

**Attebury v Corporate Express, Inc.**

2023 NY Slip Op 30475(U)

February 15, 2023

Supreme Court, New York County

Docket Number: Index No. 156148/2020

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

*Justice*

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INDEX NO. 156148/2020

SEAN ATTEBURY and MELISSA ATTEBURY

MOTION SEQ. NO. 003

Plaintiffs,

- v -

CORPORATE EXPRESS, INC.,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60

were read on this motion to/for REARGUMENT/RECONSIDERATION.

In this personal injury action, defendant moves, pursuant to CPLR 2221(d), for leave to reargue its motion to vacate the default judgment entered against it on November 10, 2021. Plaintiffs oppose.

Factual and Procedural Background

As set forth in this Court's December 23, 2022 order (NYSCEF Doc No. 31), plaintiffs commenced this action in August 2020 after plaintiff Sean Attebury was allegedly assaulted by one of defendant's employees (Doc No. 1). They served defendant through service of process upon the Secretary of State pursuant to Business Corporation Law § 306(b), and through follow-up mailings pursuant to CPLR 3215(g)(4)(i) in September and November 2020 (Doc No. 9). After defendant failed to answer or otherwise appear in this action, plaintiffs moved for a default judgment against it (Doc Nos. 4-5). By decision and order of November 10, 2021, this Court granted the motion and found defendant in default (Doc No. 13).

In October 2022, defendant timely moved to vacate the default judgment, arguing that vacatur was appropriate under CPLR 5015(a)(1) because it had a reasonable excuse for its delay in responding to the complaint and a meritorious defense to plaintiffs' claims, and that vacatur was appropriate pursuant to CPLR 317 because it was never served with process (Doc Nos. 22-23). In support of its motion, it submitted only an uncorroborated attorney affirmation (Doc No. 22). After plaintiffs submitted opposition papers (Doc No. 24), the parties entered into a stipulation extending the time for defendant to reply to plaintiffs' opposition (Doc No. 30). However, the stipulation was never filed with this Court, as it was never submitted to the undersigned to be so-ordered and it was returned for correction by the Clerk of the Court when filed on NYSCEF. Shortly thereafter, defense counsel's father apparently became ill and no reply papers were ever filed.

By decision and order of December 23, 2022, this Court denied the motion to vacate, finding that defendant failed to submit evidence from someone with personal knowledge, as its motion was "supported only by the uncorroborated affirmation of its attorney, who ha[d] no personal knowledge of the facts" (Doc No. 31 at 2-3). Therefore, it failed to demonstrate that it had a reasonable excuse for its delay and a meritorious defense, or that it was never served with process (Doc No. 31). Defendant moves for leave to reargue its original motion to vacate the default judgment against it (Doc Nos. 33-34). Plaintiffs oppose (Doc No. 53).

#### Legal Analysis and Conclusions

Defendant contends that this Court overlooked facts and misapprehended the law because it did not consider the affidavits and other evidence submitted in defendant's reply papers. It also reiterates its prior arguments that it had a reasonable excuse for its delay in responding to the complaint and a meritorious defense, and that it was never served.

Plaintiffs oppose, arguing that defendant is improperly raising new arguments for the first time on the instant motion. They also contend, among other things, that defendant fails to provide a reasonable excuse for why it did not include the affidavits and other evidence with its original motion to vacate.<sup>1</sup>

“A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. 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] [citations omitted]; *accord Mangine v Keller*, 182 AD2d 476, 477 [1st Dept 1992]).

Here, defendant fails to establish that this Court overlooked facts or misapprehended the law by not considering the affidavits and other documentary evidence included with its reply. The only document included in defendant’s original motion was an uncorroborated affirmation by its attorney; and as no reply papers were filed, none of the affidavits or other documentary evidence highlighted by defendant were before the Court and, therefore, could not have been considered.

In any event, even assuming defendant submitted its affidavits and other evidence in reply to plaintiffs’ opposition of the original motion, this Court would not have considered them because they would have been raised improperly for the first time in reply (*see Abramson v Hertz*, 19 AD3d 305, 306 [1st Dept 2005] [concluding motion court properly disregarded documentary evidence submitted by party “for the first time in [its] reply papers”]; *Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 625-626 [1st Dept 1995] [similar]; *Morgan, Lewis & Bockius LLP v*

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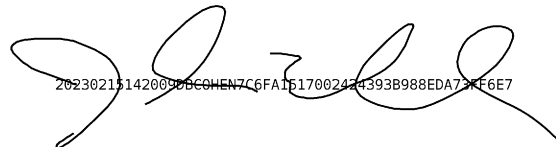
<sup>1</sup> Many of plaintiffs’ contentions and cited authority appear to incorrectly view defendant’s motion as one for leave to renew pursuant to CPLR 2221(e). However, defendant’s papers clearly indicate that it is moving for leave to reargue pursuant to CPLR 2221(d).

*IBuyDigital.com, Inc.*, 14 Misc 3d 1224[A], 2007 NY Slip Op 50149[U], \*4 [Sup Ct, NY County 2007] [concluding party’s “submission of its reply affidavits cannot cure its failure to have submitted them in its original motion papers”]). Therefore, defendant’s request for leave to reargue is denied (*see William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 28 [1st Dept 1992], *lv dismissed and denied* 80 NY2d 1005 [1992]).

The parties remaining contentions are either without merit or need not be addressed given the findings set forth above.

Accordingly, it is hereby:

ORDERED that the motion for leave to reargue by defendant Corporate Express, Inc. is denied.



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DAVID B. COHEN, J.S.C.

2/15/2023  
DATE

CHECK ONE:

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

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

APPLICATION:

CHECK IF APPROPRIATE: