Trepel v Hodgins
2019 NY Slip Op 33563(U)
December 4, 2019
Supreme Court, New York County
Docket Number: 650541/2018
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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MARTIN TREPEL,

Plaintiff,

- v -

GREGG HODGINS, STURT MANNING, CORNELL UNIVERSITY BOARD OF TRUSTEES

Defendant.

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INDEX NO. 650541/2018

MOTION DATE N/A

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

Upon the foregoing documents and for the reasons set forth below, the defendants' motion to renew/reargue or, in the alternative, for a reference of this motion to Hon. Charles E. Ramos is denied.

To succeed on a motion for reargument, a party must demonstrate that the court either (1) overlooked or misapprehended the relevant facts, or (2) misapplied a controlling principle of law (*William P. Paul Equip. Corn. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). A motion for leave to renew must be based on additional material facts which existed at the time the prior motion was made but which were unknown to the party seeking leave to renew, and therefore, not made known to the court (*Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]). Failure to include facts known to the movant at the time of the prior motion but not included in the movant's prior submissions cannot serve as the basis for a renewal motion.

The plaintiffs brought this action by summons and verified complaint on February 2, 2018 (NYSCEF Doc. No. 1). The defendants moved to dismiss pursuant to CPLR 3211(a)(1), (a)(2), (a)(5) and (a)(7), and "for such other relief and further relief as the Court deems just and proper" (NYSCEF Doc. Nos. 21, 35). On September 19, 2019, New York State Supreme Court Justice Charles E. Ramos granted the motion to dismiss on the record (NYSCEF Doc. No. 76). To wit, Justice Ramos said: "Cornell, your motion is granted in it's [sic] entirety. This action is frivolous. It is dismissed" (September 19, 2019 Tr., NYSCEF Doc. No. 76, p. 36). Although it is beyond cavil that Justice Ramos had the authority to impose sanctions at that time if he deemed it appropriate, significantly, Justice Ramos declined to do so. Subsequently, the defendants filed a motion for sanctions and attorneys' fees, and this court declined to award sanctions (NYSCEF Doc. No. 101).

Under 22 NYCRR 130-1.1(a) and (b), the court may "in its discretion" award costs, including attorneys' fees, as well as impose financial sanctions against counsel that engaged in "frivolous conduct." Generally, trial judges are accorded wide discretion to determine what sanctions, if any, are appropriate and appellate courts typically defer to the trial court's determination absent a clear abuse of discretion (*In re Kover*, 134 AD3d 64, 73 [1st Dept 2015]).

As this court explained:

> This action involves a dispute over the authenticity of an artifact that was insured for $15 million and certain carbon dating which indicated it was not authentic. There were disputes discussed regarding the statute of limitations or the basis for the experts' opinion. Based on the record, it is unclear to this Court whether Judge Ramos was making a finding or an off-hand remark. Notably, nothing that forms the basis of the instant motion was unknown to defendants at the time that they made their motions to dismiss. Defendants could have made this motion when

> they moved to dismiss. In any event, inasmuch as Justice Ramos declined to impose sanctions, the motions to impose sanctions are denied.

(February 11, 2019 Decision and Order, NYSCEF Doc. No. 101).

The defendants now move to reargue this court's decision based on an alleged off-the-record colloquy (further discussed below), or in the alternative, for a reference to Justice Ramos, who is now a J.H.O., to hear and determine the issue of sanctions. However, nothing submitted by the defendants on the motion to reargue changes the court's prior decision. The court did not overlook or misapprehend any matters of fact or law so as to warrant leave to reargue. Moreover, as the court explained at oral argument on the prior motion, given the fact that the defendants were asking this court to make a ruling awarding sanctions that ***could have been but was not made*** by Justice Ramos:

> I feel like I'm now almost being put in the position of the appellate court as it relates to this decision. I am wondering if it would be more appropriate -- quite frankly, when I was reading this last night -- I know that an appeal has been filed with respect to the decision. I wonder if a cross appeal shouldn't be filed with respect to the failure to [impose] Rule 130 sanctions with respect to Judge Ramos. That may be the better answer here. I just don't know that I am ever going to be in a position even if appropriate by -- if I had been him right now, because I can't reach into his mind, to give you what you are looking for, to be frank with you. It's just not clear to me from the record

(Tr., NYSCEF Doc. No. 103, p. 10)

As was discussed at oral argument on this court's prior motion on February 11, 2019, there appears to have been an off-the-record conversation with Justice Ramos regarding sanctions. As the defendants recall it, the defendants asked for sanctions and Justice Ramos instructed them to file a motion. As the plaintiffs recall it, when the defendants requested sanctions off the record, Justice Ramos tersely said, "file a motion." Simply put, this is not a basis for reargument. To

wit, as the defendants' counsel told this court at oral argument on the prior motion on February 11, 2019:

> THE COURT: ...One of the questions I will ask you to answer at the end of your presentations is why when you were here didn't ask Judge Ramos at that moment in time for Rule 130 sanctions?
>
> MS. DORN: We did, you Honor. He suggested that we make a motion. He told us to make the proper motion.
>
> THE COURT: Where?
>
> MR. LENCI: Your Honor, it's not...if I may speak. It's not in the record. What happened was Judge Ramos said this was frivolous and then he closed the record. I then said, Judge Ramos, we would like to see sanctions. He said you will have to make a motion to that. It was off the record

(*id.*, p. 11).

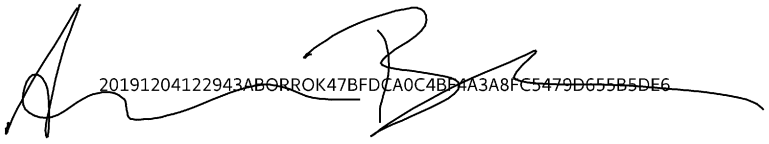
In any event, even if Justice Ramos did *sua sponte* and off the record actually ***instruct*** the defendants' to make such a motion, it does not present new information which this court did not consider – namely, that Justice Ramos ***could have*** reopened the record so that the defendants could make a record as to requesting sanctions at that time or simply awarded sanctions if he through it was appropriate to do so. Therefore, this court did not "overlook[] or misapprehend[] … what actually happened before Justice Ramos" (Def. Reply. Memo., p. 1, NYSCEF Doc. No. 126), including the alleged off-the-record colloquy. To the extent that this alleged interchange did not take place on the record and did not present an appealable order, this court issued an order regarding Justice Ramos' decision from which the defendants could appeal.

The purpose of a motion to reargue is not to serve as a vehicle for the unsuccessful party to raise argument that could have been made on the prior unsuccessful motion (*Foley, supra*, 68 AD2d

558). For this reason, the defendants' alternative request for a reference to Justice Ramos to hear and report on this issue is also denied. The defendants failed to request such relief on their prior motion and cannot try to circumvent this court's ruling by doing so now. Moreover, although the parties' may stipulate to have a matter referred to a Special Referee or JHO under certain circumstances, it is the custom and practice in this court that parties cannot chose the specific Special Referee or JHO to whom their matter will be referred. Certainly, the court will not refer a matter to a specific JHO without the consent of all parties. Here, the plaintiffs do not consent to this matter being referred to Justice Ramos and such a referral would be inappropriate at this point as this court has already rendered its decision. The matter is up on appeal before the First Department. If the First Department determines that sanctions are appropriate, it will instruct this court to impose such sanctions and this court will do so. However, the court declines to do so now, on this record.

Accordingly, it is

ORDERED that the defendants' motion for leave to renew and reargue this court's prior decision dated February 11, 2019 is hereby denied.



12/4/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED		NON-FINAL DISPOSITION			
		GRANTED	X	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE