

**CSAIL 2018-CX11 6-8 W. 28th St. LLC v JTRE Nomad
8 W 28th LLC**

2023 NY Slip Op 30450(U)

February 9, 2023

Supreme Court, New York County

Docket Number: Index No. 850161/2021

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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CSAIL 2018-CX11 6-8 WEST 28TH STREET LLC,
 Plaintiff,

- v -

JTRE NOMAD 8 W 28TH LLC, JACK TERZI, NEW YORK
 CITY DEPARTMENT OF FINANCE, NEW YORK STATE
 DEPARTMENT OF TAXATION AND FINANCE, NEW
 YORK CITY ENVIRONMENTAL CONTROL BOARD,
 ABECO CONSTRUCTION LLC, PASQUALE
 QUARANTINO INC.,

Defendants.

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INDEX NO. 850161/2021
 MOTION DATE N/A
 MOTION SEQ. NO. 003

**DECISION + ORDER ON
 MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 116, 117, 118, 119, 120, 121, 122, 123, 124, 137, 138, 139, 141, 142

were read on this motion to REARGUE.

JTRE Nomad 8 W 28TH LLC and Jack Terzi (collectively “Defendants”) move pursuant to CPLR 2221 to reargue Plaintiff’s motion for a default judgment and related relief including appointment of a receiver (Mot. Seq. 002), and upon reargument, accepting Defendants’ answer and vacating the default and appointment of the receiver on the basis that (1) the Court failed to address JTRE Defendants’ cross-motion to compel acceptance of a late answer; (2) the December 1, 2022 Decision (NYSCEF 108) appears to have mistakenly believed that the portion of Plaintiff’s motion seeking the appointment of a receiver was unopposed.¹ For the reasons set forth below, the motion is denied.

¹ The JTRE Defendants also sought temporary relief staying the Decision and Order on Motion dated December 1, 2022, holding the Defendants in default and appointing a temporary receiver (NYSCEF 108) and implementation thereof, and staying all receiver activities, powers and

Under CPLR 2221[d], a court may grant a motion to reargue where the movant offers “matters of fact or law overlooked or misapprehended by the court in determining [a] prior motion,” so long as all matters of fact on which the motion to reargue relies were offered in the prior motion (*see William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]; *see also* CPLR 2221[d]). Reargument should be granted where the court “mistakenly arrived at its earlier decision” (*see 1735 Univ. Ave. Assoc. LLC v Andrews Dev. Corp.*, 92 AD3d 516 [1st Dept 2012]).

Although Defendants have pointed out two ways in which the Order was unclear, they have not demonstrated that the Court overlooked or misapprehended any matters of law or fact. First, the Court did not ignore the arguments made in Defendants’ cross-motion to compel acceptance of a late answer. It did consider (and reject) Defendants’ arguments. Second, the Court did not overlook Defendant’s opposition to the receiver. Defendants correctly note that the sentence in the Decision (NYSCEF 108 at 7) which says, “[g]iven these circumstances, and the fact that Defendant has defaulted *on this motion*, the Court finds the appointment of a receiver appropriate” might have suggested that the Court did not consider Defendants’ opposition. That is not the case. The sentence should instead have read that “Defendant has defaulted *in this action*.”

However, the Court is not persuaded that Defendants’ arguments warrant a change in outcome. First, Defendants argue that the Court should have accepted their Answer because Plaintiff waived any objection to the Answer by failing to send a notice of rejection within 15 days, relying on CPLR § 2101(f). When addressing whether a plaintiff forfeits objection to a late

authorities pursuant to that Order. After oral argument on December 9, 2022, this Court denied the temporary relief and set a briefing schedule for the Order to Show Cause (NYSCEF 124).

answer, the First Department applies general waiver principles. A waiver may be found, for example, where a plaintiff accepts and retains a defendant's answer for an extended period and only raises the issue of its untimeliness later in the litigation, such as in response to requests for discovery or a motion (*Wittlin v Schapiro's Wine Co. Ltd.* (178 AD2d 160, 161 [1st Dept 1991]; *Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 502 [1st Dept 2014]; *Phillips v League For Hard of Hearing*, 254 AD2d 181, 181 [1st Dept 1998]). Here, there was no such a waiver. Plaintiff did not retain the answer and then raise an objection to its lateness only in response future discovery requests or the like. Rather, Plaintiff notified Defendants that its answer was late and that it was rejected.²

Second, the Court did not overlook the substance of Defendant's opposition to appointment of a receiver. It simply disagreed with Defendants' opposition on the merits.

Moreover, Defendants do not even attempt to proffer a meritorious defense (*see Bustamante v Green Door Realty Corp.*, 69 AD3d 521, 522 [2010]). They do not dispute that they have failed to pay the mortgage installments, property taxes and other amounts required by the loan documents.

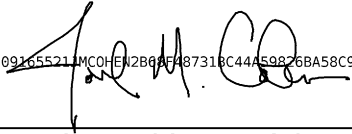
Accordingly, it is,

ORDERED that Defendants motion for leave to reargue is **denied**; it is further

² Defendants argue that the Second Department has read CPLR § 2101(f) to impose a rigid statutory 15-day deadline to reject a late answer (*see U.S. Bank N.A. et al. v Lopez*, 192 AD3d 849 [2d Dept 2021]). Even assuming that is a fair reading of the case, the Court does not believe applying such a deadline in these circumstances would be consistent with the above-referenced First Department precedent – utilizing a more flexible waiver standard – which is binding on this Court. Moreover, the Court notes that the plain language of CPLR § 2101(f) speaks to “a defect in the form of a paper,” and providing “leave to correct” such a defect, concepts that would not appear to naturally apply to whether or not the paper was filed on time.

ORDERED that Defendant’s cross-motion filed in Mot. Seq. 002 was denied by the December 1, 2022 Order (NYSCEF 108), and the Court confirms that Defendants did not default in responding to Mot. Seq. 002.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

2/9/2023
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	DENIED	SUBMIT ORDER	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	