Copy

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

----------x

RICHARD TOBING,

Plaintiff,

-against-

BMW OF NORTH AMERICA, INC., A Delaware Corporation, MASTERCARS USA, INC., a New York Corporation, and WELLS FARGO AUTO FINANCE INC., a California Corporation, jointly and severally

Defendants,

----------x

TRIAL PART: 16

NASSAU COUNTY

INDEX NO: 002083-09

MOTION SEQ. NO: 3

SUBMIT DATE: 05/28/10

The following papers having been read on this motion:

Notice of Motion 1
Opposition.....2
SurReply.....3

Motion pursuant to CPLR §2221, §3215[b] by the defendant Mastercars USA, Inc., a New York Corporation, for (1) reargument and/or renewal of the plaintiff's motion for a default judgment, which application was granted by decision and order of this Court dated January 20, 2010; and (2) upon the granting reargument and/or renewal, for further relief vacating a judgment of default entered as against it.

In December of 2007, the plaintiff Richard Tobing executed a purchase agreement pursuant to which he purchased a used, BMW automobile from codefendant Mastercars, USA, Inc ["Mastercars"] (Cmplt., ¶¶ 8-9).

According to the plaintiff, after he acquired the vehicle – which he claims was defective in a variety of respects – he discovered that, *inter alia*, Mastercars had failed to disclose that it had "repurchased" the car as a lemon (Cmplt., ¶¶ 72-76). Moreover, Mastercars allegedly: (1) violated various express and implied warranties by failing to repair the vehicle; and (2) reneged on an express promise to supply financing at a stated and attractive interest rate, which it later claimed was

unavailable (Cmplt., ¶¶ 78-84).

Based on these and other claims of wrongdoing, the plaintiff commenced the within action and effected service of process upon Mastercars on April 13, 2009.

Upon his receipt of process, Mastercars' former counsel, the firm of Feldherr & Feldherr, Esqs., requested and obtained from plaintiff's counsel, a written stipulation extending Mastercars' time to appear and/or file an answer, until May 15, 2009. However, and according to plaintiff's counsel, in the months which ensued after the stipulation was executed, defense counsel advised him that Mastercars was in the process of retaining new counsel (Schwartz Aff., ¶¶ 5-6).

On or about November 10, 2009, some five months after the stipulation was executed – Mastercars' current attorney, Steve Feinberg, Esq., was substituted as Mastercars' attorney. Approximately one week thereafter, Mr. Feinberg sent predecessor counsel a letter requested the case file, but received no response (Feinberg [Dec. 8 2009] Aff., ¶¶ 4-6).

A Court compliance conference was scheduled for late November, but according to Mr. Feinberg, even though he had sent a notice advising that he had been substituted, none of the other attorneys in the matter informed him about that conference, which he did not attend (Feinberg [Dec. 8 2009] Aff., ¶¶ 7, 9).

At that juncture, Mr. Feinberg claimed that the only document he had in his possession was a discovery order directing Mastercars to provide responses to a co-defendant's disclosure demand – a directive with which counsel claims he complied immediately (Feinberg [Dec. 8 2009] Aff., ¶¶ 5-6). Counsel also asserted that he was still unaware that no answer had been filed until the point at which he received the plaintiff's application for a default judgment, dated December 2, 2009 (Feinberg [Dec. 8 2009] Aff., ¶¶ 8-9).

In response to the default judgment application, counsel filed a two-and-one half page opposing affirmation, dated December 8, 2009, together with a proposed answer with cross claims and counterclaims (Feinberg [April 2010] Aff., Exh., "F").

According to counsel as of the date of his affirmation, prior counsel still had not turned over the file. Moreover, he claims he was working off a "partial, reconstructed file" (Feinberg [Dec 8 2009] Aff., ¶¶ 4-6). Thereafter, counsel claims that he renewed his efforts to contract prior counsel, but that his telephone calls were not returned (Feinberg [April, 2010] Aff., ¶¶ 11-12).

In further opposition to the motion, counsel argued that in order to prevail on his claims the plaintiff would be required to show, *inter alia*, that the car was mechanically unfit when it was purchased; that Mastercars refused and/or was unable to repair it; and that the used car salesman who sold him the vehicle tricked the plaintiff into buying car that was previously returned due to a warranty issue" (Feinberg [Dec. 8 2009] Aff., ¶¶ 10-13). Counsel argued that the plaintiff's claims lack merit for the additional reason that he was allegedly given a disclosure statement (not attached to his affirmation) which expressly revealed the car had been a warranty return (Feinberg [Dec. 8 2009] Aff., ¶ 11).

While the plaintiff's default motion was pending, the parties attended a December 15 compliance conference. At the conference counsel states that he informed this Court that despite earnest efforts prior counsel had still failed to return his phone calls (Feinberg [April, 2010] Aff., ¶¶ 15). The Court in response, directed counsel to send a letter to the Feldherr firm advising, *inter alia*, that if the files were not produced, the Court would sign an order compelling production upon pain of sanctions and costs (Feinberg [April, 2010] Aff., ¶¶ 15).

Counsel sent the letter that day, after which the Feldherr firm responded – also that same day – that the file in its entirety would be sent to counsel by mail (Feinberg [April, 2010] Aff., ¶¶ 15-16).

By order dated January 20, 2010, this Court granted the plaintiff's motion for a default judgment, noting in sum that: (1) the Mastercars' opposing submissions did not allege sufficient facts to establish a meritorious defense; and (2) that Mastercars' "law office failure" defense had not been properly substantiated.

With respect to the latter claim of law office failure, the Court observed that there was no affidavit competently describing the occurrences and events which lead to the delays prior to current counsel's retention (Order at 2). More specifically, the Court held that while current counsel's affirmation addressed the events which took place upon and after his retention, counsel relied in part, upon "the faulty premise that substitution of counsel excuses a later response to a Summons and Complaint before counsel's retention" (Order at 2).

Mastercars now moves for reargument and/or renewal of the plaintiff's prior motion for a default judgment, and upon reargument and renewal, for relief vacating the judgment of default.

In support of the motion, Mastercars has submitted the affirmation of Craig Feldherr,

Mastercars' former counsel.

Mr Feldherr avers that he practices with one other attorney and an assistant; that at the time the Mastercars file "was sent over to his office," his assistant left his employ; that as a result, he had to "perform every task in the office;" that he did, in fact, prepare an answer, but that answer was never served; and that he apparently was unaware that it had never been served – an omission which, he asserts, fellow counsel never raised during subsequently conducted Court conferences in connection with the matter (Feldherr Aff., ¶¶ 4-6).

According to Mr. Feldherr, "[o]nly after this matter was turned over to current counsel was it discovered that no answer had been served" (Feldherr ff., ¶ 6-7).

A defendant seeking to vacate a default in answering pursuant to CPLR §5015(a)(1) must demonstrate a reasonable excuse for the default and the existence of a meritorious defense (*Morales v. Perfect Dental, P.C.*, 73 AD3d 877; *Scala v. 4020 Jerusalem Owners, Inc.*, 72 AD3d 926; *Delgado v. JVC, Inc.*, 72 AD3d 962; *Taddeo-Amendola v. 970 Assets, LLC*, 72 AD3d 677 *see also, Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co., Inc.*, 67 NY2d 138, 141 [1986]).

Both prongs of the tests must be independently satisfied "though the submission of supporting facts in evidentiary form" which "explain and justify the default * * *" (*Ayiku v. Viteritti*, 54 AD3d 789; *Kumar v. Yonkers Contracting Co., Inc.*, 14 AD3d 493, 494 *see, Assael v. 15 Broad Street, LLC*, 71 AD3d 802, 803; *Energy Brands, Inc. v. Utica Mut. Ins. Co.*, 38 AD3d 591, 592; *Mondrone v. Lakeview Auto Sales & Serv.*, 170 AD2d 586 *see also, White v. Daimler Chrysler Corp.*, 44 AD3d 651, 652).

Although "[d]ocumented law office failure may constitute a reasonable excuse for a default (*Moore v. Day*, 55 AD3d 803, 804), "a conclusory, undetailed, and uncorroborated claim of law office failure" will not suffice (*White v. Daimler Chrysler Corp., supra*, 44 AD3d at 652 *see also, Knowles v. Schaeffer,* 70 AD3d 897, 898; *Chechen v. Spencer,* 68 AD3d 801, 802; *Brownfield v. Ferris*, 49 AD3d 790, 791). Nor will " 'bare allegations of incompetence on the part of prior counsel * * * serve as the basis to set aside a [default] pursuant to CPLR §5015' " (*Youni Gems Corp. v. Bassco Creations Inc.*, 70 AD3d 454, 455 *quoting from, Spatz v. Bajramoski*, 214 AD2d 436). Rather, "a claim of law office failure should be supported by a 'detailed and credible' explanation of the default or defaults at issue" (*Campbell-Jarvis v. Alves,* 68 AD3d 701, 702; *Michaels v. Sunrise*

Bldg. and Remodeling, Inc., 65 AD3d 1021, 1022-1024).

It is settled that "[w]hether an excuse is reasonable is a determination committed to the sound discretion of the court" (*Hye-Young Chon v. Country-Wide Ins. Co.*, 22 AD3d 849 *see, Morales v. Perfect Dental, P.C., supra see, Woodson v. Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]; *Perfect Care, Inc. v. Ultracare Supplies, Inc.*, 71 AD3d 752, 753).

A motion to renew "must be (1) based upon new facts not offered on the prior motion that would change the prior determination, and (2) set forth a reasonable justification for the failure to present such facts on the prior motion" (*Novosiadlyi v. James*, 70 AD3d 793, 794 *see, Nelson v. Allstate Ins. Co.*,73 AD3d 929; *Gonzalez v. Vigo Const. Corp.*,69 AD3d 565, 566; *Huma v. Patel*, 68 AD3d 821, 822; *Barnett v. Smith*, 64 AD3d 669, 670-671; *Kletnieks v. Hertz*, 54 AD3d 660, 662 *see also, Emigrant Mortg. Co., Inc. v. Turk*, 71 AD3d 722; *Sutton & Edwards, Inc. v. 68-60 Austin Street Realty Corp.*, 70 AD3d 810, 811; CPLR 2221[e][2],[3]).

Although the foregoing requirements are flexible (*Gonzalez v. Vigo Const. Corp., supra,* 69 AD3d 565, 566), "'[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'" (*Elder v. Elder*, 21 AD3d 1055, 1056 *see, Smith v. State*, 71 AD3d 866).

On the other hand, motions for reargument are addressed to the sound discretion of the court which decided the prior motion, and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision (*see*, CPLR §2221[d][2]; *Veeraswamy Realty v. Yenom Corp.*, 71 AD3d 874; *McGill v. Goldman*, 261 AD2d 593, 594 *see, Simon v. Mehryari*, 16 AD3d 664; *Pahl Equip. Corp. v Kassis*, 182 AD2d 22 *see also, Foley v Roche*, 68 AD2d 558).

The remedy is not designed to provide an unsuccessful party with successive opportunities to make repetitious applications, rehash questions already decided or present arguments different from those originally presented" (*McGill v. Goldman, supra,* 261 AD2d 593, 594; *William P. Pahl Equipment Corp. v. Kassis, supra,* 182 AD2d at 27 *see, Gellert & Rodner v. Gem Community Mgt.*, 20 AD3d 388; *Pryor v. Commonwealth Land Title Ins. Co.*, 17 AD3d 434, 436; *Amato v. Lord & Taylor, Inc.*, 10 AD3d 374, 375; *Silver v. Frieden*, ___Misc3d____, 2006 WL 1909956 at 1-2 [Supreme Court, New York County 2006]).

With these principles in mind, the Court agrees that Mastercars has failed to establish its entitlement to the relief sought.

Preliminarily, although Mastercars has now attached the affirmation of predecessor counsel – Craig Feldherr – to its supporting papers and an alleged affidavit of merit executed by Mastercars' manager (Feinberg Aff., Exh., "I"), no explanation has been supplied as why these materials were not produced in opposition to the plaintiff's original default judgment application (CPLR §2221[e][3]*see generally, Siculan v. Koukos,* ___AD3d___, 2010 WL 2303235 [2nd Dept. 2010]; *Huma v. Patel, supra*; *Sutton & Edwards, Inc. v. 68-60 Austin Street Realty Corp., supra*; *Caraballo v. Kim*, 63 AD3d 976; *Simon v. Mehryari, supra*, 16 AD3d at 665). The Court notes that Mastercars' legal claims with respect to the allegedly deficient nature of the plaintiff's original application are similarly raised for the first time upon the instant application (*Flomenhaft v. Baron*, 281 AD2d 389)(Feinberg Aff., ¶¶ 18-27 *cf., Amato v. Lord & Taylor, Inc., supra*, 10 AD3d 374). In any event, and apart from the foregoing, Mr. Feldherr's affirmation is nebulous and lacks meaningful detail with respect to the law office failure claim advanced (*see generally, Siculan v. Koukos, supra*; *Chechen v. Spencer supra,*, 68 AD3d at 802; *Campbell-Jarvis v. Alves, supra,* 68 AD3d 701, 702; *White v. Daimler Chrysler Corp., supra,* 44 AD3d at 652; *East Point Collision Works, Inc. v. Liberty Mut. Ins. Co.,* 289 AD2d 193, 194; *Flomenhaft v. Baron, supra*).

Specifically, Mr. Feldherr relies upon the unelaborated theory that law office failure exists merely because: (1) an assistant left his employ and burdened him with additional administrative tasks; and (2) that for reasons unstated, the answer he prepared at an unspecified date was never served. However, his affirmation does not establish a factual nexus between the assistant's departure and the firm's failure to serve the answer it prepared – or explain in any detail why the firm's two remaining attorneys were unaware for such a substantial period of time that the pleading had never been served (*see, Kumar v. Yonkers Contracting Co., Inc., supra; Wechsler v. First Unum Life Ins. Co.*, 295 AD2d 340, 342).

Similarly, it has not been asserted that the assistant committed any misconduct or, in any specific way, directly contributed to the ensuing delays – or that for that matter, that the assistant had any involvement at all in the preparation of pleadings (*cf.*, *Goldman v. Cotter*, 10 AD3d 289, 291). Nor has Mr. Feldherr explained why his firm did not respond to current counsel's requests relative to the

production of the file after the substitution had taken place in mid-November of 2009.

Lastly, that branch of the Mastercars' motion which, alternatively, seeks reargument of the plaintiff's previous application is denied, inasmuch as the Court perceives no error or misapprehension – legal, factual or otherwise – which would warrant modification of its January 20, 2009 order.

The Court has considered Mastercars' remaining contentions and concludes that they are lacking in merit.

Accordingly, it is,

ORDERED motion pursuant to CPLR §2221, §3215[b] by the defendant Mastercars USA, Inc., a New York Corporation, for, *inter alia,* (1) reargument and/or renewal of the plaintiff's motion for a default judgment; and (2) upon the granting reargument and/or renewal, for further relief vacating a judgment of default entered as against it, is denied.

The foregoing constitutes the decision and order of the Court.

ENTERED

JUL 12 2010

NASSAU COUNTY COUNTY CLERK'S OFFICE

DATED: July 8, 2010

ENTER

HON. ARTHUR M. DIAMOND
J. S.C.

To:

Attorney for Plaintiff
BOLZ, LOVASZ, TOTH & RUGGIERO, PLLC.
12 Harding Street, Suite 110
Lakeville, M.A. 02347

Attorney for Defendant
STEVEN M. FEINBERG, ESQ. LLC
50 Jericho Tpke. Suite 205
Jericho, N.Y. 11753

Attorney for Defendant
MORRISON MAHONEY
17 State Street, Suite 1110
New York, N.Y. 10004

Attorney for Defendant
BIEDERMAN REIF
570 Lexington Avenue, 16 Fl.
New York, N.Y. 10022

Attorney for Defendant
FELDHERR & FELDHERR
900 Merchants Concourse, Suite 305
Westbury, N.Y. 11510