

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

-----X  
**MORTON VILLAGE REALTY CO., INC.,**

**Plaintiff,**

**Index No.: 616328/2018**

**-against-**

**NOTICE OF ENTRY**

**PLAINVIEW HARDWARE INC., ATEK  
HARDWARE INC., BRUCE CARLOW,  
FRANCESCA CARLOW, TODD  
KIRSCHNER AND RITSA KIRSCHNER,**

**Defendants.**

-----X

**PLEASE TAKE NOTICE**, that the within is a true copy of the Order of the Hon. James P. McCormack dated January 16, 2020, which was duly entered in the Office of the Clerk of the Supreme Court, Nassau County, on January 22, 2020.

Dated: New York, New York  
January 24, 2020

RIVKIN RADLER LLP  
Attorneys for Plaintiff

By: David Gise  
David M. Grill  
David Gise  
926 RXR Plaza  
Uniondale, New York 11556  
(516) 357-3000

**SUPREME COURT - STATE OF NEW YORK  
TRIAL/TAS TERM, PART 18 NASSAU COUNTY**

**PRESENT:**

**Honorable James P. McCormack**

**Justice**

\_\_\_\_\_x

**MORTON VILLAGE REALTY CO., INC.,**

**Plaintiff(s),**

**Index No.: 616328/18**

**-against-**

**Motion Seq. No.: 003**

**Motion Submitted: 11/22/19**

**PLAINVIEW HARDWARE INC., ATEK  
HARDWARE INC., BRUCE CARLOW,  
FRANCESCA CARLOW, TODD KIRSCHNER  
and RITSA KIRSCHNER,**

**Defendant(s).**

\_\_\_\_\_x

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....X
- Memorandum of Law in Opposition.....X
- Reply Affirmation.....X

Defendant, Atek Hardware, Inc.(Atek), moves this court for leave to reargue the August 15, 2019 order of this court which granted Plaintiff's motion for a default judgment. Plaintiff, Morton Village Realty, Co. opposes the motion.

A motion for leave to renew or reargue is addressed to the sound discretion of the Supreme Court (see *Matter of Swingearn*, 59 AD3d 556 [2d Dept. 2009]). A motion for re-argument must be "based upon matters of fact or law allegedly overlooked or

misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR § 2221[d][2]). It is not designed, however, to provide an unsuccessful party with successive opportunities to re-litigate the issues previously decided (*see Foley v. Roche*, 68 AD2d 558, 567 [1st Dept. 1979]), or to present arguments different from those originally tendered (*see Giovanniello v. Carolina Wholesale Off. Mach. Co., Inc.*, 29 AD3d 737, 738 [2d Dept. 2006]).

Pursuant to CPLR § 2221(d)(3) a motion for reargument "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry". While the motion was timely filed, the Supreme Court has jurisdiction to reconsider its prior order "regardless of statutory time limits concerning motions to reargue" (*Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]; *see Aridas v Caserta*, 41 NY2d 1059 [1977]; *cf. Matter of Huie [Furman]*, 20 NY2d 568 [1967]; *Johnson v Incorporated Vil. of Freeport*, 303 AD2d 640 [2d Dept. 2003]).

Atek asserts that this court incorrectly applied precedent, misunderstood an affidavit, and violated public policy by not allowing it to answer. The court disagrees on all accounts. It is well-settled law that to prevent a default, the defendant must offer both a reasonable excuse and a meritorious defense. It is also settled law that if the excuse is deemed not reasonable, the court need not even consider the excuse. Herein, the court found the excuse not reasonable.

Ritsa Kirschner, the sole member of Atek, submitted an affidavit on the prior

motion stating she tried to e-file an answer but the answer was rejected because, as a corporation, she was required to hire counsel. She claims she was unaware of this fact. The court noted that even if the answer had been accepted, it would have been late. Regardless, she stated that once it was rejected, she became aware that a preliminary conference had been requested, and she decided that she would just wait until that conference and ask someone what to do then. She also stated that she was very busy at work and this prevented her from finding an attorney in a more timely manner. However, once she was served with the default motion, she managed to hire an attorney immediately.

As in the prior order, the court finds this excuse not reasonable. It is clear, based upon the timely filing of her individual answer and the attempted filing of Atek's answer, that she was aware that the filing of an answer was of the utmost importance. Knowing this, she still intentionally and purposely chose to wait until the preliminary conference date, not so she could have an attorney and file the answer then, but to "ask at that time what to do". This contradicts her attorney's claims that the lateness was not "willful".

The court notes that Ms. Kirschner is not your average layperson, but instead is the sole owner of a business that she runs. She was savvy enough to create a business, to purchase the assets, and not the stock, of another business (Co-Defendant Plainview Hardware whose sole member is her husband, Todd Kirschner) and understand the legal implications of that. She was understood how to have her business enter into a lease

“with a new landlord at a separate location”, and the legal implications of that as well. In light of all the foregoing, the court was justified in finding her excuse, that she would simply wait and then ask someone about filing an answer, to be not reasonable.

Finally, the court is aware of the policy that matters should be decided on the merits when possible. However, that policy is to be considered in conjunction with, not in the place of, the clear law requiring a reasonable excuse. Having failed to proffer one, the motion must be denied.

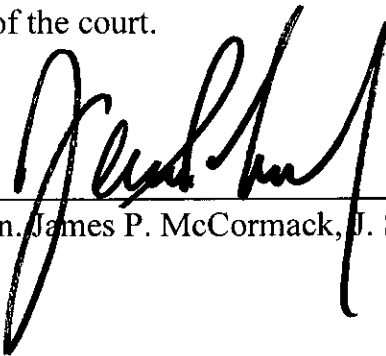
Accordingly, it is hereby

**ORDERED**, that Atek’s motion for leave to reargue this court’s August 15, 2019 order is **DENIED** in its entirety.

The court has considered the remaining arguments of the parties and finds them to be without merit.

This constitutes the decision and order of the court.

Dated: January 16, 2020  
Mineola, N.Y.

  
\_\_\_\_\_  
Hon. James P. McCormack, J. S. C.

**ENTERED**  
JAN 22 2020  
NASSAU COUNTY  
COUNTY CLERK’S OFFICE



# NYSCEF - Nassau County Supreme Court

## Confirmation Notice



The NYSCEF website has received an electronic filing on 01/24/2020 10:19 AM. Please keep this notice as a confirmation of this filing.

**616328/2018**

**Morton Village Realty Co., Inc. v. Plainview Hardware Inc. et al**

**Assigned Judge: Sharon Gianelli**

### Documents Received on 01/24/2020 10:19 AM

<b>Doc #</b>	<b>Document Type</b>
192	NOTICE OF ENTRY, Motion #003

### Filing User

David Ian Gise | david.gise@rivkin.com  
926 Rxr Plz, Uniondale, NY 11556

### E-mail Notifications

An email regarding this filing has been sent to the following on 01/24/2020 10:19 AM:

**Bruce Carlow - ymmy@aol.com**  
**Francesca Carlow - francescacarlow@gmail.com**  
**GAYLE S. GERSON - GGerson@SilvermanAcampora.com**  
**DAVID I. GISE - david.gise@rivkin.com**  
**LEONARD GRETAH - Leonard@gretahlaw.com**  
**DAVID M. GRILL - david.grill@rivkin.com**  
**Ritsa Kirschner - chxnlegs@cs.com**  
**Todd Kirschner - nyyuntif@cs.com**  
**E C. MURRAY - emurray@rmfpc.com**  
**EVAN R. SCHIEBER - evan.schieber@rivkin.com**  
**THOMAS A. TELESCA - ttelesca@rmfpc.com**

---

**Maureen O'Connell, Nassau County Clerk - <http://www.nassaucountyny.gov/agencies/Clerk/index.html>**

Phone: 516-571-2660 Website: <http://www.nassaucountyny.gov/agencies/Clerk/index.html>

---

**NYSCEF Resource Center, [EFile@nycourts.gov](mailto:EFile@nycourts.gov)**

Phone: (646) 386-3033 | Fax: (212) 401-9146 | Website: [www.nycourts.gov/efile](http://www.nycourts.gov/efile)



# NYSCEF - Nassau County Supreme Court Confirmation Notice



616328/2018

**Morton Village Realty Co., Inc. v. Plainview Hardware Inc. et al**  
**Assigned Judge: Sharon Gianelli**

## Email Notifications NOT Sent

<b>Role</b>	<b>Party</b>	<b>Attorney</b>
Respondent	Plainview Hardware Inc.	No consent on record.

\* Court rules require hard copy service upon non-participating parties and attorneys who have opted-out or declined consent.

**NOTE: If submitting a working copy of this filing to the court, you must include as a notification page firmly affixed thereto a copy of this Confirmation Notice.**

---

**Maureen O'Connell, Nassau County Clerk - <http://www.nassaucountyny.gov/agencies/Clerk/index.html>**

Phone: 516-571-2660 Website: <http://www.nassaucountyny.gov/agencies/Clerk/index.html>

---

**NYSCEF Resource Center, [EFile@nycourts.gov](mailto:EFile@nycourts.gov)**

Phone: (646) 386-3033 | Fax: (212) 401-9146 | Website: [www.nycourts.gov/eFile](http://www.nycourts.gov/eFile)