Ingvarsdottir v Gaines, Gruner, Ponzini & Novick, LLP
2015 NY Slip Op 32643(U)
September 18, 2015
Supreme Court, Westchester County
Docket Number: 57331/14
Judge: Linda S. Jamieson

To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp ____ Dec _x___ Seq. Nos. __4, 5, 6__ Type _dismiss, renew_

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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HELGA INGVARSDOTTIR,

Plaintiff,

-against-

Index No. 57331/14

GAINES, GRUNER, PONZINI & NOVICK, LLP, STEVEN H. GAINES, DENISE M. COSSU, and DOES 1-20,

DECISION AND ORDER

Defendants.

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The following papers numbered 1 to 11 were read on these motions:

Paper	Number
Notice of Motion, Affirmation and Memorandum of Law	1
Affirmation and Exhibit in Opposition	2
Reply Affirmation and Exhibit	3
Notice of Motion, Affirmation, Memorandum of Law and Exhibits	4
Affidavit and Exhibits in Opposition	5
Memorandum of Law in Opposition	6
Affirmation and Exhibit in Reply	7
Notice of Motion, Affirmation and Exhibits	8
Memorandum of Law	9
Memorandum of Law in Opposition	10
Reply Memorandum of Law	11

The Court has before it three new motions in this legal malpractice action. The first motion, brought by plaintiff, seeks to reargue her motion to renew her motion for a default judgment against defendants. The second motion, also filed by plaintiff, seeks to dismiss the third-party complaint against third-party defendant Jonathan R. Pearson, counsel for plaintiff. The third motion, filed by defendants, seeks to reargue this Court's Decision and Order dated April 3, 2015 (the "Second Decision").

The Court first examines plaintiff's first motion. This motion seeks to reargue the Second Decision. The Second Decision denied plaintiff's motion to renew Justice Bellantoni's August 14, 2014 Decision and Order (the "First Decision"). The First Decision denied plaintiff's motion for a default judgment against defendants, finding that there was no basis given the "absence of any prejudice to plaintiff, the existence of a potentially meritorious defense, the very short delay in responding to the complaint, and the strong public policy favoring the resolution of cases on the merits."

Essentially, this motion is a **third** attempt by plaintiff to obtain a default judgment against defendants. Plaintiff cites no law that allows a movant to make a motion to reargue a motion to renew, and the Court has located none. It is well-settled that CPLR § 2221(d)(2) provides that a motion to reargue "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 movant on reargument must show that the Court overlooked or misapprehended the facts or law, or for some reason mistakenly arrived at its earlier decision. It may not be used as a means by which an unsuccessful party is permitted to argue again the same issues previously decided. *Haque v. Daddazio*, 84 A.D.3d 940, 922 N.Y.S.2d 548 (2d Dept. 2011). "While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is **not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided**, or to present arguments different from those originally presented." *Ahmed v. Pannone*, 116 A.D.3d 802, 984 N.Y.S.2d 104, 107 (2d Dept. 2014) (Emphasis added).

Here, all plaintiff has done is argued, for the third time, that defendants do not have a potentially meritorious defense such that the Court should not overlook their very brief delay in answering the complaint. The Court again, for the third (and final) time, declines to make this finding. The motion to reargue is thus denied.

The second motion seeks to dismiss the third-party

complaint[1] against the third-party defendant, present counsel for plaintiff. It is well-settled that a "motion to dismiss a complaint based on documentary evidence pursuant to CPLR 3211(a)(1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law." *Air & Power Transmission, Inc. v. Weingast*, 120 A.D.3d 524, 524-25, 992 N.Y.S.2d 46, 48 (2d Dept. 2014).

The third-party complaint alleges claims for contribution and common law indemnification against third-party defendant on the theory that plaintiff had retained him "to represent her in obtaining wages owed to her," and that thus he participated in any alleged malpractice. More specifically, the third-party complaint argues that if there were malpractice, third-party defendant would be liable because he had already been retained by plaintiff for that **same work**; he was "directly" and "intricately involved in all of plaintiff's claims and strategy during the period" of defendants' representation of plaintiff; he reviewed the complaint in the underlying action; and he responded by "once again affirming the end date" of plaintiff's employment (which is critical, because of a limitations issue that is the heart of the

[1]It appears that neither party bothered to attach the third-party complaint to the papers. The Court was able to review it on the e-filing system, however.

malpractice claim).

In his motion, third-party defendant argues that many of the allegations set forth in the third-party complaint are simply not true, and are expressly belied by the documentary evidence. For example, he explains that at the time of the alleged malpractice, his representation of plaintiff was strictly limited to immigration issues, and that he repeatedly conveyed that limitation to defendants. Third-party defendant alleges that the documentary evidence - the retainer agreement with plaintiff and emails between counsel - conclusively establish that he did **not** opine on the substance of the draft complaint, nor did he "affirm" the end date of plaintiff's employment. Rather, third-party defendant states that all he did was point out an inconsistency in plaintiff's employment start date, because the purpose of his review of the draft was just to make sure that nothing in the civil litigation would impact the immigration issues for which he had been retained.

In opposition to the motion, defendants argue that the documentary evidence does not say what third-party defendant claims it does. Defendants state that third-party defendant's "position is not truthful or accurate" because the "scope of representation does not appear in the first retainer agreement between plaintiff and third-party defendant." Defendants further argue that "third-party defendant was involved in all aspects of

the legal representation of plaintiff before, during and after" defendants' representation of her.

A review of the first retainer agreement shows that defendants are, quite simply, wrong.[2] While the retainer agreement between plaintiff and defendants **is** broadly written and does not specify the legal matters to be addressed, the retainer agreements between plaintiff and third-party defendant, in contrast, **are** extremely specific and narrowly-tailored. The first retainer agreement - the one on which the third-party complaint relies - is limited **solely** to three specific immigration matters. No matter how defendants twist it, this retainer agreement cannot be read to encompass the work for which defendants alone were retained.

Moreover, third-party defendant points out, without contradiction, that plaintiff herself actually raised with defendants the issue of when her employment period ended. She sent an email to defendants, not third-party defendant, in which

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[2]Similarly, defendants' allegations that third-party defendant wanted to act as lead counsel, and "inserted himself" into every aspect of the relationship between plaintiff and defendants also is belied by the documentary evidence. Third-party defendant's email stating that he was "perplexed by the desire" of defendants to be "lead/coordinating counsel" does not indicate that he wanted to take the lead in the civil litigation; rather, a review of the email shows that he thought that defendants' desire to take the lead on all issues was odd since the two litigations were very different, and that "the immigration litigation cannot be subordinated to the civil suit (or the criminal case, for that matter) without gravely risking Helga's immigration status." He also noted that "the immigration issues related to nonpayment of Helga's by Datalink are quite discrete from an ordinary nonpayment action."

she asked "are we going for the whole period I was there, late 2000-2010, or just the H1B period?"[3] There is no evidence that defendants responded to this email, or forwarded it to third-party defendant for his thoughts.

Given that third-party defendant's representation of plaintiff prior to, and at the time of the alleged malpractice,[4] was limited solely to three enumerated immigration issues - a fact which third-party defendant expressly and repeatedly stressed to defendants - the Court finds that the present third-party complaint, as drafted, does not state a claim that any alleged malpractice could have been the responsibility of third-party defendant. *See Air & Power Transmission, Inc. v. Weingast*, 120 A.D.3d 524, 525, 992 N.Y.S.2d 46, 48 (2d Dept. 2014) ("Here, the documentary evidence . . . included forms . . . that contained specific disclaimer provisions, pursuant to which the plaintiffs expressly acknowledged that the defendants were not authorized to provide tax advice, and that they would not rely on any such advice provided. These forms conclusively established

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[3]The H1B period ended long after plaintiff's employment had ended, in May 2011. If plaintiff were allowed to use the May 2011 date, it appears that there would be no statute of limitations problem. This is an issue that the Court raised in the Second Decision, as addressed below.

[4]The second retainer agreement between plaintiff and third-party defendant was expressly limited to pursuing a claim for unpaid wages to the Department of Labor. Indeed, the second retainer agreement expressly stated that it did **not** cover any potential New York State or Federal wage claims.

the defendants' defense . . . ."). Should defendants uncover any information after discovery is complete that would provide a legitimate legal basis for an amended third-party complaint, they may seek leave to file such a complaint at that time.

The last motion seeks to reargue the Second Decision, arguing that the Court should have dismissed all of the claims against defendants. The Court first notes that defendants acknowledge that the Court "succinctly distilled the controlling issue of law as whether notice under N.Y.B.C.L. §630 must be given within 180 days of the termination of an employee's services, or within 180 days of the termination of the employment relationship." Defendants go on to argue that "the Court misapprehended the law applicable to this issue, as it is clear that the 180 days starts to run upon termination of services, and not upon termination of the employment relationship (if such dates are not the same)."

In order to determine defendants' motion, a review of the Second Decision is required. In that Decision, the Court stated that "if the only law that applied was BCL § 630, defendants would be correct that the claims were time-barred before plaintiff ever retained them in May 2011." Yet the Court went on to state that according to plaintiff, "another statute applies to determine the dates of her employment, 8 U.S.C. § 1101(a)(15)(H)(i)(B), the Immigration and Nationality Act H-1B

visa program ("H-1B")." Plaintiff claims that under this statute, an administrative decision "has already determined the end date of Plaintiff's employment with Datalink to be May 15, 2011 - four (4) days before Plaintiff retained Defendants." The Court explained that "The Administrative Decision thus found that - although plaintiff had actually not worked any days at all in 2011 - her employment status ended in May 2011, when her H-1B visa ended." The Court went on to hold that

> What the parties do not address is the interaction between the New York Business Corporation Law and the H-1B Administrative Decision. This Court is particularly interested in how the language of Section 630(a), which specifically states that workers are entitled to wages for "**services performed by them**[5] for such corporation," (emphasis added) might be affected by the H-1B determination that plaintiff was still working (when she plainly was not actually working). This is a matter that the parties should address in detail, with references to legislative history and relevant treatises if necessary, in any future motions for summary judgment.

Now, on this motion, defendants completely ignore the issue raised by the Court, as set forth above. Instead, they argue, citing to a case that has nothing to do with the H1B statute, *Grossman v. Sendor*, 392 N.Y.S.2d 997 (Sup. Ct. NY Co. 1977), *mod. on other grnds*, 64 A.D.2d 561, 407 N.Y.S.2d (1st Dept. 1978), that it is clear that plaintiff's employment ended when she stopped working. As stated, this is not the end of the analysis,

[5]This appears to require actual work, not the legal status of "working" under the H-1B program.

however. The Court is troubled by the administrative determination that plaintiff was "employed" through May 2011, and cannot grant the motion to dismiss without addressing this issue. The motion to reargue thus must be denied.

However, the Court does wish to correct one error in the Second Decision. The Court stated in the Second Decision that if the statute of limitations had not expired, then defendants had no defense to the allegations of malpractice. As defendants point out in their motion, this is not necessarily true (because they did not answer the complaint until after the Court issued the Second Decision). Defendants argue that they have several other defenses, the validity of which have not yet been determined. The Court here corrects the mistake, and emphasizes that it has not made any determination on the validity of defendants' defenses.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
SEPTEMBER 18, 2015

HON. LINDA S. JAMIESON
Justice of the Supreme Court