

Civil Court of the City of New York  
County of Queens  
Part 34

Index Number 79783/06  
Motion Cal # \_\_\_\_\_ Motion Seq. # \_\_\_\_\_  
Papers Submitted to Special Term  
on August 26, 2010

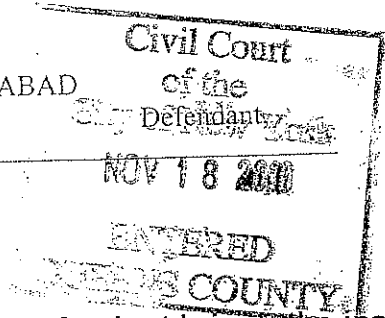
DAVIS ALARMS, INC.

### DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Plaintiff,  
against

CARLOS LANDEZABAD



Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed...	<u>2</u>
Answering Affidavits.....	_____
Replying Affidavits.....	_____
Exhibits.....	_____
Supplemental Affidavit.....	_____

The defendant brings the instant motion, after remission to this court pursuant to the Appellate Term order entered on July 29, 2010, to vacate this court's decision and order of May 4, 2009 and to restore to the calendar.

The motion by defendant is, for reasons discussed below, denied.

The parties had entered into a stipulation of settlement on March 22, 2007, the main terms of which were as follows:

The judgment entered against defendant on February 5, 2007 would stand, but enforcement thereof was stayed pending defendant's paying the settlement amount of \$ 1,587.96 by payments of \$ 793.98 on or before March 30, 2007 and the same amount on or before May 23, 2007. Upon timely payment of the first installment, alarm service would be continued and upon full payment, plaintiff would file a satisfaction of judgment. However, if defendant defaulted and failed to cure the default after 10 days written notice, plaintiff could continue to enforce the judgment.

After this court denied defendant's motion, finding that, other than payment of \$200 by check, the defendant did not provide any evidence of payment in full and, therefore, compliance with the terms of the stipulation, defendant brought the motion at bar, which motion was submitted to the Judge then sitting in Special Term. The court, by order dated June 12, 2009, granted defendant's motion to vacate the judgment. However, upon appeal, the Appellate Term, holding that pursuant to CPLR § 2221(a) defendant's motion should have been referred to *this* court, the June 12, 2009 order was reversed, the judgment was reinstated and defendant's motion was remitted to this court.

Defendant, in his motion papers, seeks to prove full compliance with the terms of the stipulation. The defendant annexed to his affidavit plaintiff's letter dated February 19, 2008, informing defendant that the second payment of \$793.98 was past due. Defendant has also attached to his affidavit copies of cancelled checks payable to plaintiff, to wit, \$200 dated April 6, 2009; \$155.36 dated September 23, 2008 and \$250 dated May 17, 2008.

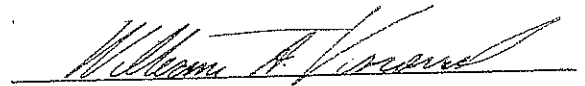
As these checks, the earliest of which is dated nearly three months after plaintiff's default letter, total \$ 605.36, the court finds that the defendant did *not* pay the full balance of \$ 793.98, nor that he timely cured his default in payment as per the terms of the stipulation. Furthermore, as shown by plaintiff's Exhibit D attached to the affirmation in opposition, two of the above payments may well have been payment for continued alarm service and not applicable to the settlement amount.

Accordingly, the motion by defendant to vacate the court's May 4, 2009 decision and order is denied and, as per said order, any and all stays herein are vacated.

The foregoing constitutes the decision and order of this court.

11/17/10

Date



HON. WILLIAM A. VISCOVICH  
Judge, Civil Court