

**Elberg v International Bank of Chicago**

2024 NY Slip Op 34409(U)

December 4, 2024

Supreme Court, New York County

Docket Number: Index No. 653079/2022

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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RUBEN ELBERG,

Plaintiff,

- v -

INTERNATIONAL BANK OF CHICAGO, FRANK WANG,  
WESTLEAD BRIDGE, LLC D/B/A WESTLEAD CAPITAL  
INC.,RAYMOND KU, NEW FUND, LLP, NYC METRO  
REGIONAL NEW FUND, LLP, LAW OFFICES OF JOE  
ZHENGHONG ZHOU AND ASSOCIATES PLLC,JOE  
ZHENGHONG ZHOU

Defendant.

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INDEX NO. 653079/2022

MOTION DATE 06/01/2023,  
08/26/2024,  
10/02/2024

MOTION SEQ. NO. 002 003 004

**DECISION + ORDER ON  
MOTION**

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 50, 51, 53, 54, 56

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, Ruben Elberg’s motions (Mtn. Seq. Nos. 003 and 004) to vacate the default and reargue and renew the Court’s prior Decision and Order (the **Prior Decision**; NYSCEF Doc. No. 53) dated July 22, 2024 are GRANTED and, upon reconsideration, the defendants’ motion to dismiss (NYSCEF Doc. No. 19) is DENIED.

The underlying facts have been discussed extensively in *Crabapple Corp. et al. v. Royal One Real Estate LLC et al.*, Index No. 650492/2015 and *Ruben Elberg v. Tamara Pewzner*, Index No. 657021/2022. Familiarity is presumed.

CPLR 5015 [a] [1] provides that a party may be relieved from an order upon the ground of “excusable default” (CPLR 5015 [a] [1]). “A defendant seeking to vacate a default under this provision must demonstrate a reasonable excuse for its delay...and a meritorious defense to the action” (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., Inc.*, 67 NY2d 138, 141 [1986]).

As relevant, the record before the Court demonstrates both a reasonable excuse and meritorious defense. To wit, Mr. Elberg filed a complaint (NYSCEF Doc. No. 1) and the defendants moved to dismiss (after a period of time went by given other pending related litigation). In response, Mr. Elberg then filed an amended complaint (NYSCEF Doc. No. 44). The defendants ultimately indicated that they wanted to have their prior motion to dismiss applied as against the amended complaint pursuant to CPLR 3211(f) (*Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 38 [1st Dept 1998] [“the moving party has the option to decide whether its motion should be applied to the new pleadings”]). Counsel to Mr. Elberg indicates by affirmation (NYSCEF Doc. No. 114) that he expected to come to Court and to set a briefing schedule as to when his opposition was due and that he did not appreciate that the Court might consider the motion fully submitted and issue a decision without further input from the litigants. This, under the circumstances of the related litigation including a communication from the Court to the parties as to the status of the related litigation, makes sense and explains why no opposition was filed following the defendant’s election. At its worst, it constitutes law office failure which is well

recognized as an appropriate excuse. As to the merits of Mr. Elberg's position, this is a case where Mr. Elberg alleges fraud. He has a meritorious claim (as discussed below) and does so with particularity in satisfaction of CPLR 3016(b). Thus, vacating the default is appropriate.

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; and shall contain reasonable justification for the failure to present such facts on the prior motion." (CPLR § 2221[e]). A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR § 2221[d]). Reargument is not intended "to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted" (*Haque v Daddazio*, 84 AD3d 940, 242 [2d Dept 2011]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]).

Renewal also appears to be appropriate here as Mr. Elberg has set forth new, material facts not offered on the motion to dismiss, and he has provided a reasonable justification for his failure to present such facts as discussed above.

The well pled amended complaint as supplemented by Mr. Elberg's affirmation (NYSCEF Doc. No. 92) alleges that the defendants "knowingly and falsely asserted and acted in the course of the merger/sale transaction, with the intent to defraud [Mr. Elberg], that: (a) the November 2012 Partnership Agreements were not controlling; (b) that [Mr. Elberg] had no individual ownership interests in Royal CP and Royal HI; (c) that [Mr. Elberg] was not a Class D Partner of Royal CP

and Royal HI; and (d) that [Mr. Elberg] had no individual ownership interests or membership in RORE and RREM” causing Mr. Elberg to suffer damages in excess of fifty million dollars.

Taking the allegations as true as the Court must on a motion to dismiss (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the motion to dismiss is denied.

The Court has considered the parties’ remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that Mr. Elberg’s motion to reargue and renew is GRANTED; and it is further

ORDERED that Mr. Elberg’s motion to vacate is GRANTED; and it is further

ORDERED that the defendants’ motion to dismiss is DENIED; and it is further

ORDERED that the parties shall serve discovery demands on or before January 6, 2025 and respond to discovery demands on or before February 6, 2025; and it is further

ORDERED that e-discovery search terms and identification of e-discovery custodians shall be served by all parties on or before March 5, 2025; and it is further

ORDERED that document production shall be completed on or before April 7, 2025; and it is further

ORDERED that the parties will provide a deposition schedule with names and dates on or before May 6, 2025; and it is further

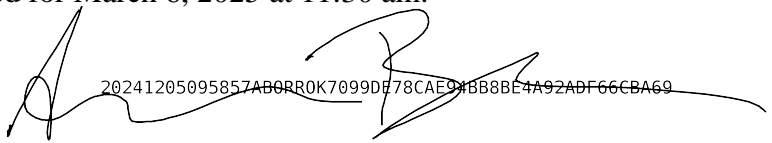
ORDERED that fact discovery shall be completed on or before July 7, 2025; and it is further

ORDERED that expert discovery shall be completed on or before October 7, 2025; and it is further

ORDERED that Notice of Issue shall be filed on or before October 21, 2025; and it is further

ORDERED that dispositive motions shall be due within 45 days thereafter; and it is further

ORDERED that a status conference is scheduled for March 6, 2025 at 11:30 am.

  
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12/4/2024  
DATE

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ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	