Curran v 201 W. 87th St., L.P.
2016 NY Slip Op 32094(U)
August 1, 2016
Supreme Court, Queens County
Docket Number: 20305/12
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA Part 6**
Justice

EMMETT CURRAN and DIANE CURRAN,
Plaintiffs,

-against-

201 WEST 87TH STREET, L.P., DELI & GROUP CORP. I and JAZZ HOSTELS, INC.,
Defendants.

Index Number 20305/12

Motion Date April 11, 2016

Motion Seq. No. 6

Motion Cal. No. 47

The following papers numbered 1 to 20 read on this (1) motion by Deli & Group Corp. I (D&G), to renew and or reargue and or vacate the prior orders of the court dated September 26, 2014, and September 8, 2015, which directed D&G to assume the defense of 201 West 87th Street, L.P. (201 West 87th Street), and, respectively, once again directed D&G to assume the defense of 201 West 87th Street and awarding sanctions and costs for its initial failure to do so; (2) cross motion by 201 West 87th Street for costs and sanctions against D&G for engaging in frivolous conduct and for willfully disobeying the prior orders of the Court directing D&G to assume the defense of 201 West 87th Street, L.P.; and (3) cross motion by plaintiffs to restore the action to the trial calendar.

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Answering Affidavits - Exhibits.....	15-16
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Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

Plaintiffs in this negligence action seek damages for personal injuries sustained by Emmet Curran while visiting the commercial premises owned by 201 West 87th Street, L.P., and leased to D&G. Specifically, it is alleged that Emmet Curran was lawfully on the deli/grocery establishment when he fell through a trap door in the floor of the same, causing him injury. Plaintiff Diane Curran sues derivatively.

As relevant herein, 201 West 87th Street, L.P., previously sought summary judgment in its favor on its claim for a defense from D&G, pursuant to the terms of a lease agreement between the parties. The court, in orders dated September 26, 2014, and September 8, 2015, directed D&G to assume the defense of 201 West 87th Street, L.P. (201 West 87th Street), and, respectively, once again directed D&G to assume the defense of 201 West 87th Street and awarded sanctions and costs for its initial failure to do so. D&G moves to reargue/renew the court's prior orders. 201 West 87th Street opposes the motion and cross-moves for sanctions against D&G for its failure to comply with the court orders. Plaintiffs also oppose the motion by D&G and cross-move to restore the case to the trial calendar.

Motion to Reargue/Renew

The branch of the motion by D&G which is to reargue/renew the court's prior orders directing D&G to assume the defense of 201 West 87th Street, and imposing costs and sanctions is denied as untimely, and otherwise on the merits.

Relative to the timeliness of a motion to reargue, CPLR 2221(d)(3) provides that a motion to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." By order dated September 26, 2014, and served with Notice of Entry on October 1, 2014, this court granted partial summary judgment in favor of 201 West 87th Street, solely on the issue of D&G's obligation to assume its defense. In its decision, the court expressly acknowledged that it was Kassim Salim Bubaker and Ahmed Saleh Zokari who entered into the lease agreement on behalf of the tenant deli. 201 West 87th Street plainly set forth such facts and, contrary to D&G's assertion, submitted the correct store lease and rider in its affirmation in support, showing that these two individuals executed the store lease on behalf of Nashwan Grocery & Deli, along with the Verified Answer from D&G (i/s/h/a Nashwan Grocery Story), indicating that these two entities were in fact one and the same. The motion to reargue in this matter was made by D&G on December 7, 2015, well over a year late. Clearly, the thirty day time limit imposed by CPLR 2221(d)(3) has long since passed.

Although D & G's motion is denominated as one for leave to reargue and renew,

that branch of D&G's motion which is characterized as being for leave to renew is not based upon new facts which were unavailable at the time of the original motion. Such a motion is actually a motion for leave to reargue (*see* CPLR 2221; *Sabetfard v Smith*, 306 AD2d 265, 266 [2003]; *Marine Midland Bank v Freedom Rd. Realty Assocs.,* 203 AD2d 538, 611 NYS2d 34; *Mgrditchian v Donato,* 141 AD2d 513, 529 NYS2d 134).

Furthermore, a motion for leave to reargue is not designed to allow a litigant to propound the same arguments the court has already considered, but to point out controlling principles of law or fact that the court may have overlooked (*see McGill v Goldman,* 261 AD2d 593, 594, 691 NYS2d 75). Even if the new affidavits supporting the old argument somehow transmuted D&G's motion into one for renewal, it still would be properly denied for their failure to give a reasonable explanation for omitting this so-called new matter on the original motion (*see* CPLR 2221[e][3]; *Simon v Mehryari*, 16 AD3d 664, 665, 792 NYS2d 543, 545 [2005]; *Kingston v Brookdale Hosp. and Med. Ctr.,* 4 AD3d 397, 398, 771 NYS2d 385; *Sherman v Piccione,* 304 AD2d 552, 757 NYS2d 112; *Malik v Campbell,* 289 AD2d 540, 735 NYS2d 793).

The branch of the motion which is to vacate the court's order directing D&G to assume the defense of 201 West 87th Street, is also denied. On a motion to vacate a default pursuant to CPLR 5015(a)(1), a movant must demonstrate a reasonable excuse for the default and a meritorious cause of action or defense (*see* CPLR 5015[a]; *Alliance Prop. Mgt. & Dev. v Andrews Ave. Equities,* 70 NY2d 831, 523 NYS2d 441, 517 NE2d 1327; *Eugene Di Lorenzo, Inc. v Dutton Lbr. Co.,* 67 NY2d 138, 501 NYS2d 8, 492 NE2d 116; *Mary Immaculate Hosp. v New York Cent. Mut. Fire Ins. Co.*, 296 AD2d 385, 386, 744 NYS2d 893, (Mem)–894 (2002). Here, D&G failed to comply with either of these requirements. The excuse proffered by the D&G of unspecified law office failure does not constitute a reasonable excuse (*see Miraglia v County of Nassau,* 295 AD2d 411 [2002]; *Goldstein v Lopresti,* 284 AD2d 497 [2001]; *Bravo v New York City Hous. Auth.*, 253 AD2d 510 [1998]; *Sarles v Village of Tarrytown,* 245 AD2d 440 [1997]). Further, D&G failed to show the existence of a potentially meritorious cause of action (*see Leibowitz v Glickman*, 50 AD3d 643, 644 [2008]). D&G failed to submit any proof or testimony from any witnesses with knowledge of the facts underlying this matter to substantiate its newly asserted argument that D&G was not bound by the relevant lease and rider requiring it to assume the defense. Specifically, D&G did not submit any evidence to refute the fact that the two individuals who executed the lease and rider, Kassim Salim Bubaker and Ahmed Saled Zokari, did so on behalf of the tenant, Deli & Group i/s/h/a Nashwan Grocery Store. In fact, the statements made by D&G's new counsel in the instant motion contradict its prior attorneys' affirmative representations that the lease and rider disclosed by the parties during discovery was indeed the relevant lease that was in effect between the defendants. In the absence of an affidavit or

admissible documentary proof establishing merit to its argument that D&G was not a party to that lease, the branch of the motion which is to vacate the court's orders directing that D&G assume the defense of 201 W 87th Street, is denied.

Cross Motion by 201 West 87th Street

The cross motion by 201 West 87th Street for sanctions and costs against D&G is granted.

22 NYCRR § 130–1.1(a) authorizes the award of costs and the imposition of sanctions for "frivolous conduct," which, under paragraph (c) is defined as, inter alia, conduct "completely without merit in * * * fact * * *." Costs are awarded in reimbursement of actual expenses reasonably incurred and reasonable attorneys' fees resulting from the frivolous conduct (22 NYCRR 130–1.1[a]; *William P. Pahl Equip. Corp. v Kassis,* 182 AD2d 22, 32, 588 NYS2d 8, *app. den. in part, app. dismissed in part* 80 N.Y.2d 1005, 592 NYS2d 665, 607 NE2d 812.) Sanctions are payable to either the Clients' Security Fund (sanctions imposed on an attorney) or to the clerk of the court for transmittal to the State Commissioner for Taxation and Finance (sanctions imposed on a party who is not an attorney) (22 NYCRR 130–1.3; *Sanders v Copley*, 194 AD2d 85, 87–88, 605 NYS2d 281, 283 (1993). Conduct is frivolous and can be sanctioned under 22 NYCRR 130–1.1 "if it is completely without merit ... and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; *or* ... it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (*Tyree Bros. Envtl. Servs. v. Ferguson Propeller,* 247 AD2d 376, 377, 669 NYS2d 221 [emphasis in original]). Here, D&G previously conceded that it was tenant of the ground floor commercial deli space at the time of the subject accident and never (until now) disputed that it was bound by the lease and rider exchanged by defendants during discovery. The newly raised contention by D&G that it was never a party to the subject lease and rider is not only without merit but is also false and clearly contradicts the affirmative representations made by D&G's former attorneys. In response to plaintiff's demand for "any and all leases and /or subleases in effect on the date of the accident as between or involving any of the defendants regarding the location where the accident is alleged to have occurred" and in response to 201 West 87th Street's demand for information pertaining to the insurance policy maintained by D&G, relevant to the premises and pursuant to the lease between these defendants, prior counsel for D&G e/s/h/a Nashwan Grocery Store formally disclosed the exact same rider, executed by "Kassim Salim Bubaker and Ahmed Saleh Zokari" on August 29, 2008, which 201 West 87th Street later produced and submitted in support of its motion for summary judgment. D&G e/s/h/a Nashwan Grocery Store thereby affirmatively represented to the parties that this was the lease and rider in effect on the date of the accident as between the defendants

in this action.

Moreover, by remaining silent in this regard and in failing to refute such facts in opposition to the initial summary judgment motion, D&G tacitly admitted that it was the tenant of the ground floor deli space of the premises and that it was bound by the terms of the lease and rider exchanged among the parties during discovery. Thus, the record supports 201 W. 87th Street's contention that D&G's motion to reargue/renew is completely without merit in law or fact, and was made primarily to delay compliance with the court's prior Orders (*see Tyree Bros. Envtl. Servs. v Ferguson Propeller*, 247 AD2d 376, 377 [1998] [internal quotation marks omitted]).

A hearing on the subject of the amount of sanctions and costs shall be had on Tuesday, October 4, 2016, 2:15 P.M., IAS Part 6, courtroom 24, 88-11 Sutphin Blvd., Jamaica, New York. Counsel are directed to contact the clerk of Part 6 at (718) 298-1113 on Monday, October 3, 2016 to ascertain the availability of the court.

Cross Motion to Restore the Case to the Trial Calendar

Plaintiffs filed the Note of Issue in this action on December 6, 2013. As a result of his injuries, the injured plaintiff, Emmett Curran, was compelled to undergo further additional surgeries and, therefore, on January 20, 2015, at a pre-trial conference, the case was marked off the calendar temporarily on consent of all parties. It is noted that the matter was not marked off calendar as a result of any default and was not deemed dismissed or abandoned. On July 6, 2015, plaintiffs served a Notice of Medical Exchange and provided copies of operative reports. A conference was held before this court on October 23, 2015, wherein the parties agreed that a deposition of the plaintiff would be held on or before December 9, 2015, and further medical examination within sixty (60) days. Plaintiff was deposed and agreed on December 9, 2015, but there has been no additional communication from defendant's office regarding further medical examination of the plaintiff.

On October 1, 2015, plaintiffs moved to have the case placed back on the trial calendar. The defendants requested additional discovery and a stipulated order was signed allowing for discovery. A deposition was held and defendants waived a further IME pursuant to the order. Notably, the order allows the case to be placed back on the trial calendar without motion practice.

It is undisputed that the action was marked off the trial calendar on January 20, 2015. By electing to mark the case off the trial calendar pursuant to CPLR 3404, the trial court set the course for restoration (*see Basetti v Nour,* 287 AD2d 126, 135, 731 NYS2d

35). Since the plaintiff moved to restore the action to the trial calendar within one year after the date it was marked off, restoration was automatic (*see Ross v Brookdale Univ. Hosp. & Med. Ctr.,* 54 AD3d 370, 371, 863 NYS2d 236; *Kohn v Citigroup, Inc.,* 29 AD3d 530, 532, 814 NYS2d 702; *Hirsch v Monroe Bus Corp.,* 24 AD3d 609, 808 NYS2d 342). There was no obligation to demonstrate a reasonable excuse, meritorious action, lack of intent to abandon, and lack of prejudice to the defendants, or some lesser burden (*see Basetti v Nour*, 287 AD2d 126, 134–35, 731 NYS2d 35, 41–42 [2001]). Accordingly, the plaintiffs' cross motion to restore the action to the trial calendar is granted (*see Chambers v City of New York*, 111 AD3d 593, 974 NYS2d 119, 120 [2013]).

Conclusion

The motion by D&G to reargue/renew the court's prior orders directing D&G to defend 207 W. 87th Street, is denied.

The cross motion by 201 West 87th Street for costs and sanctions against D&G, is granted.

Plaintiffs' cross motion to restore the action to the trial calendar is granted.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: August 1, 2016

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Howard G. Lane, J.S.C.