Ameritel Mgt. Inc. v Tanvir
2013 NY Slip Op 34210(U)
August 16, 2013
Supreme Court, Kings County
Docket Number: 500330/12
Judge: David I. Schmidt
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART COM 2

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Ameritel Management Inc.,

Plaintiff,

Index No. 500330/12
DECISION and ORDER

-against-

Shahid Tanvir,

Defendant.

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SCHMIDT, DAVID, J.:

Defendant Shahid Tanvir moves, *pro se*, "for an order of Reconsideration" of the court's July 12, 2013 decision and order, denying defendant leave to file a late jury demand.

For the reasons that follow, the motion is denied.

I. Relevant Procedural History

Plaintiff commenced this action by filing a summons and complaint on February 21, 2012. The complaint alleges a single cause of action for breach of contract. On March 15, 2012, defendant served an answer, interposing four counterclaims. On March 22, 2012, plaintiff served and filed a note of issue, requesting a trial without a jury. Pursuant to CPLR 4102 (a), the deadline for defendant to file a jury demand was April 11, 2012. However, defendant did not file such demand. Between March 28, 2012 and April 22, 2013, defendant made numerous motions, including to change venue, to vacate the note of issue, for dismissal and for summary judgment. These motions were all denied.

On May 21, 2013, more than a year after the filing of the note of issue, defendant served a "motion for Jury Trial Demand." By decision and order dated July 12, 2013 (the July 12th Order), the court denied the motion. *See* affidavit of Shahid Tanvir, sworn to July 23, 2013

(Tanvir aff.), Ex. A (July 12th Order). In particular, the court stated that it would not grant defendant an extension of time, noting that:

> ". . . defendant's papers do not adequately explain why he waited thirteen months to file a demand for a jury trial. Moreover, there is nothing in defendant's submissions that indicates that his waiver of his right to a jury trial was the result of inadvertence or other excusable conduct – an omission that is fatal to defendant's late demand for a jury trial."

Id., at 2 (citing *Skelly v Sachem Cent. School Dist.*, 309 AD2d 917 [2d Dept 2003] as to movant's burden on a motion, pursuant to CPLR 4102 (e), for an extension of time to file a demand for a jury trial).

On this motion, defendant requests that the court "reconsider" the July 12th Order, "denying defendant's jury demand." Tanvir aff., ¶ 2.

II. Discussion

Defendant's substantive arguments in support of reconsideration are propounded in an affidavit annexed to his notice of motion. However, as a preliminary matter, the court will address the technical deficiencies in the motion papers raised by plaintiff. Specifically, plaintiff argues that nowhere does the CPLR provide for a motion for "reconsideration." Moreover, plaintiff argues that it is unclear from defendant's papers whether defendant is seeking leave to renew or leave to reargue – the relief available to defendant under CPLR 2221.

A "notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor. Relief in the alternative or of several different types may be demanded." CPLR 2214(a).

Despite this directive, the court may disregard certain irregularities, defects, mistakes,

and omissions, if a substantial right of a party is not prejudiced. CPLR 2001. Here, the court will disregard defendant's failure to properly denominate his motion as one for leave to renew and/or to reargue, in view of the lack of prejudice to plaintiff, who was sufficiently apprised by defendant's affidavit as to the basis of the motion and was able to oppose it on the merits. *See Fletcher v Greiner*, 73 AD2d 591, 591 (2d Dept 1979). Accordingly, the court will treat the motion as one for: leave to renew and/or to reargue, and upon renewal and/or reargument, to vacate the court's July 12th Order, and for an order granting defendant leave to file a jury demand.

A. Leave to Reargue

A motion to reargue affords a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law (CPLR 2221 [d] [2]), and is a "procedural avenue . . . available which allow[s] an . . . attorney to correct an . . . error without resort to an unnecessary appeal." *Kent v Kent*, 29 AD3d 123, 130 (1st Dept 2006). However, a motion to reargue is not meant to afford an unsuccessful party an opportunity to reargue the same questions previously decided. *See Gellert & Rodner v Gem Community Mgt., Inc.*, 20 AD3d 388, 388 (2d Dept 2005). Nor is it designed to provide an opportunity for a party to advance arguments different from those originally tendered (*see Amato v Lord & Taylor, Inc.*, 10 AD3d 374, 375 [2d Dept 2004]), argue a new theory of law, or raise new questions not previously advanced. *Frisenda v X Large Enterprises, Inc.*, 280 AD2d 514, 515 (2d Dept 2001). Instead, a movant must demonstrate the matters of fact or law that it believes the court has misapprehended or overlooked. *See Hoffmann v Debello-Teheny*, 27 AD3d 743, 743 (2d Dept 2006).

To the extent that defendant's motion herein is one for leave to reargue, a review of the supporting papers reveal that defendant has largely repeated the same arguments the court already considered and rejected in reaching its prior determination. Indeed, the arguments contained in defendant's affidavit in support of the instant motion correspond so closely with those offered in his affidavit in further support of the prior motion (*see* Tanvir aff., Ex. B [Tanvir 6/6/13 affidavit]) as to be practically indistinguishable.[1] Moreover, in the July 12th Order, the court stressed that it had reviewed all of the arguments contained in defendant's papers, finding them critically lacking with respect to defendant's burden of showing excusable conduct. *See* July 12th Order at 2-3. As such, plaintiff's motion for leave to reargue must be denied. *Simon v Mehryari*, 16 AD3d 664, 665 (2d Dept 2005) ("motion for leave to reargue is not designed to allow a litigant to propound the same arguments the court has already considered"), citing *McGill v Goldman*, 261 AD2d 593, 594 (2d Dept 1999) (motion for reargument "is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided").

B. Leave to Renew

"[A] motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination, and must set forth a reasonable justification for the failure to present such facts on the prior motion." *Worrell v Parkway Estates, LLC*, 43 AD3d 436, 437 (2d Dept 2007). Nevertheless, a motion "to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation."

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[1] To illustrate, Tanvir aff., ¶ 8 coincides with Ex. B, ¶¶ 4-5; Tanvir aff., ¶ 9 coincides with Ex. B, ¶¶ 9, 11-15; Tanvir aff., ¶¶ 17-18 coincides with Ex. B, ¶ 16.

Renna v Gullo, 19 AD3d 472, 473 (2d Dept 2005), quoting *Rubinstein v Goldman*, 225 AD2d 328, 329 (2d Dept 1996).

Here, even read generously, there are no new or additional material facts alleged in defendant's supporting affidavit, let alone "new facts or information which could not have been readily and with due diligence made part of the original motion." *Foley v Roche*, 68 AD2d 558 (1st Dept 1979). As plaintiff correctly observes, defendant has not cited a single new fact that was previously unavailable and that, had it been presented earlier, would have changed the outcome of his motion for leave to file an untimely jury demand.

Accordingly, it is

ORDERED that defendant's motion for reconsideration, is denied.

Dated: August 16, 2013

ENTER:

J.S.C.

HON. DAVID I. SCHMIDT

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