Unreported Disposition
16 Misc.3d 1114(A), (N.Y.Sup.)2007 WL 2127343

Star Industries, Inc. v. Innovative Beverages, Inc.
N.Y.Sup.,2007.
(The decision of the Court is referenced in a table in the New York Supplement.)

Supreme Court, Nassau County, New York.
STAR INDUSTRIES, INC., Plaintiff,
v.
INNOVATIVE BEVERAGES, INC., d/b/a Gecko Tequila Company, and Vincent Viola, Defendants.
No. 13306-03.

July 24, 2007.

Steinberg, Fineo, Berger & Fischoff, PC, Woodbury, for Plaintiff.
The **Bostany** Law Firm, New York, for Defendant.
LEONARD B. AUSTIN, J.
***1** The following papers were read on Defendants' motion to renew and reargue: [FN1]

FN1. This motion was initially returnable on June 18, 2007. The motion was adjourned to June 25, 2007 to permit Plaintiff's counsel to submit opposition papers. The affirmation of James E. Brandt, Esq. submitted in opposition to the motion is undated. The affidavit of service for this affirmation indicates it was served by regular mail on June 23, 2007. June 23, 2007 was a Saturday. CPLR 2214(b) requires opposition papers to be served at least 2 days prior to the return date of the motion. CPLR 2103(b)(2) states that where a time period is measured from the service of papers and service is made by mail, five days shall be added to the period. Since the opposition papers were served by mail 2 days prior to return date, they were not timely served and were not considered in deciding this motion.

Notice of Motion dated June 8, 2007;

Affidavit of John P. **Bostany**, Esq. dated June 8, 2007;

Affidavit of Vincent Viola sworn to on June 6, 2007.

Defendants move to renew and reargue from this Court's order of April 23, 2007 which denied Defendants' motion to vacate a default judgment and, upon reconsideration, to vacate the judgment.

BACKGROUND

By Notice of Motion dated February 16, 2007, Defendants moved to vacate a default judgment entered against them on June 22, 2005. The June 22, 2005 judgment was entered based upon damages awarded by Special Referee Thomas V. Dana at an inquest held on April 1, 2005.

By order dated April 23, 2007, this Court denied Defendants' motion except that the court vacated the award of legal fees in the sum of $24,226.87. Based upon Special Referee Dana's award as modified, this Court's April 23, 2007 order directed the Nassau County Clerk to enter a judgment in favor of Plaintiff and against Defendants for compensatory damages in the sum of $473,313.74 together with interest from December 1, 2002, punitive damages in the sum of $105,000 together with interest from April 1, 2005 and costs and disbursements as taxed by the Clerk.

This action was commenced in August 2003. Defendants appeared in this action by Andrew Weiss, Esq. (“Weiss”).

In 2004, **Star** Industries, Inc. (“**Star**”) served an amended complaint. Weiss moved to withdraw as attorney for the Defendants before interposing an answer to the amended complaint. By order dated December 21, 2004, this Court granted Weiss leave to withdraw as attorney for the Defendants. Weiss was directed to serve a copy of the December 21, 2004 order and a Notice to Appoint Another Attorney upon Defendants Innovative Beverages, Inc. d/b/a Gecko Tequila Company (“Innovative”) pursuant to CPLR 311(a)(1) and upon Vincent Viola pursuant to CPLR 308(1) or (2). The order provided for a stay of all proceedings against the Defendants for 30 days after service of a copy of the order.

While the Court has never been provided with affidavits of service indicating that its order granting Weiss leave to withdraw as attorney for the Defendants was served as provided by the order, Viola acknowledges receipt of the order no later than February 8, 2005.[FN2]

FN2. Viola concedes that a copy of the

> Notice to Appoint a New Attorney dated January 20, 2005 was faxed to him at one of his places of employment on February 8, 2004. The Notice to Appoint a New Attorney advised Viola of status conference scheduled for February 11, 2004.

Neither Viola nor an attorney appeared on behalf of the Defendants for the status conference scheduled for February 11, 2005. However, the Court did not default Defendants for failing to appear for this conference.

The Court adjourned the conference to March 1, 2005 and directed the attorney for the Plaintiff to notify the Defendants of the new conference date. Plaintiffs, by letter dated February 22, 2005, advised Defendants of the March 1, 2005 conference.

Neither Viola nor an attorney for the Defendants appeared for the March 1, 2005 conference. Therefore, on oral application of Plaintiff's attorney made on the record on March 1, 2005, the Court granted Plaintiff's application for a default judgment on liability and set the matter down for an inquest on damages before Special Referee Thomas V. Dana. The order granting Plaintiff leave to enter a default judgment directed the attorneys to serve upon the Defendants copies of the order referring the matter to Special Referee Dana for inquest, the transcript of the March 1, 2005 proceedings, a note of issue and notice of inquest.

***2** The inquest was held before Special Referee Dana on April 1, 2005. On June 22, 2005, **Star** entered a judgment based upon the damages awarded by Special Referee Dana at inquest.

A copy of the judgment with notice of entry was served upon Viola in July 2005. Viola concedes he received a copy of the judgment with notice of entry.

Viola asserts that he retained Weiss again in April or May 2006 in an effort to resolve this matter. However, this assertion is questionable. By letter dated October 31, 2005, Weiss advised the attorneys for **Star** that he had been retained by Viola and Innovative to represent them solely in connection with supplementary proceedings brought to enforce the judgment. Viola retained Weiss only after he had failed to appear for a deposition in supplementary proceedings.

By notice of motion dated October 3, 2006, **Star** moved for an installment payment order. In response to that motion, Cyruli, Shanks & Zizmor, LLP, on behalf of Defendants, cross-moved to vacate the judgment and for an order directing Plaintiff to return to Defendants14,400 bottles of tequila that **Star** has in its possession. Although Cyruli, Shanks & Zizmor served the papers upon Plaintiff's counsel and provided copies to the Court, they never paid the motion filing fee. As a result, this motion was never calendared or considered by the Court.

By notice of motion dated February 16, 2007, Defendants moved to vacate the default judgment. This motion, which was submitted on February 27, 2007, was decided by the April 23, 2007 order from which Defendants now seek renewal and reargument.

DISCUSSION

A. *Reargument*

A motion to reargue must be so designated, shall be based upon an assertion that the court overlooked relevant facts or misapprehended matters of law when it decided the prior motion and shall be made within thirty (30) days of service of the order with notice of entry from which reargument is sought.CPLR 2221(d).

A motion to reargue is addressed to the discretion of the court and may granted upon a showing that the court overlooked relevant facts or misapplied or misapprehended the applicable law or for some other reason improperly decided the prior motion. *Carrillo v. PM Realty Group*, 16 A.D.3d 611, 793 N.Y.S.2d 69 (2nd Dept.2005); *Hoey-Kennedy v. Kennedy*, 294 A.D.2d 573, 742 N.Y.S.2d 573 (2nd Dept.2003); and *Foley v. Roche*, 68 A.D.2d 558, 418 N.Y.S.2d 588 (1st Dept.1979).

A motion to reargue is based solely upon the papers submitted in connection with the prior motion. New facts may not be submitted or considered by the court. *James v. Nestor*, 120 A.D.2d 442, 502 N.Y.S.2d 27 (1st Dept.1986); and *Philips v. Village of Oriskany*, 57 A.D.2d 110, 394 N.Y.S.2d 941 (4th Dept.1997).

Viola and Innovative assert, for the first time in their motion to reargue that they could not have been defaulted except by motion on notice made in accordance with CPLR 2214. Since this is a new argument, it may not be considered as a basis for reargument.

Even if this argument had been raised in the initial motion, it would not have served as a basis for vacating the default. Both the Uniform Rules for the New York State Trial Courts and the then applicable rules of the Commercial Division Nassau County permitted the court to strike the Defendants' answer and set the matter down for an inquest when Defendants failed to appear for a conference. See, 22 NYCRR 202.27(a) which permits the court to enter a default and direct and inquest against a defendant who fails to appear for a conference; and Rules 1 and 12 of the Commercial Division of Nassau County, which required an attorney familiar with the case and authorized to enter in agreements both procedural and substantive to appear at all conferences and permitted the court to strike a defendant's answer for failure to appear or to impose a sanction permitted by 22 NYCRR 130-1.2 or 202.27.

***3** A motion to reargue is not a means by which the unsuccessful party can obtain a second opportunity to argue issues decided in the prior motion or to present new and different arguments relating to the previously decided issues.*Gellert & Rodner v. Gem Community Mgt., Inc.*, 20 A.D.3d 388, 797 N.Y.S.2d 316 (2nd Dept.2005); and *McGill v. Goldman*, 261 A.D.2d 593, 691 N.Y.S.2d 75 (2nd Dept.1993). The other grounds Defendants assert for granting reargument involve new facts. The court may not and will not consider new facts in connection with a motion to reargue. *James v. Nestor, supra.*

Defendants fail to establish that the Court overlooked any relevant facts or misapplied or misconstrued any relevant law in denying their motion to vacate the default judgment entered against them. Defendants did not, in their prior motion, offer a reasonable explanation for their default or a meritorious defense. *Newton v. The Nutty Irishman*, 38 A.D.3d 630, 831 N.Y.S.2d 509 (2nd Dept.2007); and *Platinum RX, LLC v. Pose*, 31 A.D.3d 522, 818 N.Y.S.2d 283 (2nd Dept.2006). Nor did they establish that the court overlooked any relevant facts or misapplied or misinterpreted any applicable law in making that determination. The Court corrected the only error of law and fact made in the judgment by striking the award of legal fees. Therefore, the motion to reargue must be denied.

B. *Renewal*

A motion to renew shall be designated as such, shall be based upon new facts not presented to the court in connection with the prior motion that would change the court's prior determination or shall demonstrate that there has been a change in the law which would change the prior decision and shall provide a reasonable justification for the failure to present the new facts on the prior motion. CPLR 2221(e).

Viola and Innovative now, for the first time, offer a sworn statement and documentary evidence which may contest many of the allegations underlying Plaintiff's cause of action.

Star alleged that Gecko Blue was not tequila. Viola now states that the product was 100% tequila which had be specially labeled to reflect that it was blue in color as opposed to tequila's traditional gold color.

Star alleged that Viola had misrepresented that it had entered into a contract with Snoop Dogg to promote Blue Gecko Tequila. In support to their motion to renew, Defendants provide the Court with proof that they had an arrangement with Snoop Dogg to promote Gecko Blue tequila. Defendants attach a letter on the letterhead of Snoop Dogg Clothing Company authorizing the use of pictures of Snoop Dogg holding bottles of Gecko Black and Gecko Blue tequila to promote the product. Defendants attach a copy of a print advertisement for a “Blue Dogg Margarita” featuring Snoop Dogg.

Defendants also attach a copy of a cancelled check dated October 11, 2002 issued by 576 Midland Realty Corp. to Calvin Brodus a/k/a Snoop Dogg as evidence that Innovative paid fees relating to the promotional agreement. Defendants have also provide copies of pictures of Snoop Dogg holding bottles of Blue Gecko. In addition, Defendants have annexed copies of **Star** executives next to Snoop Dogg's van and at a boxing event being used to promote Blue Gecko.

***4** One of the other components of **Star's** claim relates to **Star** having advanced $19,000 to Innovative to be used to purchase a boat to promote the product and Innovative's failure to apply the money for that purpose. Defendants submitted copies of photographs of a boat with the Gecko Blue logo on the side which Defendants aver they bought with the money advanced by **Star**.

While these are "new facts" in that they were not previously provided to the Court, they are not "new facts" for the purposes of a motion to renew. "New facts" for the purposes of a motion to renew are facts that existed when the original motion was made but were not known to the party seeking renewal when the motion was made. *Angiolillo v. Town of Greenburgh*, 290 A.D.2d 1, 735 N.Y.S.2d 66 (2nd Dept.2001); and *Gilson v. National Union Fire Ins. Co.*, 246 A.D.2d 897, 668 N.Y.S.2d 287 (3rd Dept.1998).

The court may, in its discretion, grant renewal based upon facts known to the movant at the time the original motion was made if the movant offers a reasonable excuse for its failure to present these facts to the court on the original motion. *Surdo v. Levittown Public School District*, 41 A.D.3d 486, 837 N.Y.S.2d 315 (2nd Dept.2007); and *Lawman v. The Gap, Inc.*, 28 A.D.3d 852, 813 N.Y.S.2d 791 (2nd Dept.2007).

Innovative and Viola fail both of these tests. The "new facts" which Innovative and Viola place before the Court are facts known to them when the original motion for vacatur was made. The documentary evidence; to wit: the letter, photos, checks, etc. were and have always been in Defendants' possession. Defendants do not offer any excuse, let alone a reasonable excuse, for failing to place this evidence before the Court in connection with their prior application for vacatur.

Viola and Innovative are attempting to use the motion to renew as a vehicle for remedying the deficiencies in its prior papers. A motion to renew is not a second chance given to a party who failed to exercise due diligence when making their initial factual presentation. *Renna v. Gullo*, 19 A.D.3d 472, 797 N.Y.S.2d 115 (2nd Dept.2005); and *O'Dell v. Caswell*, 12 A.D.3d 492, 784 N.Y.S.2d 603 (2nd Dept.2004).

C. *Conclusion*

Although it appears there is some merit to the defenses belatedly raised on this motion by Defendants, the motion must, in any event be denied. Defendants have failed to explain or justify their pattern of defaults in appearance before this Court which resulted in the striking of their answer in the first place. Thus, no basis to grant reargument or renewal has been established to warrant such relief at this late juncture.

Accordingly, it is,

ORDERED, that Defendants motion to reargue and/or renew the Court's order dated April 23, 2007 is **denied.**

This constitutes the decision and Order of the Court.

N.Y.Sup.,2007.
Star Industries, Inc. v. Innovative Beverages, Inc.
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