

Zeidman v Chen

2023 NY Slip Op 34310(U)

November 20, 2023

Supreme Court, New York County

Docket Number: Index No. 656793/2022

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH **PART 14**

Justice

-----X

ANDREW ZEIDMAN,

Plaintiff,

- v -

HARRISON CHEN

Defendant.

-----X

INDEX NO. 656793/2022

MOTION DATE 11/17/2023

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114 were read on this motion to/for RENEWAL.

Plaintiff’s motion to renew is denied.

Background

In this case concerning the sale of a dental practice, plaintiff moves to renew his opposition to defendant’s motion for a default judgment on his counterclaims. This Court previously granted that motion in a decision dated December 13, 2022 (NYSCEF Doc. No. 80). Plaintiff submitted opposition but did not attach a proposed reply to the counterclaims or cross-move for an extension of time to reply. Instead, plaintiff argued that he was unaware that he had to file a reply to the counterclaims at all.

Plaintiff submits an affidavit in support of the instant motion in which he blames his former attorney for not filing adequate opposition to the previous motion. He contends that his prior attorney contemplated filing a motion to vacate the Court’s decision but ultimately decided not to go forward with that effort. Plaintiff references that his former attorney had some sort of

head injury but that he was never provided with any medical documentation to back up that assertion.

In opposition, defendant emphasizes that plaintiff's time to reply to the counterclaim expired on October 11, 2022. He also points out that the instant motion raises the same exact arguments offered by plaintiff in connection with the prior motion for a default judgment. Defendant argues that plaintiff's attorney previously referenced a vague illness and that no reasonable excuse has been offered for the failure to file a timely reply to the counterclaims. Defendant insists that the instant motion should be viewed as a motion to reargue as there are no new facts alleged.

In reply, plaintiff argues that the lack of effective assistance of counsel justifies the Court granting the instant motion. He adds that even if the Court were to view this as a motion to reargue, it should grant the motion notwithstanding the statutory time limits (the time to make such a motion has long passed).

Discussion

“A motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination, and must set forth a reasonable justification for the failure to present such facts on the prior motion. While it may be within the court's discretion to grant renewal upon facts known to the moving party at the time of the original motion, a motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (*Renna v Gullo*, 19 AD3d 472, 473, 979 NYS2d 115 [2d Dept 2005] [internal quotations and citations omitted]).

The Court denies the motion. A motion to renew asks the Court to consider whether or not movant has presented the Court with new facts that would have changed the Court's previous determination. In the prior motion, defendant moved for a default judgment on his counterclaims. Plaintiff submitted opposition but did not include a reply or cross-move for an extension of time to offer a reply.

Nothing submitted on this motion constitutes new facts that were not presented in the prior motion. In both the previous motion and in the instant motion, plaintiff refers to certain health issues that afflicted his prior attorney. But, just as in the prior motion, no specific details are offered. While the Court recognizes that plaintiff may not have access to that information, the fact is that vague allusions to health issues is not a catch-all for ignoring deadlines. Critically, the instant motion papers do not assert that these health problems were significant enough to prevent plaintiff's prior counsel from making arguments—in fact, he filed opposition on plaintiff's behalf.

Put another way, this is not a situation where plaintiff's prior counsel forgot to upload opposition and now plaintiff seeks to excuse that failure. It was not “law office failure” in that traditional sense; (i.e., where a motion gets submitted without opposition). Here, plaintiff offered substantive opposition and simply lost the motion. The instant effort is, in this Court's view, an attempt to submit a better motion in light of the Court's previous decision. That is not a proper basis to grant renewal.

And, although plaintiff admits he discovered his attorney's failures in January 2023 (NYSCEF Doc. No. 92, ¶ 7) and acknowledges that he held discussions with his prior attorney for months and months, plaintiff did not get a new attorney until August 2023 and this motion was not made until October 25, 2023. This timeline compels the Court to decline to exercise its

discretion to grant the motion. Plaintiff clearly did not move expeditiously to remedy what he claims were errors made by his prior attorney.

Accordingly, it is hereby

ORDERED that plaintiff's motion to renew is denied.

See NYSCEF Doc. No. 69 for details about the next conference.

11/20/2023

DATE



ARLENE P. BLUTH, 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