

Fleischer v Zhang

2023 NY Slip Op 32141(U)

June 16, 2023

Supreme Court, New York County

Docket Number: Index No. 100163/2022

Judge: Kathy J. King

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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. KATHY J. KING **PART** **06**

Justice

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GEORGETTE FLEISCHER,

Plaintiff,

- v -

JOHN J. ZHANG, ZITAO LIU, ZHANG MEDICAL, P.C.
D/B/A NEW HOPE FERTILITY CENTER, NEW HOPE
FERTILITY CENTER, INC., ZHUO LU, HUI LIU, DARWIN
LIFE, INC., DOES 1-10,

Defendant.

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INDEX NO. 100163/2022

MOTION DATE 03/08/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

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

Plaintiff, Georgette Fleischer, moves to reargue the Court’s decision/order dated February 3, 2023, which denied plaintiff’s motion for default judgment. Defendants oppose the requested relief and cross-move for an order: a) pursuant to CPLR § 3126, striking plaintiff’s complaint for willful failure to comply with defendants’ discovery demands; or in the alternative b) pursuant to CPLR § 3126(2), precluding plaintiff from introducing at trial evidence of any particulars which have been demanded and any evidence of the discovery which has been demanded but not provided; or in the alternative c) pursuant to CPLR § 3124, compelling plaintiff to provide all outstanding discovery by a date certain; and d) pursuant to 22 NYCRR § 130.1-1, awarding costs and the imposition of sanctions upon the plaintiff for failing to provide discovery and engaging in frivolous conduct.

CPLR § 2221(d)(2) provides that a motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” (*see James v Nestor*, 120 AD2d 442, 443 [1st Dept 1986]). In support of her motion to reargue, plaintiff contends that in denying plaintiff’s motion for default judgment, the Court overlooked or misapprehended the law by miscalculating the applicable time for proof of service to be filed pursuant to CPLR § 3215(g)(4).

CPLR § 3215(g)(4) provides:

- (i) When a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served pursuant to paragraph (b) of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment.
- (ii) The additional service of the summons by mail may be made simultaneously with or after the service of the summons on the defendant corporation pursuant to paragraph (b) of section three hundred six of the business corporation law, and shall be accompanied by a notice to the corporation that service is being made or has been made pursuant to that provision. An affidavit of mailing pursuant to this paragraph shall be executed by the person mailing the summons and shall be filed with the judgment. Where there has been compliance with the requirements of this paragraph, failure of the defendant corporation to receive the additional service of summons and notice provided for by this paragraph shall not preclude the entry of default judgment.

Plaintiff argues that CPLR § 3215(g)(4) permits filing of proof of an additional copy of the summons after submission of the motion for default judgment. In support of reargument, plaintiff mailed a copy of the summons to defendant on February 20, 2023, and filed proof thereof on February 22, 2023, nineteen days after plaintiff’s default judgment motion was decided. Plaintiff relies on a line of cases which hold that failure to comply with the additional mailing requirement of CPLR § 3215(g)(4) is not a fatal defect where a default judgment *has been granted*, and no

excusable default or meritorious defense is set forth by the moving party for vacatur (emphasis added).

Here, the cases relied upon by plaintiff are inapposite to the instant case, since plaintiff's motion seeking a default judgment was not granted. Accordingly, plaintiff's interpretation is misplaced, and inconsistent with the case law (*see Sterk-Kirch v Uptown Communications & Elec., Inc.*, 124 AD3d 413 [1st Dept 2015]; *Balaguer v 1854 Monroe Ave. Hous. Dev. Fund Corp.*, 71 AD3d 407 [1st Dept 2010]).

Significantly, plaintiff's additional mailing, which occurred after the Court's denial of the motion for default judgment, logically and practically, could not constitute a "fact" existing at the time of plaintiff's prior motion (*see CPLR 2221(d)(2)*). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided ... or to present arguments different from those originally asserted" (*Matter of Setters v AI Props. & Devs. (USA) Corp.*, 139 AD3d 492, 492 [1st Dept 2016], quoting *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [internal quotation marks omitted]; *see Foley v Roche*, 68 AD2d 558, 567-68 [1st Dept 1979]).

Plaintiff also contends that the Court's decision/order dated February 3, 2023, erred in holding that defendants, in opposition, established a reasonable excuse and meritorious defense, which deemed Darwin Life's answer timely filed, *nunc pro tunc*. It is undisputed that defendants filed their answer in the underlying action on April 19, 2022, twenty days after the deadline to do so had expired. The Court held that at oral argument counsel for defendants established a meritorious defense to the instant action, and that any delay in filing the answer was *de minimus*. "To have a late answer deemed timely served *nunc pro tunc*, and avoid the entry of a default judgment, a nonanswering defendant is required to provide a reasonable excuse for the delay in

answering and demonstrate a potentially meritorious defense to the action” (*Nationstar Mtge. LLC v Ahmed*, 194 AD3d 575, 575 [1st Dept 2021]).

Plaintiff contends that the Court erroneously relied on the affirmation of defendants’ counsel, submitted in opposition to the motion, in determining that Darwin was a research facility, and not in the business of *in vitro* fertilization. However, a review of the record establishes that at oral argument counsel for defendants referred to the affidavit of Dr. Zhang, a part-owner of Darwin Life, Inc. (NYSCEF Doc. No. 15), which was submitted in a prior motion to dismiss, attesting to the operation of Darwin Life, Inc. solely as a medical research facility.

Contrary to plaintiff’s assertions that the Court erred in its determination, it should be noted that the submission of a motion on default does not impose upon the Court a ministerial duty to grant whatever relief is demanded, since the Court is vested with inherent discretionary authority (*see Rivera v Laporte* 120 Misc 2d 733, 735 [Sup Ct, NY County 1983] [holding that “if proof is absent, insufficient, or untrustworthy, if proper procedure has not been followed, or service not made, or notice not timely given, where a valid cause of action is not stated, or if jurisdiction is absent, the moving party cannot presume entitlement to the requested relief, even on default”]); *see Kahn v Friedlander*, 90 AD2d 868 [3rd Dept 1982]; *Cree v Cree*, 124 AD2d 538 [2d Dept 1986]).

As to defendants’ cross-motion, the requested relief is premature since defendants’ motion to dismiss (Motion Seq. No. 02) is presently *sub judice* before the Court. (*see* CPLR 3214(b)).

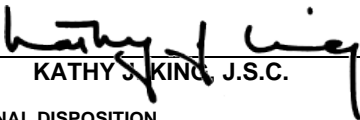
Accordingly, it is hereby

ORDERED, that plaintiff’s motion for leave to reargue is denied; and it is further

ORDERED, that defendants’ cross-motion is denied.

This constitutes the decision and order of the Court.

6/16/2023
DATE


KATHY S. KING, 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