

Weintraub v Yarmish
2020 NY Slip Op 34117(U)
December 10, 2020
Supreme Court, Kings County
Docket Number: 515541/17
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of December, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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ARI WEINTRAUB, both individually and derivatively on behalf of ZAP CELLULAR, INC., A&Y SALES AND MARKETING, INC., MAZAL TECH MEDIA, INC.,

Plaintiff,

- against -

JACOB YARMISH, ZAP CELLULAR, INC., A&Y SALES AND MARKETING, INC., MAZAL TECH MEDIA, INC., EZ ROAMER LLC, EMANUEL YARMISH, CHANA YARMISH, MICHAEL YARMISH, TOPLINE CONTRACTING, INC., JOHN DOES 1-100 and ABC COMPANIES 1-100 (said names being fictitious and presently unknown to plaintiff),

Defendants.

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DECISION AND ORDER

Index No. 515541/17

Mot. Seq. No. 3

The following e-filed papers read herein:

NYSCEF #:

Notice of Motion, Affirmation, and Exhibits Annexed _____
Affirmation in Opposition _____
Reply Affirmation _____

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Upon the foregoing papers, plaintiff Ari Weintraub, both individually and derivatively on behalf of Zap Cellular, Inc., A&Y Sales and Marketing, Inc., Mazal Tech Media, Inc. (collectively, plaintiff), moves, in effect, for leave pursuant to CPLR 2221 (e), to restore this action to active status and, upon granting such leave, granting him his prior motion in Seq. No. 1 which was for leave to enter a default judgment against seven of the nine named defendants; to wit, Jacob Yarmish, Chana Yarmish, Emmanuel Yarmish, EZ Roamer LLC, Mazal Tech Media, Inc., Topline Contracting, Inc. and ZAP Cellular, Inc. (collectively, the

seven named defendants). The seven named defendants, together with the two additional named defendants, A&Y Sales and Marketing, Inc., and Michael Yarmish (collectively with the seven named defendants, defendants), oppose plaintiff's motion.

By short-form order, dated Nov. 27, 2018 (the prior order), the Court denied plaintiff's prior motion in Seq. No. 1 and granted the initial branch of defendants' prior cross motion in Seq. No. 2 to dismiss the complaint pursuant to CPLR 3211 (a) (4) because, at that time, the claims herein had been raised as part of the action and third-party action then pending in the United States District Court for the Eastern District of New York (the district court) under Docket No. 15-CV-6723 (PKC) (VMS) (NYSCEF #39). The prior order did not address the alternative branch of defendants' prior cross motion in Seq. No. 2 which was for leave to serve and file their joint answer in the form annexed thereto as Exhibit G (NYSCEF #33).

Twenty-two months later, the district court, by Memorandum & Order, dated Sept. 30, 2020, dismissed, for lack of subject matter of jurisdiction, all of the claims which, before their dismissal by the prior order, had been at issue in this action (*see ZAP Cellular, Inc. v Weintraub*, 2020 WL 5820319 [ED NY 2020] [NYSCEF #42] (the district court's dismissal order)).

Although the instant motion is denominated as one for leave "to restor[e] this action to active status," it is, in effect, a motion for leave to renew. CPLR 2221 (e), which does not impose a time limit for making a motion for leave to renew, allows the court to reconsider a prior order when new facts are presented which were not offered on the prior motion and which, when considered, would change the prior determination (*see Glicksman v Board of Ed./Cent. School Bd. of Comsewogue Union Free School Dist.*, 278 AD2d 364, 365 [2d Dept

2000]). The district court's dismissal order which was issued subsequent to the prior order in this action constitutes sufficient grounds for the vacatur of the prior order.

Upon vacatur of the prior order, the Court denies the remaining branch of plaintiff's motion which is for leave to enter a default judgment against the seven named defendants and further grants the alternative branch of defendants' prior cross motion in Seq. No. 2 which was for leave to serve and file their joint answer. As defendants (including the seven named defendants) demonstrated in their prior cross motion, they had a reasonable excuse for their delay in interposing an answer. Further, the record is bereft of any evidence of willfulness on defendants' part, or that they intended to abandon their defenses, or that plaintiff was prejudiced by the delay (*see* CPLR 3012 [d]; *Federal National v Williams*, 187 AD3d 991, 991-992 [2d Dept 2020]; *Setiles v OneWest Bank*, 186 AD3d 1551, 1553 [2d Dept 2020]).

Accordingly, based on the foregoing, it is

ORDERED that plaintiff's motion in Seq. No. 3 is *granted solely* to the extent that, upon renewal: (1) the prior order, dated Nov. 27, 2018, is vacated, and (2) the alternative branch of defendants' prior cross motion in Seq. No. 2 which was for leave to file and serve their joint answer is granted; and the remainder of plaintiff's motion in Seq. No. 3 is denied; and it is further

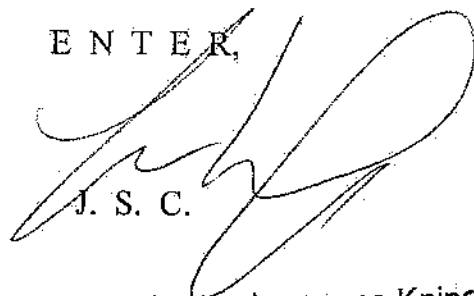
ORDERED that plaintiff's counsel is directed to electronically serve a copy of this decision and order with notice of entry on defendants' counsel and to electronically file an affidavit of service thereof with the Kings County Clerk; and it is further

ORDERED that defendants shall file and serve their joint answer, substantially in the form annexed to their prior cross motion in Seq. No. 2 as Exhibit G thereto, within 20 days

after electronic service of this decision and order with notice of entry by plaintiff's counsel on defendants' counsel.

This constitutes the decision and order of the Court.

E N T E R,



J. S. C.

Justice Lawrence Knipel