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

PRESENT: MARCY S. FRIEDMAN PART 57
Justice

VLADMIR DREYSTER, et al.,

PLAINTIFFS

- V -

195 REALTY, LLC, et al.,

DEFENDANT

INDEX NO. 401140/2008

MOTION DATE

MOTION SEQ. NO. 013

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying decision/order, dated August 21, 2012.

FILED

AUG 22 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: August 21, 2012

MARCY S. FRIEDMAN, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

VLADIMIR DREYTSER, et al.,

Plaintiff(s),

Index No.: 401140/08

- against -

195 REALTY, LLC, et al.,

Defendant(s).

DECISION/ORDER

Defendant McClellan Equities, LLC, mistakenly named as McClennan Equities, LLC (hereafter McClellan) moves for leave to reargue and renew its prior motion to vacate a default judgment as to liability granted against it by order of this court dated January 10, 2010. This order was based on defendant's failure to appear at discovery conferences held on August 20 and November 19, 2009. The prior motion to vacate the default was denied by this court's decision on the record on March 8, 2012, the transcript of which was so ordered on April 23, 2012.

It is well settled that a motion for reargument "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." (Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979].)

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination," and "shall contain reasonable justification for the failure to present such facts on the prior motion." (CPLR 2221[e][2],[3].) It is well settled that a motion for leave to renew must ordinarily "be based upon additional material facts which existed

at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court. Renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application." (Foley, 68 AD2d at 568.) Leave to renew is not proper to fill in gaps in proof on the original motion. (Santini v Grant & Co., 272 AD2d 271 [1st Dept 2000].)

The court grants leave to reargue, but finds that defendant fails to demonstrate that the court misapprehended applicable facts or law. Although plaintiff mistakenly named McClellan as McClennan, it is undisputed that it served McClellan. It is also undisputed that defendant had actual knowledge of and an opportunity to defend the action. Defendant thus does not deny its former attorney's receipt of the following documents from plaintiff's attorney regarding this action: a letter dated August 14, 2009 (P.'s Ex. E), notifying defendant of, and requesting compliance with, the court's July 20, 2009 decision in a consolidated action (Tapia v Successful Mgt. Corp., 24 Misc 3d 1222[A], 2009 NY Slip Op 51552[U] [2009], affd 79 AD3d 422 [1st Dept 2010]), which granted various plaintiff-tenants' summary judgment motion and directed their landlords to accept their section 8 vouchers; and service upon defendant's attorney in September and October 2009, respectively, of a discovery demand (P.'s Ex. F) and demand for a bill of particulars (P.'s Ex. G.)[1] Under these circumstances, the misspelling of defendant's name in the caption is a non-prejudicial defect that is subject to correction. (See NYRU, Inc. v Forge Rest., LLC, 92 AD3d 511 [1st Dept 2012].)

Defendant also fails to demonstrate that it has a meritorious defense to this action.

[1]The court notes, however, that it does not appear that defendant McClellan ever filed an answer in this action.

Contrary to defendant's contention, the determination of the New York State Division of Human Rights, dated September 29, 2008 (D.'s Ex. 1[E]), is not a res judicata bar to plaintiff's claims in this action. That decision determined that there was no probable cause to believe that defendant's managing agent had engaged in unlawful discrimination based on plaintiff's disability. Plaintiff's complaint to the Division of Human Rights (D.'s Ex. 1[D] was based on disability, and made no mention of Local Law 10 or any claim of discrimination based on source of income.

Defendant also fails to establish a meritorious defense based on its wholly conclusory assertion that it completed plaintiff's section 8 package in 2008 and again in 2009. (See Aff. of Ana Molina [managing agent] in Support ¶¶ 8-17.) Defendant does not describe or attach the documents, and does not make any showing that they were properly completed.

The court further holds that leave to renew should be denied. In its prior motion, defendant did not make any factual showing of a reasonable excuse for its delay in moving to vacate its defaults in this action. It now seeks to do so. However, the evidence it proffers is patently insufficient to establish an excuse. Defendant's purported excuse for its defaults at the discovery conferences on August 20 and November 19, 2009 is that its then attorney, Brian Stark, did not effectively represent it. Defendant asserts that it did not raise that excuse in its prior motion because Mr. Stark's successor, Mark Cohen, who has now also been discharged by defendant, did not wish to charge another attorney with misconduct. Defendant's claim that Mr. Cohen was unwilling to assert the excuse is based wholly on an alleged inadmissible hearsay conversation between its current attorney's associate and Mr. Cohen's associate. (See Cruz Aff. in Support, ¶ 10 n 12.) Significantly also, defendant's managing agent acknowledges that after

she became aware of the January 26, 2010 default judgment, she asked Mr. Stark about the defaults and he "informed [her] that his strategy for defending this action was to prosecute a non-payment proceeding against Tenant in Bronx Housing Court." (Molina Aff. in Support, ¶ 20.) The court finds wholly unpersuasive defendant's claim that an experienced managing agent would treat a decision to leave a default judgment in effect as a viable strategy for defending an action. Rather, defendant's inaction, in the face of its knowledge of the defaults, amounts to "persistent and willful inaction" that should not be excused. (See Pires v Ortiz, 18 AD3d 263, 264 [1st Dept 2005]; Aaron v Carter, Conboy, Case, Blackmore, Napierski & Maloney, P.C., 12 AD3d 753, 755 [3d Dept 2004].)

As noted above, plaintiff's counsel advised Mr. Stark in August 2009 of this court's July 20, 2009 decision and took the position that it applied to McClellan. In his letter (P.'s Ex. E), plaintiff's counsel thus stated that there is a decision of the court "whereby your client is ordered to accept her Section 8 voucher." Although clearly aware of the decision, defendant purports only to offer an explanation for its defaults at the August 20 and November 19 discovery conferences. Defendant gives no explanation for its default in appearing between the time of service of the summons and complaint in May 2008 (see P.'s Ex. B) and issuance of the decision.

The court rejects defendant's excuse for its default on plaintiff's motion for a stay of an eviction proceeding brought by McClellan against plaintiff (there, respondent) in the Civil Court Housing Part. This motion was decided by this court's September 16, 2010 order. Again, defendant fails to offer a credible excuse for its delay in appearing in this action in the nearly eight months between the January 26, 2010 default judgment and the decision on the motion for a stay.

The court has considered defendant's remaining contentions and finds them without merit.

It is accordingly hereby ORDERED that the motion of defendant McClellan Equities, LLC is granted to the following extent: Leave to reargue is granted, and upon reargument, the court adheres to its decision on the record on March 8, 2012, the transcript of which was so ordered on April 23, 2012; and it is further

ORDERED that the branch of the motion for leave to renew is denied; and it is further

ORDERED that the caption of all pleadings in this action is amended to read that a defendant is McClellan Equities, LLC (not McClennan Equities, LLC); and it is further

ORDERED that movant shall serve a copy of this order with notice of entry on the Clerk of the Court and on the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein.

This constitutes the decision and order of the court.

Dated: New York, New York
August 21, 2012

MARCY FRIEDMAN, J.S.C.