Kapnag Heating & Plumbing Corp. v Alliance Corinthian Parking LLC
2014 NY Slip Op 33213(U)
December 8, 2014
Supreme Court, New York County
Docket Number: 150200/2013
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 39

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KAPNAG HEATING AND PLUMBING CORP.,

Plaintiff,

-against-

Index No. 150200/2013

ALLIANCE CORINTHIAN PARKING LLC,
ALLIANCE PARKING SERVICES, LLC,
and ROSE ASSOCIATES, INC.,

DECISION AND ORDER

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action seeking, *inter alia*, recovery of moneys allegedly due and owing for work performed related to inspection and testing of a sprinkler system, plaintiff Kapnag Heating and Plumbing Corp. ("Kapnag" or "plaintiff") moves for an order pursuant to CPLR § 2221 for leave to reargue (1) the motion by defendants Rose Associates, Inc. "Rose Associates" or "defendants") to vacate the default judgment entered against it (motion seq. no. 002); and (2) the motion by Rose Associates to quash the information subpoena and restraining notice (motion seq. no. 003). In separate orders dated September 11, 2013, I granted both motions on default, based on plaintiff's failure to appear at oral argument on September 11, 2013.

When a party defaults, resulting in a default order, the procedural device to vacate the default order is a motion to set aside default, not a motion to reargue. Plaintiff here

has made a motion to reargue and not a motion to set aside its default. I therefore address the motion as made.

A motion to reargue 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. *See Opton Handler Gottlieb Feiler Landau & Hirsch v. Patel*, 203 A.D.2d 72 (1st Dept. 1994). Here, plaintiff failed to submit either the decision and order as to motion sequence no. 003 which it is seeking leave to reargue, or the moving and opposition papers for either motion sequence no. 002 or 003. This alone is sufficient to deny plaintiff leave to reargue. "At the outset, the moving papers are insufficient because they fail to include a copy of the initial moving and opposing papers and the order for which reargument or renewal is being sought." *J.D.M. Import Co., Inc. v Hartstein*, 2008 N.Y. Misc. LEXIS 8488, 6-7, 2008 NY Slip Op 30668(U) (Sup. Ct. N.Y. Co. 2008) (citing C.P.L.R. 2214©). *See also Biscone v. JetBlue Airways Corp.*, 103 A.D.3d 158, 178 (2d Dep't 2012) (collecting cases) ("[s]ome trial courts, in deciding motions for leave to renew and/or reargue, have concluded that the moving party's failure to submit the papers relied upon in connection with the initial motion renders the motion for leave to renew and/or reargue defective").

This standard is equally applicable to e-filed cases such as this one. "[J]ust as a court 'should not be compelled to retrieve the clerk's file in connection with its consideration of subsequent motions,' a court should likewise not be compelled, absent a

rule providing otherwise, to locate previously submitted documents in the electronic record in considering subsequent motions." *Biscone,* 103 A.D.3d at 179 (quoting *Sheedy v. Pataki*, 236 A.D.2d 92, 97 (3d Dep't 1997); *citing Loeb v. Tanenbaum*, 124 A.D.2d 941, 942 (3d Dep't 1986)).

Even if I were to address this defective reargument motion on the merits, plaintiff has not shown that I misapprehended or misunderstood any facts or law. Plaintiff argues that my underlying decision on defendant's motion to vacate the default judgment failed to evaluate whether or not Rose Associates has any meritorious defense to plaintiff's claims based on the accounts stated and unjust enrichment, and failed to make a determination of the adequacy of service of process in effecting notice on Rose Associates. Plaintiff's counsel also asserts that it did not receive any notice that an oral argument had been scheduled form either the court or defendant' counsel.

In light of New York's policy of resolving actions on the merits, the lack of prejudice to defendant, even upon reconsideration I would vacate defendant's default and permit defendant to defend this suit on the merits. *See, e.g., Myers v City of New York*, 110 A.D.3d 652 (1st Dep't 2013); *Auerbach v Tregerman*, 106 A.D.3d 633 (1st Dep't 2013) ("The court properly exercised its discretion in granting the motion, given the lack of evidence that the default was willful or part of a pattern of dilatory conduct and the strong public policy in favor of disposing of cases on their merits"); *Pena v. Mittleman*, 179 A.D.2d 607 (1st Dep't 1992) .

Inasmuch as Kapnag has not shown any way in which this court misapprehended the relevant facts or misapplied the controlling law, its motion to reargue is denied.

In accordance with the foregoing, it is

ORDERED that plaintiff Kapnag Heating and Plumbing Corp.'s motion for leave to reargue this Court's (1) the motion by defendants Rose Associates, Inc. "Rose Associates" or "defendants") to vacate the default judgment entered against it (motion seq. no. 002); and (2) the motion by Rose Associates to quash the information subpoena and restraining notice (motion seq. no. 003) is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
December 8, 2014

ENTER:

Saliann Scarpulla, J.S.C.