Seq. No. 1) and denied defendant's cross-motion to vacate her default (Motion Seq. No. 2), as defendant failed to state a meritorious defense. Plaintiff served the order with Notice of Entry on January 15, 2019. A judgment was entered against defendant, in the amount of \$43,199.58 on June 7, 2019. Plaintiff moved, by order to show cause signed July 3, 2019 (Motion Seq. No. 3), to direct defendant to turn over his shares of 1323 Flatbush Avenue Realty Corp to satisfy the judgment debt. On November 18, 2019, defendant cross-moved to renew and reargue the default judgment and to vacate said default judgment. By order dated

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November 19, 2019, the court granted the turnover motion and directed defendant to deliver the shares of 1323 Flatbush Avenue Realty Corp. to plaintiff or the marshal and/or execute and deliver any and all documents necessary to affect such delivery and turnover. The November 19, 2019 order also denied defendant's cross-motion to reargue as untimely, and noted the court's prior finding that defendant failed to proffer a meritorious defense. The November 19, 2019 order additionally directed plaintiff to settle an order on notice. The court signed the settled order on May 15, 2020, which directed that defendant turnover his shares in 1323 Flatbush Avenue Realty Corp. to plaintiff.

"In order to find that contempt has occurred in a given case, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. It must appear, with reasonable certainty, that the order has been disobeyed. Moreover, the party to be held in contempt must have had knowledge of the court's order ... Finally, prejudice to the right of a party to the litigation must be demonstrated (see Judiciary Law, § 753, subd. A)." *Massimi v. Massimi*, 56 A.D. 624 (2d Dep't 2008) quoting *McCormick v. Axelrod*, 59 N.Y.2d 574, 583 (1983).

Plaintiff moves to sanction defendant for failure to comply with the court's May 15, 2020 order. The order in question states in relevant part,

that defendant JEAN PHILIPPE, judgment debtor, forthwith, and not later than three business days after service of notice of entry of this Order, deliver and turn over to the Kings County Sheriff any and all of defendant's shares of 1323 Flatbush Avenue Realty Corp. and title thereto, and further execute and deliver and turn over to the Sheriff any and all documents necessary to effect such delivery and turn over, including but not limited to an assignment of such shares...

The May 15, 2020 order also directs the Sheriff to sell defendant's shares at a public auction, at a time and place posted in three public places in Kings County or advertised in a newspaper.

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Plaintiff contends that defendant failed to turnover these shares to the Sheriff, pursuant to this court's order. Defendant does not dispute that he failed to turnover the shares in question. Plaintiff's cross-motion to advance the hearing date is denied as moot.

Defendant moves, pursuant to CPLR 5015(a)(1), to vacate this court's September 17, 2019 and May 15, 2020 orders. "A party seeking to vacate a default judgment pursuant to CPLR 5015(a)(1) 'must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action.'" *New York and Presbyterian Hosp. v. American Home Assur. Co.* 28 A.D.3d 442 (2d Dep't 2006) quoting *Eugene Di Lorenzo, Inc. v. Dutton Lbr. Co.* 67 N.Y.2d 138, 141 (1986); See *New York University Hosp. Rusk Institute v. Illinois Nat. Ins. Co.*, 31 A.D.3d 511 (2d Dep't 2006). In the instant case, by order dated January 15, 2019, Hon. Lawrence Knipel found that defendant had stated "[n]o meritorious defense." This court denied reargument as to the finding that defendant failed to proffer a meritorious defense, by order dated November 19, 2019. As defendant has not met its burden in showing a meritorious defense, the court need not address whether defendant stated a reasonable excuse for his delay. The branch of defendant's motion to vacate the September 17, 2019 and May 15, 2020 orders is accordingly denied.

"Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision." *Carrillo v. PM Realty Group*, 16 A.D.3d 611 (2d Dep't 2005); see CPLR 2221(d)(2). Additionally motions for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior

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motion and written notice of its entry.” CPLR 2221(d) (3). Motions for reargument “are not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented.” *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dep’t 1999).

Defendant attempts to reargue Motion Seq. No. 4, which was denied by order dated November 19, 2019. Ordinarily, a motion to renew or reargue must be made upon the judge who signed the order. See CPLR 2221, *Doscher v. Doscher*, 54 A.D.3d 890 (2d Dep’t 2008). However, in the instant case, this court heard and denied Motion Seq. No. 4, as it was filed November 19, 2019. Notice of Entry of the underlying order was served upon defendant on January 18, 2019, so Motion Seq. No. 4 was obviously untimely. The November 19, 2019 order was entered on December 4, 2020. Defendant also seeks to reargue the court’s May 15, 2020 order. The May 15, 2020 order was entered on May 21, 2020. Both orders were served upon defendant with notice of entry. The order to show cause in question was filed on September 3, 2020, significantly past the thirty-day statutory period to move to reargue.

Additionally, in the instant motion, defendant effectively requests to reargue Hon. Knipel’s January 15, 2019 order a second time. In *McGill v. Goldman, supra*, the Appellate Division, Second Department held that the trial court erred in granting what amounted to a second motion for reargument. In *William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22 (1st Dep’t 1992), the Appellate Division, First Department reversed the trial court’s order granting leave to reargue and imposed sanctions on the plaintiff, where plaintiff used motions to reargue to bring the same argument thrice before the court. Based on the foregoing, it is hereby

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ORDERED that plaintiff's motion to punish defendant for contempt (Motion Seq. No. 6) is granted; and it is further

ORDERED that defendant's motion to vacate this court's September 17, 2019 and May 20, 2020 orders; reargue Motion Seq. No. 4 and stay enforcement of the court's September 17, 2019 and May 20, 2020 orders (Motion Seq. No. 7) is denied in all respects; and it is further

ORDERED that defendant is given until June 1, 2022 to purge his contempt and upon his failure to do so, plaintiff may submit an order to the court allowing for the issuance and execution of an arrest warrant which may provide for statutory fees and costs; and it is further

ORDERED that plaintiff's motion to advance the contempt hearing (Motion Seq. No. 8) is denied as moot.

All other relief requested is denied.

A copy of this decision and order must be served by first class mail upon defendant within 30 days of entry of this order

This constitutes the decision and order of the court.

ENTER


Hon. Richard J. Montelione, J.S.C.

KINGS COUNTY CLERK
FILED
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