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At a term of the Appellate Term of the Supreme Court
of the State of New York for the 2nd, 11th & 13th Judicial Districts

JUL 29 2010

MICHAEL L. PESCE, P.J.
JOSEPH G. GOLIA
JAIME A. RIOS, JJ.

JUNE 9, 2010 TERM
2009-01578 Q C

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DAVIS ALARMS, INC.,

Appellant,

-against-

Lower Court #
79783-06

CARLOS LANDEZABAD
Doing Business as IRIS CLEANERS,

Respondent.

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The above named appellant having appealed to this court from an **ORDER** of the **CIVIL COURT, CITY OF NEW YORK, QUEENS COUNTY** entered on **JUNE 12, 2009** and the said appeal having been **submitted** by **GENE W. ROSEN, ESQ.** counsel for the appellant and **NO BRIEF SUBMITTED** for the respondent and due deliberation having been had thereon; it is hereby,

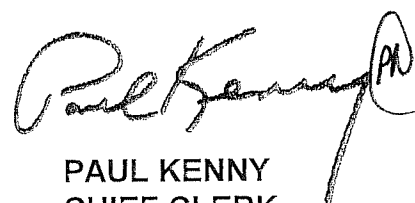
ORDERED AND ADJUDGED that the order is reversed without costs, the order entered May 7, 2009 and the judgment entered February 5, 2007 are reinstated, and the matter is remitted to the Civil Court for a determination by Judge William A. Viscovich of the respondent's motion.

Pesce, P.J., Golia and Rios, JJ., concur.

GENE W. ROSEN, ESQ.
KIRSCHENBAUM & KIRSCHENBAUM, P.C.
200 GARDEN CITY PLAZA, STE 500
GARDEN CITY, N.Y. 11530

ENTER:

CARLOS LANDEZABAD
d/b/a IRIS CLEANERS
88-17 31ST AVENUE
JACKSON HEIGHTS, N.Y. 11369


PAUL KENNY
CHIEF CLERK
APPELLATE TERM

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM : 2nd, 11th and 13th JUDICIAL DISTRICTS

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PRESENT : PESCE, P.J., GOLIA and RIOS, JJ.

-----X

DAVIS ALARMS, INC.,

Appellant,

-against-

JUL 29 2010

NO. 2009-1578 Q C

DECIDED

CARLOS LANDEZABAD
Doing Business as IRIS CLEANERS,

Respondent.

-----X

Appeal from an order of the Civil Court of the City of New York, Queens County (Thomas D. Raffaele, J.), entered June 12, 2009. The order, insofar as appealed from, granted respondent's motion by, inter alia, vacating an order of the same court entered May 7, 2009 (William A. Viscovich, J.), setting aside a judgment entered against respondent on February 5, 2007 and restoring the matter to the calendar.

ORDERED that the order is reversed without costs, the order entered May 7, 2009 and the judgment entered February 5, 2007 are reinstated, and the matter is remitted to the Civil Court for a determination by Judge William A. Viscovich of respondent's motion.

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In 2003, the parties entered into a contract whereby Davis Alarms, Inc. (Davis) agreed to lease an alarm system and to provide alarm monitoring service to respondent Carlos Landezabad doing business as Iris Cleaners (Landezabad). Davis subsequently commenced an arbitration proceeding against Landezabad for breach of contract, and obtained an award in its favor in the sum of \$3,578.39. After Davis commenced this special proceeding to confirm the award, the parties entered into a stipulation which required Landezabad to make three installment payments totalling \$1,000 "in full settlement of any and all claims arising from this action." The stipulation further provided that should Landezabad default in making any of the payments, Davis "shall have judgment for the full amount demanded in the complaint, including legal fees, less credit given for any payments actually received hereunder without further notice." A judgment in the principal sum of \$3,578.39 was entered on February 5, 2007 upon Landezabad's failure to comply with the payment terms of the stipulation (see CPLR 3215 [i] [1]).

After Landezabad moved to vacate the judgment, the parties entered into a second stipulation whereby Landezabad agreed to pay Davis \$1,587.96 in two separate installments of \$793.98. The stipulation provided that should Landezabad default in making either of the scheduled payments, Davis "shall continue to enforce the judgment entered on February 5, 2007 without further notice." Although Landezabad made the

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first installment payment of \$793.98, he failed to make the second installment payment. After Davis sent him a notice of default and he failed to cure, Davis resumed enforcement of the judgment.

Landezabad subsequently moved to, among other things, vacate the judgment, claiming that payment pursuant to the stipulation had been made. In an order entered May 7, 2009, the Civil Court (William A. Viscovich, J.) denied the motion, noting that Landezabad had failed to support his motion with a copy of the stipulation or with any evidence of payment in compliance with the stipulation.

Thereafter, Landezabad moved to vacate the May 7, 2009 order of Judge Viscovich, to modify the stipulation of settlement, and to place the matter on the calendar. Davis requested referral of the motion to Judge Viscovich, since the motion affected his prior order, and also opposed the motion on the merits. By order entered June 12, 2009, the Civil Court (Thomas D. Raffaele, J.) granted Landezabad's motion by, inter alia, vacating the order entered May 7, 2009, setting aside the judgment entered against Landezabad on February 5, 2007, and restoring the matter to the calendar. The instant appeal by Davis ensued.

With certain exceptions not relevant to the case at bar, CPLR 2221 (a) provides, among other things, that a motion to renew a prior motion or to vacate a prior order "shall be made, on notice, to the judge who signed the order, unless he or she is for any

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reason unable to hear it.” CPLR 2221 (c) further provides that “[a] motion made to other than a proper judge under this rule shall be transferred to the proper judge.”

Landezabad’s motion, denominated as one to vacate the May 7, 2009 order of Judge Viscovich, apparently actually sought renewal of his prior motion, which had been denied by Judge Viscovich. In any event, as there is no indication in the record that Judge Viscovich was no longer available to hear the motion, Judge Raffaele improperly entertained Landezabad’s motion and, in effect, overruled a court of coordinate jurisdiction (see *Doscher v Doscher*, 54 AD3d 890 [2008]). Accordingly, the order is reversed, the order entered May 7, 2009 and the judgment entered February 5, 2007 are reinstated, and the matter is remitted to the Civil Court for a determination by Judge Viscovich of Landezabad’s motion.

Pesce, P.J., Golia and Rios, JJ., concur.