Aquatic Pool & Spa Servs., Inc. v WN Weaver St., LLC
2012 NY Slip Op 33811(U)
October 31, 2012
Supreme Court, Westchester County
Docket Number: 59075/12
Judge: Mary H. Smith
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DECISION AND ORDER

FILED & ENTERED
10/31/12

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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AQUATIC POOL & SPA SERVICES, INC.,

Plaintiff,

MOTION DATE: 10/26/12
INDEX NO.: 59075/12

-against-

WN WEAVER STREET, LLC,

Defendant.
----------X

The following papers numbered 1 to 7 were read on this motion by defendant for an Order granting reargument and/or renewal of a portion of this Court's September 25, 2012, Decision and Order, etc.

Papers Numbered

Order to Show Cause - Affirmations (Furman) - Affidavit (Weinberg) - Exhs. (A-F) 1-5
Answering Affirmation (Corrigan) - Exh. 6-7

Upon the foregoing papers, it is Ordered that defendant's motion for an Order granting reargument and/or renewal of that portion of this Court's September 25, 2012, Decision and Order, which had denied defendant's request for an Order extending its

time to answer the complaint is denied.

Firstly, the Court notes that defendant properly should have annexed a complete copy of the underlying papers to its instant motion. See Lower Main Street LLC v. Thomas Re & Partners, (Alpert, J.), N.Y.L.J., April 5, 2005, p. 19, col. 3, citing generally Gerhardt v. New York City Transit Authority, 8 A.D.3d 427 (2nd Dept. 2004); Sheedy v. Pataki, 236 A.D.2d 92, 97 (3rd Dept. 1997), lv. to app. den. 91 N.Y.2d 805 (1998); Bellofato v. Bellofato, 8 Misc.3d 1019(A) (Sup. Ct. Put. Co. 2005).

In any event, with respect to reargument, defendant has failed to demonstrate that this Court, in reaching its prior Decision and Order denying defendant an extension of time in which to answer, had misapprehended any of the relevant facts or had misapplied any controlling principal of law. See CPLR 2221, subd. (d), par. 2; Pro Brokerage Inc. v. Home Insurance Co., Inc., 99 A.D.2d 971 (1st Dept. 1984); Foley v. Roche, 68 A.D.2d 558, 567 (1st Dept. 1979); see, also Amato v. Lord & Taylor, Inc., 10 A.D.3d 374 (2nd Dept. 2004). Reargument does not afford a party the opportunity to successive opportunities to reargue that which has been decided. See Mazinov v. Rella, 79 A.D.3d 979 (2nd Dept. 2011); Pro Brokerage Inc. v. Home Insurance Co., Inc., supra. Moreover, a motion for reargument preludes a litigant from advancing new arguments or taking new positions which were not previously raised in the

original motion, see V. Veeraswami Realty v. Yenom Corp., 71 A.D.3d 874 (2nd Dept. 2010); Gellert & Rodner v. Gem Community Management, Inc., 20 A.D.3d 388 (2nd Dept. 2005); Amato v. Lord & Taylor, Inc., 10 A.D.3d 374, 375 (2nd Dept. 2004); Spatola v. Tarcher, 293 A.D.2d 523 (2nd Dept. 2002); Matter of Mayer v. National Arts Club, 192 A.D.2d 863, 865 (3rd Dept. 1993); Lopez v. New York City Housing Authority, 7 Misc.3d 1006(A) (N.Y. Sup. Ct. 2005), and no new facts may be considered. See Frenchman v. Lynch, 31 Misc.3d 1209(A) (Sup. Ct. Nass. Co. 2011).

In its earlier Decision and Order, this Court correctly had found that defendant was in default of pleading, see infra, that it had offered no reasonable excuse for its delay in timely appearing, moving for relief, or answering the complaint, that it had failed to properly offer any meritorious defense and that it had failed to submit a copy of a verified proposed answer. This Court therefore properly had concluded that it would have been an improvident exercise of its discretion to have granted defendant's then request for an Order extending its time to answer or compelling plaintiff's acceptance of its late answer. Defendant's motion for reargument is thus denied.

To the extent that defendant now is moving for renewal of this Court's earlier Decision and Order, its motion also is denied. An application for renewal "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, subd. (e), paras. 2, 3; see, also Sobin v. Tylutki, 59 A.D.3d 701 (2nd Dept. 2009). "Renewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit additional facts on the original application." Matter of Beiny v. Wynyard, 132 A.D.2d 190 (1st Dept. 1987), app. dsmd. 71 N.Y.2d 994 (1988). Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion, see Worrell v. Parkway Estates, LLC, 43 A.D.3d 436, 437 (2nd Dept. 2007); Sobin v. Tylutki, 59 A.D.3d 701 (2nd Dept. 2009), and renewal is not available as a second chance for parties who have not exercised due diligence in making their first factual presentation. See Hart v. City of New York, 5 A.D.3d 438 (2nd Dept. 2004); Chelsea Piers Management v. Forest Elect. Corp., 281 A.D.2d 252 (1st Dept. 2001).

The new evidence that defendant offers herein simply does not alter the Court's prior analysis or the result. It appears that defense counsel, purposefully or not, created confusion in the email exchanges upon which she relies in making her instant argument that plaintiff's counsel had extended defendant's time in which to answer and thus that defendant is not in default, contrary

to the Court's express finding. It is apparent to this Court that the source of the confusion lies in defense counsel's use of the word "respond" when it now appears she had meant "answer."

Contrary to defendant's assertion that plaintiff's counsel had "agreed to extend Defendant's time to respond to the Complaint through August 16, 2012," emphasis supplied, the emails offered to purportedly support defense counsel's argument do not do so. In the first email, plaintiff's counsel had advised defendant's counsel, on August 16, 2012, that "the time for defendant's answer has elapsed," and he notably had reiterated in said email defense counsel's earlier telephonic representation to him that she "would not be requesting any extension of time to respond." Emphasis in original. Plaintiff's counsel's email had continued, "You indicate that you may file a motion, but declined to indicate what type or basis for the motion you would file. Without some responsive pleading, I plan to file a default against your client." Clearly, the foregoing does not indicate plaintiff's counsel's agreement to waive defendant's default and to accept service of a late answer. In her immediate email response to this email, defense counsel had written, "We will be filing a motion to dismiss for lack of subject matter jurisdiction ... Based upon the tenor of our conversation, it seemed to me that requesting an extension of the time to respond would be fruitless." Emphasis supplied. Although defense

counsel's choice of the word "respond" is imprecise and loose, given its context and the totality of defendant's counsel's email, it is clear to this Court that defense counsel, at the time that this email had been sent, had been referring in the latter part of said email to the "fruitlessness" of defendant's seeking an extension of the time to answer the complaint. At the very best, defense counsel, instead of properly and carefully using the word "answer," injudiciously had used the word "respond"; at the very worst, she intentionally is attempting herein to re-write history.

After an immediate follow-up email reply by plaintiff's counsel, defense counsel immediately had emailed plaintiff's counsel that "the motion will be filed today. Please advise me if you are willing to extend our time to respond through today." Emphasis added. Again, defense counsel now appears to be stating that she had meant an extension of time to "answer" the complaint instead of "responding" by way of her intended motion. Plaintiff's counsel, however, understood "respond" to refer to the intended defense motion and not to a request for an extension of time to answer the complaint: "Yes. Of course. Please let me know if you get jammed up and need additional time." In none of the submitted emails did plaintiff's counsel expressly agree to afford defendant's an extension of time to serve an answer, as defense counsel now argues, and plaintiff's counsel's consistent position

is that he never had agreed to relieve defendant of its default. Defense counsel's lack of clarity, particularly with respect to an issue as important as seeking an extension of defendant's time to answer, cannot and does not inure to her benefit.

Accordingly, at the time of the making of defendant's original motion, defendant had been in default in pleading, and defense counsel's mere description of her earlier motion as a "pre-answer motion to dismiss" does not ipso facto make same a pre-answer motion to dismiss. The newly submitted email exchanges do not change this result. Since defendant had not then been in pre-answer status, defendant had not been entitled to an extension of time to plead pursuant to CPLR 3211, subdivision (f).

Further, the Court cannot consider the newly submitted copy of its answer with affirmative defenses and counterclaims in support of defendant's instant request for renewal relief. Renewal therefore is denied.

In order for defendant to obtain relief from its default status, it must establish both a reasonable excuse for its default and a potentially meritorious defense to this action. See CPLR 3012, subd. (d); Weinstein v. Schacht, 98 A.D.3d 1106 (2nd Dept. 2012); Kolonkowski v. Daily News, LP, 94 A.D.3d 704 (2nd Dept. 2012); Lipp v. Port Authority of New York and New Jersey, 34 A.D.3d 649 (2nd Dept. 2006).

On the totality of the record at bar and good cause having been demonstrated, this Court finds, based upon the affidavit of Ted Weinberg, defendant's principal, that, although he physically is present at 869 Weaver Street, in New Rochelle, daily, the guard at said property had not given him the process of service which had been received from the Secretary of State until August 16, 2012, whereupon Mr. Weinberg immediately thereupon had contacted defense counsel, who in turn immediately had contacted plaintiff's counsel, which thereupon had resulted in the August 16 emails heretofore noted, and defendant's immediate filing of its motion, and that at the time of defendant's original motion it only had been several weeks in default of pleading, and finally that plaintiff has not herein identified any prejudice and none is perceived by this Court, the Court hereby grants defendant's motion pursuant to CPLR 3012, subdivision (d), to the extent that defendant's default in pleading is hereby excused. Defendant's answer with affirmative defenses and counterclaims in the form annexed to defendant's moving papers is deemed served as of the date of entry of this Order.

Lastly, the Court denies defendant's motion to the further extent that it seeks summary judgment dismissing this action based upon plaintiff's being a foreign corporation which is not authorized to do business in New York. Defendant prima facie has

failed herein to demonstrate that plaintiff regularly, systematically, extensively and continuously does business in New York, resulting in a large volume of sales, both in number and dollar amounts, such that it can be found as a matter of law that plaintiff does business in New York within the meaning and intent of Business Corporation Law section 1312, subdivision (a), and that authorization for it to do business in New York had been required. See Highfill, Inc. v. Bruce & Iris, Inc., 50 A.D.3d 742 (2nd Dept. 2008); cf. Schwarz Supply Source v. Redi Bag USA, LLC, 64 A.D.3d 696 (2nd Dept. 2009).

The parties shall appear in the Preliminary Conference Part, at 9:30 a.m., on November 19, 2012.

Dated: October 31, 2012
White Plains, New York

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J.S.C.

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