

**Wells Fargo Bank, N.A. v Yakubov**

2022 NY Slip Op 33430(U)

October 6, 2022

Supreme Court, Queens County

Docket Number: Index No. 720435/20

Judge: Robert I. Caloras

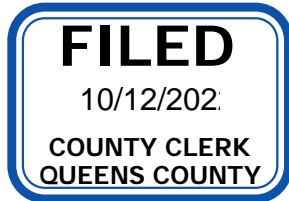
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This opinion is uncorrected and not selected for official publication.

**Short Form Order  
NEW YORK SUPREME COURT - QUEENS COUNTY  
PRESENT: HON. ROBERT I. CALORAS PART 36  
Justice**

-----X  
**WELLS FARGO BANK, N.A.,  
Plaintiff,**

**Index No. 720435/20  
Seq. No. 3**



**-against-  
GRIGORY YAKUBOV,  
Defendant.**

-----X  
The following papers numbered E42-E50, E52-E55 read on this motion by Defendant for an order for the following: (1) leave to renew pursuant to CPLR 2221( e) the branch of this Court’s prior order, dated and filed on March 23, 2022, granting Plaintiff’s motion to extend time to serve pursuant to CPLR 306-b and vacating the prior order dated and filed on October 22, 2021, based on new evidence that between the time of the motion papers and the extension order, the underlying South Carolina judgment docketed February 8, 2012, upon which the action is based, was no longer enforceable pursuant to South Carolina Code Ann. Section 15-39-30; (2) reargue pursuant to CPLR 2221(d) the branch of the prior order granting Plaintiff an extension pursuant to CPLR 306-b and vacate the prior dismissal order because the Court overlooked that by the time of its extension order, more than ten years had elapsed from date of original entry of the underlying South Carolina judgment docketed February 8, 2012 and was no longer enforceable pursuant to South Carolina Code Ann. Section 15-39-30); and (3) dismiss pursuant to CPLR 3211.

	<b>PAPERS NUMBERED</b>
Notice of Motion-Memo of Law-Affirmation-Affidavit-Exhibits-.....	E42-E50
Affirmation in Opposition-Exhibits.....	E52-E54
Memo of Law in Reply.....	E55

Upon the foregoing papers, it is ordered, that Defendant’s motion is granted in part and denied in part for the following reasons:

Plaintiff commenced this action on October 30, 2020 by filing a Summons and Complaint, wherein it is alleged that a judgment was entered in the Common Pleas Court, County of Horry, South Carolina in favor of Plaintiff’s predecessor in interest, Wachovia Bank, National Association, on August 26th, 2011, and against Defendant in this action for the sum of \$234,909.73. Plaintiff annexed thereto as Exhibit A the exemplification of the deficiency judgment which was entered in South Carolina on February 8, 2012. Plaintiff alleges that no part of that judgment has been paid, but Plaintiff is waiving its right to recover the accrued interest, attorneys’ fees and miscellaneous charges included in the judgment amount that were awarded and is seeking to recover the sum of \$192,537.00 under the judgment. In an order, dated and filed on March 23, 2022, this Court granted the branch of Plaintiff’s motion seeking leave to vacate the prior dismissal order and extend its time to serve process upon Defendant pursuant to CPLR 306-b, and denied the branch for alternate service pursuant to CPLR 308(5).

In the first branch of the instant motion, Defendant moves for leave to renew his opposition to Plaintiff’s prior motion pursuant to CPLR 2221(e). Defendant has submitted, among other things, a copy of South Carolina Code Ann. Section 15-39-30 and a decision entitled Gordon v Lancaster, 425 S.C. 386 (Supreme Court of South Carolina, 2018). Defendant claims that pursuant to South Carolina Code Ann. Section 15-39-30, the judgment issued in South Carolina abated on February 8, 2022. Thereby, the underlying judgment was unenforceable when the prior order was issued on

March 2, 2022. As such, Defendant argues that the expiration of the underlying judgment constitutes a new fact not offered on the prior motion that would change the outcome of the prior order. Defendant further argues that it did not include the South Carolina statute and caselaw in its prior opposition because the underlying judgment had not yet expired, and that “[w]hile the clock was ticking, under the adversary system defendant is not obliged to prompt plaintiff of a looming cut-off date, and advance plaintiff’s cause against defendant in the process”.

In opposition, Plaintiff argues, among other things, that even though Defendant was aware of the South Carolina statute and its implications on the underlying judgment, Defendant still failed to raise said issues in his opposition to the prior motion. Consequently, Plaintiff argues that Defendant failed to provide a reasonable justification for failing to notify the Court of the South Carolina statute in his prior opposition papers. Plaintiff further argues that Defendant’s reliance on the South Carolina statute does not constitute a new fact nor a change in the law. In reply, Defendant argues, among other things, that the Court should not consider Plaintiff’s opposition papers because they were not timely filed.

A motion for leave to renew ‘shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination’ (CPLR 2221[e][2]; 25 Bay Terrace Assoc. L.P. v Public Serv. Mut. Ins. Co., 194 AD3d 668 [2d Dept. 2021]). “While a court has discretion to entertain renewal based on facts known to the movant at the time of the original motion, the movant must set forth a reasonable justification for the failure to submit the information in the first instance” (id.). “When no reasonable justification is given for failing to present new facts on the prior motion, the Supreme Court lacks discretion to grant renewal” (id.). “A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (id.).

Initially, the Court finds that even though Plaintiff failed to set forth a reasonable excuse for filing its opposition papers late, there was no prejudice to Defendant (Narvaez v City, 171 AD3d 764 [2d Dept. 2019], lv denied 34 NY3d 1012 [2019]). As such, the Court will consider Plaintiff’s opposition papers in determining this motion. The Court also finds that Defendant failed to set forth a reasonable justification for failing to submit the South Carolina statute and caselaw in his opposition papers to the prior motion. New York Rules of Professional Conduct section 3.3(a)(2) provides that “A lawyer shall not knowingly fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel”. Here, the subject judgment was entered on February 8, 2012 in South Carolina. South Carolina Code Ann. Section 15-39-30 provides that:

Executions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof and shall have active energy during such period, without any renewal or renewals thereof, and this whether any return may or may not have been made during such period on such executions.

Consequently, pursuant to this statute, the underlying judgment expired on February 8, 2022. Although the underlying judgment was still active when the prior motion was submitted, Defendant was obligated to inform the Court of the existing law that would directly affect the underlying judgment. Defendant’s counsel’s claims that he was not obligated notify the Court of the existing law in South Carolina in his prior opposition papers flaunts counsel’s obligation under Section 3.3(a)(2) of the New York Rules of Professional Conduct. As such, the Court finds that Defendant failed to establish a reasonable justification for failing to notify the Court of the existing law for

renewing a judgment in South Carolina in his prior opposition papers. Notwithstanding this, the Court finds that Defendant has established that the issuance of the prior order after the expiration of the underlying judgment constitutes new facts and forms a sufficient basis for renewal.

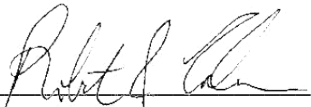
Consequently, the Court grants renewal, and upon renewal makes the following findings:

The renewal of the underlying judgment is a creature of statute and exclusively governed by the terms of the statute that created this authority (see e.g. Langan v St. Vincent's Hosp. of N.Y., 25 AD3d 90 [2d Dept. 2005] ["An action alleging wrongful death, unknown at common law, is a creature of statute requiring strict adherence to the four corners of the legislation"]). Where a court is divested of subject matter jurisdiction, it cannot exercise such jurisdiction by virtue of an order *nunc pro tunc* (see Davis v State of New York, 22 AD2d 733 [3<sup>rd</sup> Dept. 1964] ["(w)here, as here, the subject matter is jurisdictional, the error cannot be corrected by an order *nunc pro tunc*"]; see also Matter of Lourdes B.V.I. v Jose R.D.L.C.Q., 144 AD3d 909 [2d Dept. 2016] [appeal of Family Court dismissed a Guardianship Petition three days before Petitioner turned 21 years of age. Subsequent appeal denied because pursuant to SCPA 1701[2], "once the child turns 21, the court "is divested of subject matter jurisdiction, [and] cannot exercise such jurisdiction by virtue of an order *nunc pro tunc*"; Matter of Maria C.R. v Rafael G., 142 AD3d 165 [2d Dept. 2016]).

Here, the underlying judgment was entered on February 8, 2012. In Gordon v Lancaster, supra, the South Carolina Supreme Court held that pursuant to Section 15-39-30 "a judgment becomes stale and a judgment lien is extinguished after ten years", and that even though "... our approach is in isolation compared with other jurisdictions, we must remain faithful to the text of the [statute]". As such, pursuant to South Carolina Code Ann. Section 15-39-30, the underlying judgment expired on February 8, 2022 and may not be revived *nunc pro tunc*. Consequently, unbeknownst to the Court and without any notice from the parties in the papers filed in the underlying motion, the judgment expired prior to the issuance of the order on March 23, 2022. As such, Plaintiff's prior motion is denied and this action is dismissed.

In light of the foregoing, the remaining branch of the instant motion seeking leave to reargue Defendant's opposition to the prior motion, and to dismiss this action pursuant to CPLR 3211 are denied as academic.

**Dated: October 6, 2022**

  
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**ROBERT I. CALORAS, J.S.C.**