

SUPREME COURT OF THE STATE OF NEW YORK

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CENTRAL CLERKS OFFICE

COUNTY OF NEW YORK: PART 32

SEP 14 1993

SUPREME COURT
CRIMINAL TERM
NEW YORK COUNTY

-----X
THE PEOPLE OF THE STATE OF NEW YORK,
PLAINTIFFS,

-AGAINST-

DOMINIC M, FRANZA,
DEFENDANT.
-----X

NOTICE OF MOTION

AFFIDAVIT

FOR

SUMMARY JUDGMENT

ON

C.P.L. §440.10 FILED ON 7/20/93

SUMMARY JUDGMENT FILED ON 8/23/93

INDICTMENT #11987/91

NOTICE OF MOTION PAGES 1-2

AFFIDAVIT PAGES 1-6

EXHIBIT #1, 2, 3

Dominic M. Franza

DOMINIC M, FRANZA

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK; PART 32

-----X
The People of the State of New York, : NOTICE OF MOTION
Plaintiffs, : SUMMARY JUDGMENT
-against- : ON DEFENDANTS C.P.L.
Dominic M. Franza, : \$440.10 MOTION AND
Defendant. : SUMMARY JUDGMENT

-----X INDICTMENT #11987/91

PLEASE TAKE NOTICE that upon the annexed affidavit of Dominic M. Franza, duly being sworn to the 9th day of September, 1993, and upon the Defendants C.P.L. \$440.10 Motion filed on 7/20/93 and Summary Judgment filed on 8/23/93, Defendant will move this court at Criminal Term, Part 32 thereof, at the Courthouse located at 111 Centre st, New York, on the 27th day of September, 1993 at 12:00 A.M., for Summary Judgment on Defendants C.P.L. \$440.10 filed on 7/20/93 and Summary Judgment filed on 8/23/93, for an Order Vacating the Judgment entered against the above-named Defendant on the 8th day of April, 1992, whether such Judgment should be Vacated on the Following Grounds:

A) Peoples further Failure to serve Opposition Motion upon Defendant and Court on September 1st, 1993, as well Failure to answer Defendants Summary Judgment filed on 8/23/93, D.A. office violating the requirements of C.P.L. \$440.30 and C.P.L.R. §2214. THE D.A.'S OFFICE HAS DEFAULTED.

B) Peoples Failure to Dispute Defendants sworn

allegations of Fact with Documentary Proof. Peoples Failure
to Dispute Defendants Summary Judgment.

Defendant further request the grounds raised for relief
in Defendants C.P.L. §440.10 Motion Filed on 7/20/93 be
GRANTED IN IT'S ENTIRETY, Together with such other and
further relief as the Court may deem just and proper.

Dated: SEPTEMBER. 9th

1993

Dominic M. Franza

Dominic M, Franza

92A3659

P.O. BOX 500

Elmira, N.Y.

14902-0500

PRO SE.

TO: Hon Robert Morgenthau, Esq.
District Attorney of
New York County

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK; PART 32

-----X
The People of the State of New York, : AFFIDAVIT IN SUPPORT
Plaintiffs, : OF SUMMARY JUDGMENT
-against- : ON DEFENDANTS C.P.L.
Dominic M , Franza, : §440.10 AND SUMMARY
Defendant. : JUDGMENT.

-----X INDICTMENT #11987/91

State of New York)
County of Chemung) ss.:

Dominic M Franza, being duly sworn, deposes and says:
1) I am the Defendant in the above-entitled proceeding.

I make this Affidavit in support of Summary Judgment, to
Vacate the Judgment of Conviction herein, upon the Grounds:

A) Peoples further Failure to serve Opposition Motion
upon Defendant and Court on September 1st, 1993, as well
Failure to answer Defendants Summary Judgment filed on
8/23/93, D.A. office violating the requirements of C.P.L.
§440.30 and C.P.L.R. §2214. THE D.A."S OFFICE HAS DEFAULTED.

B) Peoples Failure to Dispute Defendants sworn
allegations of Fact with Documentary Proof. Peoples Failure
to Dispute Defendants Summary Judgment.

2) Defendants C.P.L. §440.10 was filed, Personally
served upon this Court (EX #1) and D.A"S office (EX #2)

on 7/20/93. The return date was 8/2/93.

Defendant has given the D.A.'S Office 13 days notice, the D.A.'S office was to respond to Defendants Motion on 7/27/93 seven days before 8/2/93 as required by law, the D.A.'S office has not satisfied this requirement (C.P.L.R. §C2214:8).

As of 7/27/93 there has been no opposition from the D.A.'S office to Defendants Motion. The D.A.'S office regardless of when or whether a Motion term is available must file an opposition with the Court (C.P.L.R. §C2214:11).

The Defendant has given the D.A.'s office adequate notice to motion. Should the D.A.'S office feel that they could not oppose on 7/27/93 the D.A.'S office should of informed Defendant with a PROMPT LETTER in any event advising of the Defect and stating the Motion will be answered, but not by the 7th day preceding the return date (C.P.L.R. §C2214:12).

Defendant has not received any such Notice the D.A.'S office knows the Defendants Whereabouts, The D.A.'S office has been given an extension of time by this Court till 9/1/93 to Respond, Defendant was never informed of this by this Court or the D.A.'S office.

The non-receipt of the opposition is not the Fault of the Defendant or due to the Mail or Overnight service or improper Notice. The D.A.'S conduct is DELIBERATE RATHER THAN INADVERTENT (C.P.L.R. §C2214:14).

On 8/23/93, Defendant has moved for Summary Judgment

(EX #3), the Defendant has Personally served this Court and D.A.'S office on 8/23/93 with a return date of 9/1/93, on 9/1/93 the D.A.'S office has not opposed Defendants Motion as well Summary Judgment, the total time that has passed is 44 days since the filing of Defendants C.P.L. §440.10 Motion.

The Conduct of the D.A.'S office shows a DELIBERATE RATHER THAN INADVERTENT AVOIDANCE in filing an Opposition to Defendants C.P.L. §440.10 Motion and Summary Judgment. THE D.A.'S OFFICE HAS DEFAULTED.

The proscribed procedure for this Motion is C.P.L. §440.30. The D.A.'S office has not filed with the Court and served the Defendant as well any Opposition papers, which the D.A.'S office may do or not, the D.A.'S office chose not to (C.P.L §440.30, Sub [1]).

Do to the Inaction by the D.A.'S office the Facts are conceded requiring GRANTING of Defendants Motion, the Grounds in C.P.L. §440.10, Sub (2) do not apply to Defendants Motion, Defendant has met the Enumerated Grounds listed in C.P.L. §440.10, Sub (1) and the Facts with Documentary Proof are VOID of the Trial Record (C.P.L. §440.30, Sub [2]).

This Court should consider the Merits of Defendants Motion and Grant Defendants Motion and Vacate the Conviction due to the Fact:

A) C.P.L. §440.30, Sub 3 [a], Defendant alleged Ground's constituting Legal Basis for the Motion.

B) C.P.L. §440.30, Sub 3 [b], the Ground's are based upon the existence of Fact's and is supported by sworn allegations.

C) C.P.L. §440.30, Sub 3 [c], The sworn allegations of Fact essential to support the Motion are Conceded by the People through Inaction, making Defendants Motion Conclusively Substantiated by Unquestionable Documentary Proof.

Defendant has met the Statutory Requirements in it's Entirety.

Defendants allegations of Fact essential to support the Motion is NOT:

A) Refuted or Conclusively Refuted by Unquestionable Documentary Proof.

B) Contradicted by the Court Record or other official record.

C) Defendants Motion IS supported by Documentary Evidence.

D) Defendants Documentary Evidence show's Defendants allegations are True, Documentary Evidence came directly from the D.A.'S office.

The requirements of C.P.L. 440.30, Sub 1 requires Moving Papers on behalf of the Defendant and D.A's office, and does not call for an Oral Motion on the Matter or argument, Defendant in filing C.P.L. §440.10 Motion as well Summary Judgment filed on 8/23/93 never requested Oral Argument (New York Rules of Court, Uniform Rules for

the N.Y.S. Trial Courts §202.8 Sub D). Through Inaction the D.A. has Defaulted, the Statute clearly shows the Legislative requirements of filing papers, the Rule and Standing Practice is Dictated by C.P.L. §440.30 this Statute does not call for ORAL Argument, due to the Fact Defendants C.P.L. §440.10 is to be decided on the Moving Papers this Court should be amenable to that (C.P.L.R. C2214:19).

The Adjournment from 9/1/93 to 9/27/93 has not been stipulated by the Defendant, the D.A.'S office has not submitted in writing for an adjournment to this Court as required by Law (New York Rules of Court, Uniform Rules for N.Y.S. Trial Courts §202.8 Sub E [1]).

The Defendant has not agreed to an adjournment nor has the Defendant been advised of any adjournment in writing by the D.A.'S office before the return date, this is in violation of the Law (New York Rules of Court, Uniform Rules for the N.Y.S. Trial Courts §202.8, Sub E [2]).

The adjournment from 9/1/93 to 9/27/93 has not been stipulated by the Defendant (C2214:19) and is inconsequential to the requirements set forth in C.P.L. §440.30 and C.P.L.R. §2214, the D.A.'S office had more than enough ample time to file an Opposition Motion as well an Opposition to Defendants Summary Judgment, as well notify the Defendant of any adjournments or in not filing an Opposition within the prescribed time for filing.

As of 9/9/93 there has been no Opposition yet. This Court should not condone such an abuse of the Law. This

Court should IMMEDIATELY GRANT DEFENDANTS MOTION.

Defendants prior Summary Judgment (EX #3) is to be read in conjunction with this Motion.

The Grounds for relief raised upon this Motion has not previously been determined on the Merits upon a prior Motion or Proceeding in a Court of this State, or upon an appeal from judgment, or upon a prior Motion or prior proceeding in a Federal Court.

WHEREFORE, The Defendant asks this Honorable Court to GRANT Defendants Summary Judgment on the Grounds:

A) Peoples further Failure to serve Opposition Motion upon Defendant and Court on September 1st, 1993, as well Failure to answer Defendants Summary Judgment filed on 8/23/93, D.A. office violating the requirements of C.P.L. §440.30 and C.P.L.R. §2214. THE D.A.'S OFFICE HAS DEFAULTED.

B) Peoples Failure to Dispute Defendants sworn allegations of Fact with Documentary Proof. Peoples Failure to Dispute Defendants Summary Judgment.

Defendant further request the grounds raised for relief in Defendants C.P.L. §440.10 Motion filed on 7/20/93 be Granted in it's Entirety, and that this Court grant such and other and further relief as it may deem just and proper.

Sworn to before me this

9th day of September, 1993



Dominic M. Franza



NOTARY PUBLIC

JAMES P. THOMPSON
Notary Public, State of New York
No. 495-757, Westchester County
Commission Expires Aug. 14, 1995