San Lim v MTA Bus Co.
2019 NY Slip Op 33623(U)
December 10, 2019
Supreme Court, New York County
Docket Number: 153702/2018
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ADAM SILVERA** **PART** **IAS MOTION 22**

Justice

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SAN LIM,

Plaintiff,

- v -

MTA BUS COMPANY, SHAWN TOBIN

Defendant.

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INDEX NO. 153702/2018

MOTION DATE 10/16/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 79, 80, 81, 82, 83, 84, 85, 87, 88, 89

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

Upon the foregoing documents, it is ordered that defendant MTA Bus Company's (hereinafter referred to as "defendant MTA") motion to renew and reargue this Court's prior Decision/Order dated August 1, 2019 (hereinafter referred to as the "Prior Decision") is denied for the reasons set forth below.

Plaintiff commenced this action against defendants, by summons and complaint dated April 23, 2018, seeking monetary damages for personal injuries resulting from a motor vehicle accident. Defendant Tobin failed to file an answer and a judgment was entered against him on January 2, 2019. By motion dated February 7, 2019, Defendant MTA moved to: (1) vacate the default judgment against defendant Tobin pursuant to CPLR §§5015(a)(1), 5015(a)(4), and 317; (2) dismiss the action against defendant Tobin pursuant to CPLR §3211(a)(8); (3) reargue plaintiff's prior motion for a default judgment pursuant to CPLR §2221(d); and (4) renew plaintiff's prior motion for a default judgment pursuant to CPLR §2221(e). Such motion was denied in the Prior Decision.

Here, defendant MTA moves to renew and reargue the Prior Decision, and seeks, upon reargument and renewal, to vacate the default judgment entered against co-defendant Shawn Tobin who has not appeared in the instant action. Defendant MTA argues, *inter alia*, that the default judgment against defendant Tobin must be vacated as defendant Tobin was never properly served. Such argument is the same argument which was made in the prior motion to renew and reargue, and to vacate. However, in the instant motion, defendant MTA proffers new evidence in the form of the affidavit of Maria Foglia, dated September 6, 2019, an employee of defendant MTA. Such affidavit attaches an Exhibit consisting of a printout of the MTA administrative system purporting to demonstrate that co-defendant Tobin was no longer employed by defendant MTA at the time of service, and that co-defendant Tobin's actual place of employment was not at the place of service. Plaintiff opposes and cross-moves for sanctions. Defendant MTA opposes the cross-motion and replies.

CPLR 2221(d)(2) permits a party to move for leave to reargue a decision upon a showing that the court misapprehended the law in rendering its initial decision. "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dep't 1992), *appeal denied in part, dismissed in part* 80 NY2d 1005 (1992) (internal quotations omitted). Preliminarily, the Court notes that defendant MTA has failed to establish that the Court, in the Prior Decision, misapprehended the law or the facts in determining that defendant MTA's prior reliance on a hearsay document, purportedly written by co-defendant Tobin on July 19, 2017, was insufficient to establish a meritorious defense pursuant to CPLR §§317 and 5015(a)(1). Moreover, defendant MTA has similarly failed to establish that

the Court's Prior Decision misapprehended or overlooked any law or facts in determining that the affidavit of Baby Kurup was insufficient to support their previous motion, and insufficient to establish that defendant Tobin was not an employee at the time of service. Thus, defendant MTA's instant motion to reargue is denied.

CPLR§2221(e) permits a party to move for leave to renew a decision to assert "new facts not offered on the prior motion that would change the prior determination or...demonstrate that there has been a change in the law that would change the prior determination". CPLR §2221(e). Here, the Court notes that defendant MTA has failed to show how the purported new evidence is new, or why such facts were not provided in the prior motion. Here, defendant MTA proffers the affidavit of Maria Foglia who states that she has been an employee of defendant MTA for 23 years and has personal knowledge to the facts to which she attests as she has access to the records and files of defendant MTA. Here, it is undisputed that the "new" information was available to defendant MTA at the time the prior motion was made. Defendant MTA has wholly failed to state why such new facts were not previously provided. Instead, defendant MTA relies on *Whelan v GTW Sylvania, Inc.*, 182 AD2d 446 (1st Dep't 1992), to argue that the new facts are being provided to address the Court's concerns articulated in the Prior Decision. However, the Appellate Division, First Department, in *Whelan* held that "[i]n light of the IAS court's rationale for denying summary judgment..., it was appropriate for these defendants to clarify a misapprehended fact. It was an abuse of discretion not to consider the second Levine affidavit." *Id.* at 450. Here, defendant MTA is not clarifying a misapprehended fact. In the instant second motion to renew and reargue, defendant MTA is attempting to submit additional evidence which defendant MTA clearly had in their possession but either inadvertently or intentionally omitted from the prior motion. The new affidavit does not clarify a misapprehended fact. Rather, the

affidavit of Maria Foglia herein is an attempt by MTA to cure their previously insufficient submissions. However, contrary to defendant MTA's arguments, the *Whelan* decision does not provide litigants, who failed to meet their burden on a motion to renew and reargue, multiple bites at the apple. The CPLR is clear that on a motion to renew, the moving party must submit new facts or demonstrate that there has been a change in the law. *See* CPLR §2221(e). Defendant MTA has failed to meet its burden on this second motion to renew such that defendant MTA's motion to renew is denied.

As for plaintiff's cross-motion for sanctions, such cross-motion is denied. Plaintiff seeks costs and fees incurred as a result of the instant motion which plaintiff argues is frivolous. According to plaintiff, defendant MTA is now moving a second time seeking the identical relief as requested in the prior motion. 22 NYCRR § 130-1.1 (c) states that:

> conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

Plaintiff has failed to establish that defendant MTA's motion was completely without merit, or that the motion was made primarily to delay resolution of the litigation. Thus, plaintiff's cross-motion is denied in its entirety.

Accordingly, it is

ORDERED that the defendant MTA's motion to renew and reargue is denied in its entirety; and it is further

ORDERED that plaintiff's cross-motion for sanctions is denied in its entirety; and it is further

ORDERED that all parties or counsel shall appear for a previously scheduled status

conference on January 6, 2020 at 9:30am in room 106 of 80 Centre Street, New York, NY; and it is further

ORDERED that, within 30 days of entry, plaintiff shall serve upon defendant MTA Bus Company a copy of this decision and order, together with notice of entry.

This constitutes the Decision and Order of the Court.

12/10/2019
DATE

ADAM SILVERA, J.S.C.

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