

Scher v Paramount Pictures Corp.

2012 NY Slip Op 33784(U)

February 27, 2012

Supreme Court, New York County

Docket Number: 116541/06

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTE
Justice

PART 7

MARLENE SCHER,
Plaintiff,

- against -

PARAMOUNT PICTURES CORP. and
VIACOM, INC.,
Defendants.

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INDEX NO. 116541/06

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion by defendants to reargue pursuant to CPLR 2221.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits (Memo)

Replying Affidavits (Reply Memo)

PAPERS NUMBERED

1,2

3

4

FILED

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Cross-Motion: Yes No

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This is a motion by defendants Paramount Pictures Corp. and Viacom, Inc. (defendants) filed on November 22, 2011, for an order, pursuant to CPLR 2221, granting reargument of this Court's decision and order dated September 30, 2011 and entered on October 24, 2011 (Prior Decision) and vacating plaintiff's Note of Issue and Certificate of Readiness for trial filed on November 1, 2011. In its Prior Decision, this Court granted the motion by plaintiff Marlene Scher (plaintiff) to strike the defendants' answer for defendants' failure to comply with discovery requests and previous orders of this Court and denied defendants' cross-motion to compel discovery. Upon reargument, defendants seek that this Court to reverse its Prior Decision, deny plaintiff's motion to strike, and grant defendants' motion to compel discovery from the plaintiff. Defendants also seek an order vacating plaintiff's Note of Issue and Certificate of Readiness and striking this matter from the trial calendar. Plaintiff is in opposition to defendants' motion.

In support of their motion to reargue defendants set forth mostly the same arguments offered in opposition to the plaintiff's' motion to strike, but they submit an incomplete record of

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all the papers in the original motion (Defendant's affirmation in support, ¶ 2 p.2.). Defendants proffer, *inter alia*, that the Court misapprehended both the law and the facts relevant to the Prior Decision. Specifically, defendants maintain that the Court failed to consider affidavits of Paramount employees, dated August 17 and 19, 2010, in which they claimed that they made a search for various records at an unspecified time.

In opposition, plaintiff maintains that this Court should not grant defendants' motion to reargue because the Court in reaching its Prior Decision did not misapprehend or overlook matters of law or fact. Specifically, plaintiff asserts that defendants' reliance on the two affidavits as the basis for this motion is "troubling" and "baseless" because deposition testimony which took place subsequent to the submission of the two affidavits clearly evidenced that the information contained in such affidavits were false. Plaintiff states that the purpose of the affidavits, which were submitted after defendants' failure to comply with four consecutive orders of this Court directing defendants to respond to outstanding discovery, was to escape the consequence of their willful and contumacious conduct, and that the Court, having been apprised of the falsity of the affidavits properly struck the defendants' answers.

STANDARD

CPLR 2221(d) provides, in relevant part, that a motion to reargue must be identified as such and "shall 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." A motion for reargument "addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; see CPLR 2221[d] [2]). A reargument motion is based solely on the papers submitted in connection with the prior motion. It is not a means by which an unsuccessful party can obtain a second opportunity to argue one or more issues

previously decided, nor is it an opportunity to submit new or additional facts not previously submitted as part of the motion (see *McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; 15 E. 63 St. Co. v Cook, 120 AD2d 442, 443 [1st Dept 1986]; *Foley v Roche*, 68 AD2d 558, 567 - 568 [1st Dept 1979]).

DISCUSSION

Upon the foregoing papers, defendants have demonstrated that the Court, in its Prior Decision, overlooked or misapprehended matters of fact in its determination of the plaintiff's prior motion to strike pursuant to CPLR 3126 (see CPLR 2221[d][2]). Thus, the Court grants defendants' motion to reargue this Court's Prior Decision on plaintiff's motion to strike.¹

Upon reargument, and after a review of the record, the Court adheres to its original determination. The defendants have failed to comply with orders of this Court dated January 16, 2009, October 1, 2009, July 13, 2010, February 11, 2010, and May 12, 2011, which directed the defendants to either provide the plaintiff with requested documentation and/or submit a satisfactory affidavit stating that no such documentation exists. Defendants were put on notice at a compliance conference held on July 13, 2010 that should they fail to comply, the plaintiff would move to strike, the relief she sought and was granted. The defendants have not submitted sufficient documentation or an affidavit which provides a satisfactory explanation as to the delay in providing such materials. The affidavits submitted by the defendants in opposition to plaintiff's motion which state that a search for requested documents was conducted are contradicted by deposition testimony given by both affiants and taken after the submission of the affidavits. The affidavits are accordingly rendered false and void, and do not satisfy defendants' burden to provide discovery. Defendants' willful failure to produce the

¹The Court notes that in the notice of motion the defendants do not request reargument of their cross-motion to compel discovery from the plaintiff (Defendant's Notice of Motion ¶¶ 1-3), but briefly refer to it in ¶ 15 of the supporting affirmation. However, the defendants do not meet the standard for reargument as they have not demonstrated that the Court overlooked or misapprehended any matters of fact or law which would have changed the determination of defendants' motion to compel (see CPLR 2221 [d][2]).

requested discovery or a satisfactory affidavit indicating a search was conducted for the requested discovery and that no such discovery exists is in contravention of this Court's previous orders, including the July 13, 2010 conditional order. As such, the defendants will not be afforded any more opportunities to provide the requested discovery, and their answers are stricken (see CPLR 3126). Further, the Court will not vacate the Note of Issue and Certificate of Readiness and the matter shall proceed to a trial on damages.

CONCLUSION

Accordingly, it is,

ORDERED that the motion by defendants Paramount Pictures Corp. and Viacom Inc. to reargue an order of this Court dated September 30, 2011 and entered on October 24, 2011 is granted; it is further,

ORDERED that upon reargument, plaintiff's motion to strike the defendants' answer is granted; it is further,

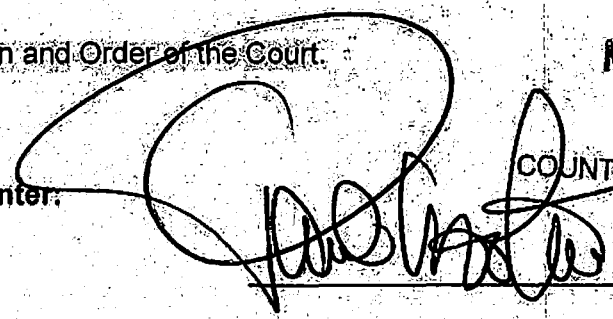
ORDERED that defendants cross-motion to compel discovery is denied; and it is further,

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon the defendants.

This constitutes the Decision and Order of the Court.

Dated: 2-27-12

Enter:



PAUL WOOTEN J.S.C.

FILED

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Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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