

Attebury v Corporate Express, Inc.

2023 NY Slip Op 31578(U)

May 12, 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

-----X INDEX NO. 156148/2020
SEAN ATTEBURY, MELISSA ATTEBURY MOTION SEQ. NO. 004

Plaintiffs,

- v -

CORPORATE EXPRESS, INC.,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 93

were read on this motion to/for RENEWAL.

In this personal injury action, defendant moves, pursuant to CPLR 2221(e), for leave to renew its motion to vacate the default judgment entered against it on November 10, 2021, and, upon renewal, for an order granting the motion and vacating the default judgment.

Factual and Procedural Background

As set forth in this Court's December 23, 2022 and February 21, 2023 orders (NYSCEF Doc Nos. 31, 61), 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. 21-23). In support of its motion, it submitted only an uncorroborated attorney affirmation (Doc No. 22).

In October 2022, after plaintiffs submitted opposition papers (Doc No. 24), the parties entered into a stipulation extending the deadline for defendant to reply to plaintiffs' opposition until November 11, 2022 (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, the father of defendant's prior counsel apparently became seriously 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).

After hiring new counsel, defendant moved for leave to reargue its original motion to vacate the default judgment (Doc Nos. 33-34), which plaintiffs opposed (Doc No. 53). By decision and order of February 21, 2023, defendant's reargument motion was denied after it was determined that it failed to establish that this Court "overlooked facts or misapprehended the law by not considering the affidavits and other documentary evidence included with [defendant's] reply"

(*Attebury v Corporate Express, Inc.*, 2023 NY Slip Op 30475[U], *2 [Sup Ct, NY County 2023])
(Doc No. 61).

Defendant moves for leave to renew its original motion to vacate, and, upon renewal, for an order granting its motion and vacating the default judgment as against it (Doc Nos. 65-66).¹ Plaintiffs oppose (Doc No. 87).

Legal Analysis and Conclusions

Defendant contends that it has new facts not provided in support of the initial motion to vacate that would change the prior determination, including affidavits from its president and vice president purportedly averring that defendant was never served. It also contends that it has a reasonable justification for not including these new facts in the initial motion to vacate, given the affidavit from its prior counsel averring that she suffered an urgent family emergency which prevented her from including the new facts in her reply to plaintiffs' opposition to the initial motion. Lastly, it contends that it has a meritorious defense to plaintiffs' claims and a reasonable excuse for its delay in responding to the complaint.

Plaintiff maintains in opposition that defendant has not set forth any new facts or changes in the law that warrant renewal and is merely reasserting the arguments it made in its prior motion for leave to reargue.

In reply, defendant reiterates that the affidavits and other items submitted in support of this motion are new facts not previously offered that will change this Court's prior determination on the motion to vacate the default judgment.

¹ Defendant's motion for leave to renew was filed by the same attorney who represented her when she filed her motion for leave to reargue.

Legal Analysis and Conclusions

As with motions for leave to reargue, motions for leave to renew are left to the discretion of the trial court (*see Wang v LaFrieda*, 189 AD3d 732, 732 [1st Dept 2020], *lv dismissed* 37 NY3d 1042 [2021]). Such leave is warranted only when a movant demonstrates that there has been “a change in the law that would change the prior determination,” or when he or she demonstrates that there are “new facts not offered on the prior motion that would change the prior determination” and provides a reasonable justification for why such facts were not included before (CPLR 2221 [e] [2], [3]; *see Abu Dhabi Commercial Bank, P.J.S.C. v Credit Suisse Sec. (USA) LLC*, 114 AD3d 432, 432 [1st Dept 2022]).

Here, defendant fails to provide a reasonable justification for why these new facts were not included with its initial motion to vacate. The affidavit from defendant’s prior counsel does not explain why these affidavits and other records were not submitted with the initial motion filing, it only explains that she failed to submit them in reply to plaintiff’s opposition papers because of an urgent family emergency and mistaken belief that her time to reply had been extended. That distinction matters given that “[a] motion to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (*Queens Unit Venture, LLC v Tyson Ct. Owners Corp.*, 111 AD3d 552, 552 [1st Dept 2013] [internal quotation marks and citation omitted]). Defendant’s papers in support of this motion also fail to proffer a justification for why the affidavits and other records were not submitted when the initial motion was filed. Therefore, it is apparent that defendant failed to exercise due diligence in preparing its initial motion to vacate, and is not entitled to leave to renew (*see Amtrust-NP SFR Venture, LLC v Vazquez*, 140 AD3d 541, 541 [1st Dept 2016] [affirming denial of renewal because movant “offered no justification whatsoever as to why he did not obtain the new evidence in time to submit

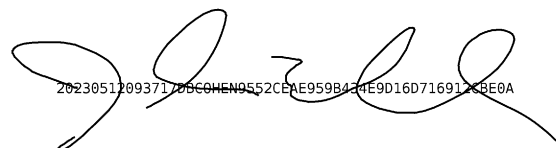
it in opposition to plaintiff's original motion, and did not assert that he made any effort, let alone a diligent effort, to obtain this new evidence, which was readily available"]; *Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 484 [1st Dept 2015] [affirming denial of renewal motion because moving party "did not provide a reasonable justification for failing to submit the additional affidavit and documents in support of [its] original motion"]).

However, even assuming defendant provided a reasonable justification for why she did not provide the affidavits and other records in reply to plaintiff's opposition, the prior determination would not change. It is well established that items submitted by a movant for the first time in its reply papers should be disregarded by the motion court (*see Abramson v Hertz*, 19 AD3d 305, 306 [1st Dept 2005] [concluding motion court properly disregarded invoices submitted by movant for the first time in its reply papers]; *Morgan, Lewis & Bockius LLP v 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 motion to vacate would have still been denied because the affidavits and other records submitted for the first time in reply would have been disregarded and its attorney affirmation would have been the sole support for its assertions that it was entitled to relief pursuant to CPLR 317 and 5015 (*see Attebury v Corporate Express, Inc.*, 2022 WL 17905175, *2 [Sup Ct, NY County 2022] [denying defendant's initial motion to vacate]).

Accordingly, it is hereby:

ORDERED that defendant Corporate Express, Inc.'s motion for leave to renew is denied; and it is further

ORDERED that the parties are to appear for the previously scheduled inquest set for May 19, 2023, at 71 Thomas Street, Room 305, at 9:30 a.m.



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5/12/2023
DATE

DAVID B. COHEN, 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