

Andre Romanelli, Inc. v Citibank, N.A.

2011 NY Slip Op 33146(U)

December 5, 2011

Supreme Court, New York County

Docket Number: 109293/05

Judge: Shirley Werner Kornreich

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

5/16
sp

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Andre Romanelli, Inc., et al.

INDEX NO. 109293/05

MOTION DATE 9/22/11

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

- v -
Citibank, N.A.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

FILED

DEC 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

12
5/11

Dated: _____

JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 54

-----X
ANDRE ROMANELLI, INC., VAN GILS
INTERNATIONAL, INC., and ANDRE ROMANELLI
INTERNATIONAL, INC.,

Plaintiffs,

Index No.: 109293/2005

-against-

DECISION and ORDER

CITIBANK, N.A. f/k/a EUROPEAN AMERICAN
BANK, NORTH FORK BANK, HSBC BANK USA,
N.A., JPMORGAN CHASE BANK, N.A., BORIS
SCHOR d/b/a BORIS SCHOR CPA, SUSAN
GOODMAN and STEPHEN SCHOR,

FILED

DEC 06 2011

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

-----X
KORNREICH, SHIRLEY WERNER, J.:

This action arises out of an alleged fraudulent scheme orchestrated by defendant accountant Boris Schor and his son, defendant Stephen Schor, and facilitated by defendant Susan Goodman, an employee of defendant JPMorgan Chase Bank, N.A. (Chase). Plaintiffs, three companies allegedly defrauded by the Schors, brought this action against them as well as against Goodman and Chase, the bank where accounts were improperly created by the Schors. Claims were also brought against defendants Citibank N.A., North Fork Bank and HSBC Bank USA, N.A., generally arising out of the wrongful honor of checks issued from the improperly created accounts.

By a decision and order dated July 20, 2006, the justice of this court to which this action was previously assigned granted plaintiffs' motion for a default judgment against Stephen Schor based on his failure to appear or otherwise answer, and he directed plaintiffs to settle an order.¹

¹ Though defendant avers that he does not remember ever being served with notice of this motion, a search of the County Clerk's file uncovered an affidavit of service by mail upon Mr.

By a decision and order dated January 8, 2007, the same justice signed the settled order. It stated that

It is ... ORDERED and ADJUDGED that the motion is granted on default, and that a default judgment be entered in favor of the plaintiffs and against the defendant STEPHEN SCHOR; and it is further ORDERED and ADJUDGED that an assessment of damages against defendant STEPHEN SCHOR is directed of this matter; and it is further Ordered that, within 60 days from the date hereof, plaintiff shall serve a copy of this order with notice of entry, a note of issue and a statement of readiness upon the Clerk of the Trial Support Office (Room 158) and pay the proper fees, if any, and such clerk shall thereupon place this action on the appropriate trial calendar for the assessment hereunder directed; and it is further Ordered that plaintiff's failure to comply with the immediately preceding paragraphs shall result in the dismissal of this action without further application to the court.

By a letter to the prior justice dated January 25, 2007, plaintiffs' counsel alerted the court to the fact that the remaining defendants were actively participating in the lawsuit.² Noting that discovery was still ongoing, he urged that the deadline to file the note of issue, as set forth in the January 8, 2007 order, be extended until after discovery was completed as to all parties. The prior justice then issued an order dated that same day, stating that the prior order was amended "to reflect that the plaintiff is not required to file a note of issue in this matter until June 18, 2007." In compliance with that order, on June 7, 2007, plaintiffs filed a note of issue and certificate of readiness.

However, the matter was not set down for an assessment of damages at that time. By

Schor, over whom this court had already established jurisdiction by personal service—a fact corroborated by the original affidavit of personal service also contained in the file. Defendant's admissions that during the time in which he is alleged to have been served he was suffering from emotional problems and was taking psycho-active drugs leads the court to be disinclined to question the validity of these affidavits of service merely due to his lack of memory of being served.

² While neither party brought this letter or the related order to the attention of the court, it was located in the County Clerk's file.

stipulation between the parties, on May 9, 2007, plaintiffs discontinued their action against defendant Boris Schor with prejudice. In August of 2007, the then remaining defendants moved for summary judgment dismissing the action against them. In late October and early November of that year, via stipulations plaintiffs discontinued with prejudice the claims against defendants North Fork Bank, Citibank, N.A., and HSBC Bank USA, N.A. By a decision and order dated April 8, 2008, the prior justice granted summary judgment in favor of Goodman and the banks. Further motion practice and appeals ensued, with the result that the original decision granting summary judgment was upheld. Finally, on March 12, 2009, judgment was entered dismissing the action against the then remaining defendants—JPMorgan Chase Bank, N.A. and Susan Goodman.

It was at this point that plaintiffs' counsel avers that he "discovered the inadvertence that the Note of Issue had not been filed as required under the order of January 8, 2007." Zuckerbrod Affirm., ¶ 8. He further avers that by the time he learned of this "inadvertence," he "felt that nothing could be done at the time due to the fact that STEPHEN SCHOR was incarcerated as a result of a plea of guilty in the criminal proceedings with regard to the matter set forth in this action." *Id.*, ¶ 8. Mr. Schor now having been released from prison, though, plaintiffs move for an order allowing them to file a note of issue and to proceed with the assessment of damages against Schor which was referred to in the prior justice's order dated January 8, 2007.

In his opposition to the present motion, Schor makes the following representations. He was incarcerated from June 25, 2008 until December 20, 2010. Schor Aff., ¶ 9. While in prison, he learned of the January 8 order, but recognizing the conditional nature of its grant to plaintiffs and believing that it had not been complied with, he presumed that the lawsuit had been

dismissed and therefore took no further action in regard to it. *Id.*, 17-26. It does not appear that he received any notice of the January 25, 2007 order extending the time to file the note of issue. He further avers that his subsequent efforts after his release from prison to determine the status of the matter seemed to confirm that it had been dismissed. Specifically, he states that when he searched for it on the Supreme Court's E-Courts system, the action was marked as disposed. *Id.*, ¶ 29.

The court acknowledges defendant's resentment that this request for an assessment of damages is being brought so long after the original granting of the default judgment. Nor does the court fail to appreciate the difficulty this may pose to him given his current life circumstances. However, based on the record before it, denial of this motion would be improper.

Defendant offers no convincing reason for the court to question the prior justice's decision to grant the motion for a default judgment against him as to liability. While it is true that the January 8, 2007 order stated that the action would be dismissed if a note of issue was not filed within 60 days, the order dated January 25, 2007 extended the time for plaintiffs to do so. As plaintiffs' complied with the second deadline, Schor is wrong to argue that the action should have been dismissed for failure to file the note of issue within 60 days of the first of the two orders.

Next, given the intertwined nature of the claims against Steven Schor and those against the other defendants, it was appropriate for the assessment of damages to have been delayed until after resolution of all claims. To do otherwise would have created the potential for conflicting rulings. Thus, plaintiffs' delay in seeking the assessment of damages, at least until after the resolution of the appeals in early 2009, was entirely appropriate.

Moreover, defendant has not convinced the court that the delay after March of 2009 was egregious or has been seriously prejudicial to him. Putting aside whether or not plaintiffs really were unable to pursue any action against him while he was in prison, certainly he will find it easier to defend himself now that he is no longer incarcerated and subject to all of the difficulties that imposes on a litigant. And, while he is understandably frustrated that, contrary to his initial expectations, he will not be able to start afresh his life after prison, free of the consequences of the actions that originally sent him there, he has not offered any evidence of specific harm he will suffer as a result of his initial reliance on the belief that this litigation was behind him.

For the above reasons, plaintiffs are entitled to a hearing on the damages inflicted on them by defendant Stephen Schor. However, as a note of issue has already been filed in this action, doing so again is unnecessary. Accordingly, it is hereby

ORDERED that plaintiffs' motion for an order permitting them to file a note of issue for the purpose of setting down an inquest against defendant Steven Schor is denied insofar as it seeks to file a note of issue since it already has been filed, but granted insofar as it seeks an assessment of damages owed by defendant Stephan Schor to plaintiffs; and it is further

ORDERED that the issue of damages is referred to a Special Referee to hear and to determine; and it is further

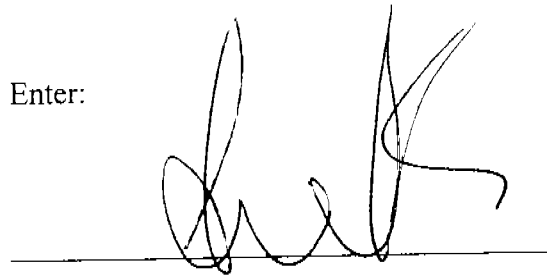
ORDERED that a copy of this order with notice of entry, together with a completed Information Sheet, shall be served on the Special Referee Clerk in the Motion Support Office (Room 119) who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that the Clerk shall notify all parties of the date of the hearing on the issue of damages; and it is further

ORDERED that plaintiff is to serve a copy of this decision by first class mail upon Stephen Schor.

Dated: December 5, 2011

Enter:

A handwritten signature in black ink, appearing to be 'J.S.C.', written over a horizontal line.

J.S.C.

FILED

DEC 06 2011

NEW YORK
COUNTY CLERK'S OFFICE