

**DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT: CIVIL PART 3**

-----X
NEW YORK MERCHANTS PROTECTIVE CO., INC.,

Plaintiff,

against

ROLL-RITE TOWING INC. and ANTHONY MARRA,

Defendant.
-----X

The following named papers numbered 1 - 4
submitted on this motion on March 23, 2010

INDEX NO. 13230/05

Present:

Hon. Fred J. Hirsh

	Papers Numbered
Notice of Motion and Affidavits Annexed	
Order to Show Cause and Affidavits Annexed	1-2
Affirmation in Opposition	3
Replying Affidavits	4

Defendant moves to vacate the order of this Court dated February 4, 2010 and to sanction the attorney for the defendants.

BACKGROUND

The background underlying these actions is contained in this Court's February 4, 2010 decision and order. However, some of the operant facts are essential to this decision.

On September 23, 2005, plaintiff entered a default judgment against Roll-Rite Towing, Inc. and Anthony Marra in the sum of \$2427.39. This action bore District Court Nassau County Index No. 13230/05. ("The 2005 Action")

In an effort to enforce the judgment entered in The 2005 Action, New York Merchants Protective Co., Inc. ("NYMPC") served an information subpoena an questions upon JP Morgan Chase Bank.

JP Morgan Chase Bank responded to the information subpoena by advising the attorneys for NYMPC Anthony Marra maintained joint banks account with JP Morgan Chase.

NYMPC commenced a turnover proceeding seeking to compel JP Morgan Chase Bank to turnover to it the funds on deposit in the accounts maintained by Anthony Marra in partial satisfaction of the judgment. ("The Turnover Proceeding").

By order dated September 2, 2009, this Court denied NYMPC's application for a turnover order and dismissed The Turnover Proceeding without prejudice with leave to recommence. To the best of the court's knowledge, NYMPC has not recommenced the turnover proceeding.

After the court denied the NYMPC's application for a turnover order, Anthony Marra and Roll-Rite Towing, Inc. moved to vacate the judgment in The 2005 Action. This motion was submitted to the court without opposition and was decided by the court by decision and order dated February 4, 2010.

Confusion arises because there are two Anthony Marra's and two Roll-Rite Towing's.

Anthony G. Marra operated Roll-Rite Towing, Inc. from premises 639 Sunrise Highway, West Babylon, New York. Anthony G. Marra is alleged to be deceased. Roll-Rite Towing, Inc. is listed with the Secretary of State as an inactive corporation. The judgment in The 2005 Action was entered against Roll-Rite Towing, Inc. and Anthony G. Marra.

Anthony R. Marra ("ARM") operates Sunrise Transporters Inc. d/b/a Roll-Rite Towing ("Sunrise") at 639B Sunrise Highway, West Babylon.

The court denied the motion made by Anthony R. Marra and Sunrise Transporters Inc. d/b/a Roll Rite Towing to vacate the judgment entered in The 2005 Action by order dated February 4, 2010. The February 4, 2010 order further ordered NYMPC to release any funds being restrained by JP Morgan Chase pursuant to the restraining notice served with the information subpoena. The February 4, 2010 also directed NYMPC to return to Anthony R. Marra and/or Sunrise Transporters Inc. d/b/a Roll-Rite Towing any funds it had seized from either in satisfaction of the judgment entered in The 2005 Action.

NYMPC claims it received motion papers from ARM and Sunrise attorney in November seeking to vacate the judgment obtained in The 2005 Action and seeking to obtain the return of money seized from ARM and Sunrise in partial satisfaction of the judgment entered in The 2005 Action. The motion served upon defendant's attorney had a return date of December 3, 2009.

Upon receiving the motion papers, NYMPC's attorney called the attorney for ARM and Sunrise and requested the motion be withdrawn because ARM signed the agreement personally guaranteeing Roll-Rite Towing, Inc.'s obligations on the contract that whose breach gave rise to The 2005 action. NYMPC's attorney advised ARM and Sunrise attorney that if the motion was not withdrawn, it would be opposed.

NYMPC's attorney contacted the court on several occasions to ascertain if the motion filed by ARM and Sunrise attorney was on the motion calendar for December 3, 2009. They were advised and determined that the motion was not on the motion calendar for December 3, 2009. The reason the motion was not on the calendar for December 3, 2009 was because the original notice of motion filed with the court had a return date of December 11, 2009. When the motion, appeared on the calendar on Civil, Part 3 on December 11, 2009 it was submitted without opposition.

A review of the original motion papers submitted on December 11, 2009 indicate the return date was "whited out". The original date on the papers cannot be determined. However, the "11th" is handwritten on the notice of motion.

The court rendered a decision on the motion on February 4, 2010. This is the order NYMPC seeks to have the court vacate and reconsider.

NYMPC seeks to have the court reconsider and reverse so much of the February 4, 2010 order that ordered NYMPC to return to ARM and/or Sunrise any funds recovered in satisfaction of the judgment entered in The 2005 Action. NYMPC's attorney acknowledges that it has already seized some money from either ARM or Sunrise in partial satisfaction of the judgment. NYMPC asserts a review of the signature on the contract that gives rise to The 2005 Action establishes the contract was actually signed by ARM not Anthony G. Marra. Since ARM actually signed the agreement, he personally guaranteed Roll-rite Towing Inc.'s obligation. Since a judgment was properly entered against ARM, NYMPC should be permitted to retain the funds it obtained in partial satisfaction of the judgment.

NYMPC withdrew these funds from accounts for which a turnover order was not required. These funds could be withdrawn through execution by the sheriff.

DISCUSSION

CPLR 5015(a)(1) permits the court to vacate an order provided the party moving to vacate the order makes the motion within one year after service of a copy of the order with notice of entry and upon a showing of excusable default and a meritorious defense. Yellow Book of New York, Inc. v. Weiss, 44 A.D.3d 755 (2nd Dept. 2007); Kurtz v. Mitchell, 27 A.D.3d 697 (2nd Dept. 2006); and Harkless v. Reid, 23 A.D.3d 622 (2nd Dept. 2005).

The motion was made within one year of the entry of the order. NYMPC has established a reasonable excuse for its default. In fact, ARM and Sunrise attorney concedes she changed the return date after the paper had been served and failed to provide a corrected notice of motion to NYMPC's attorney.

NYMPC has also established a meritorious defense. The papers raise issues as to whether ARM or Anthony G. Marra actually signed the agreement.

The has four exemplars the court has of ARM's handwriting: (1) the photostatic copy of the signature on the agreement dated March 31, 1999; (2) the signature contained on the affidavit submitted in opposition to the application for a turnover order submitted in the Turnover proceeding; (3) a photostatic copy of the signature contained on the Corporation-Certificate of Assumed Name filed with the Secretary of State in connection with the application of Sunrise to do business under an assumed name; (4) an original signature on a sur-reply affidavit submitted in the Turnover Proceeding; and (5) the original signature contained on the affidavit submitted in support of the motion to vacate the judgment entered in The 2005 Action.

The signature on items 2, 3, 4 and 5 appear to be identical. In each case, the document is signed "Anthony R. Marra". However, the signature on item 1, the March 31, 1999 agreement is signed "Anthony Marra". The court cannot determine from a review of the photostatic signature whether this is the same signature as is contained on the other items. Additionally, the court does not have any exemplars of the handwriting of Anthony G. Marra. Therefore, the court cannot determine as a matter of law who signed the March 31, 1999 agreement.

The denied ARM's motion to vacate the judgment on the grounds he lacked standing to contest the judgment since the judgment was not entered against him. NYMPC's motion papers confer standing upon ARM by asserting he was person who signed the agreement on behalf of Roll-Rite Towing, Inc. and who personally guaranteed Roll-Rite's obligations under that agreement.

On the papers now before the court, plaintiff has established questions of fact exist as to who signed the agreement on behalf of Roll-Rite Towing, Inc. and who personally guaranteed Roll-Rite's obligations on the agreement. If the agreement was signed by Anthony G. Marra, then the judgment should stand as entered. If ARM did not sign the agreement, he is not personally liable and any money seized from him in partial satisfaction of the judgment should be returned to him.

On the other hand, if ARM signed the March 31, 1999 agreement on behalf of Roll-Rite Towing, Inc., he is personally liable as guarantor. A judgment should be entered and enforced against him.

New York has a strong public policy of having cases resolved on their merits. Reed v. Grossi, 59 A.D.3d 509 (2nd Dept. 2009); . Delgado v. City of New York 245 A.D.2d 123

(1st Dept. 1997); and Walter v. Rockland Armor & Metal Corp., 140 A.D.2d 335 (2nd Dept. 1988).

The only way to determine who signed the contract on behalf of Roll-rite Towing, Inc. is at a trial. The only way to have a trial is to vacate the judgment and permit ARM to interpose an answer.

The order in the Turnover Proceeding does not resolve any of the issues involved in this motion. The court never reached the issue of which Anthony Marra the judgment was entered against in the Turnover Proceeding. The court dismissed the Turnover Proceedings because petitioner failed to name or serve a necessary party.

Therefore, the court hereby recalls its decision and order of February 4, 2010 in its entirety.

The judgment entered on September 23, 2005 in The 2005 Action is hereby vacated as to the defendant Anthony Marra. Said defendant is granted 20 days from the date of this order to serve and file an answer in this action.

The provision of this Court's February 4, 2010 order that directed NYMPC to return the money if seized from ARM or Sunrise Transporters, Inc. d/b/a Roll-Rite Towing is hereby recalled. NYMPC may retain these funds pending disposition of this matter on its merits. NYMPC's obligation to return these funds cannot be determined until the court determines who actually signed the agreement on behalf of Roll-Rite Towing, Inc.

The judgment entered on September 23, 2005 shall remain in effect as against defendant Roll-Rite Towing, Inc.

This constitutes the decision and order of this court.

SO ORDERED:



Hon. Fred J. Hirsh
District Court Judge

Dated: May 25, 2010

cc: Kirschenbaum & Kirschenbaum, P.C.
Anne Rosenbach, P.C.