

Toscano v International Diversified Servs., LLC

2019 NY Slip Op 34242(U)

November 19, 2019

Supreme Court, Nassau County

Docket Number: 614099/17

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ENTERED
IN
COMPUTER
CF

FREDERICK TOSCANO,

Plaintiff,

- against -

INTERNATIONAL DIVERSIFIED SERVICES, LLC,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 614099/17
Motion Seq. No.: 02
Motion Date: 09/10/19

XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavit and Exhibits	1
Affirmation in Opposition and Exhibit	2

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 3211(a)(3), for an order dismissing plaintiff's Complaint on the grounds that plaintiff lacks standing to sue, or, in the alternative, moves, pursuant to CPLR § 3212, for an order granting it summary judgment dismissing plaintiff's Complaint; and moves, pursuant to 22 NYCRR 202.21(e), for an order vacating the Note of Issue for good cause as plaintiff was incompetent at every step of this matter and is unable to initiate or continue litigation; and moves for an order disqualifying plaintiff's attorneys, Elovich & Adell, as plaintiff is unable to retain attorney representation as an incompetent. Plaintiff opposes the motion.

The instant action was brought to recover for personal injuries allegedly sustained by plaintiff on August 31, 2015, at approximately 9:30 a.m., when he tripped and fell on the sidewalk in front of a building owned by defendant, located at 97-08 Rockaway Boulevard, Ozone Park, County of Queens, State of New York. The action was commenced with the filing of a Summons and Verified Complaint on or about December 27, 2017. *See* Defendant's Affirmation in Support Exhibit L. Issue was joined on or about February 1, 2018. *See id.*

In support of the motion, counsel for defendant submits, in pertinent part, that, "[t]he Plaintiff's action is an alleged 'slip and fall' resulting in a broken ankle occurring on August 31, 2015 on the street/sidewalk in front of property formerly belonging to the Defendant. The Plaintiff was (*sic*) a morbidly-obese 400 pound, methadone/heroin addict, who was being transported by medical Ambulette when he alleges he asked to 'stop at a deli' to get food, and then either 'lost consciousness' or tripped getting out of the Ambulette. Plaintiff was - in 2015 - found to be mentally incompetent by the Supreme Court, Queens County, with a legal guardian - and lacks 'legal capacity' to bring the above action. In addition, the alleged 'trip and fall' never happened at Defendant's former property - there was never a deli at Defendant's property - Defendant's owner was present at the alleged time of the incident - and nothing happened. Finally, Plaintiff waited 2½ years to file this action - after Defendant sold the property - and failed to identify the 'necessary parties' - the Ambulette company that had control of Plaintiff - until after the three (3) year statute of limitations expired. The medical records of Plaintiff indicate he suffered from 'extreme dementia.' The Plaintiff admitted in depositions that he has used 'every' illegal drug, was arrested 'over a dozen times,' and had been shot by the police for

‘resisting arrest.’ This action is improper on many grounds - legal incapacity, impossibility, lack of any credible claim that the twisted ankle actually occurred on Defendant’s former property; refusal by Plaintiff to provide necessary discovery; and failure to join necessary parties. This action should never have been filed, is bounded by *res judicata* by the Supreme Court Queens County, and this Court should dismiss the action.”

Counsel for defendant further asserts, in pertinent part, that, “in August, 2015, the [subject] building was occupied by two tenants - Expo Home Design, Inc. (‘Expo’) and Prestige Furniture & Mattress, Inc[.] (‘Prestige’). The terms of both tenant’s leases required them to clean and maintain the sidewalks in front of the building. The property never had a deli while owned and managed by Defendant IDS. At the time of the fall Plaintiff was being transported by medical ambulette. Plaintiff had the ambulette stop in front of a deli, so he could ‘walk to a deli.’ At the time of this action, Plaintiff was sixty-two (62) years old. Plaintiff’s medical history includes diabetes, obesity, anxiety, dementia, leukocytosis, and opiate addiction.” *See* Defendant’s Affirmation in Support Exhibit H.

Counsel for defendant also contends, in pertinent part, that, “[t]he Plaintiff was adjudicated an incompetent and appointed a Legal Guardian by the Supreme Court, Queens County. He lacks ‘legal capacity’ to sue.... On June 5, 2015, the Supreme Court, In the Matter of Application of Steven Banks for Appointment of a Guardian for Frederick Toscano, Queens County Index No.: 1608/2015, declared Plaintiff incompetent and appointed the Jewish Association Serving the Aging (‘JASA’) to be Plaintiff’s legal guardian.... This Order states: ‘Frederick Toscano is a person in need of a Guardian and the appointment is necessary.’ The Court further states that the guardian is to ‘defend or maintain any administrative, civil or

criminal judicial proceeding.’ Plaintiff’s guardian has refused to be involved in this matter. Plaintiff initiated this lawsuit without the consultation nor (*sic*) involvement of his guardian, despite being declared judicially incompetent. The guardian’s name is not on the complaint. The guardian made no court appearances on behalf of Plaintiff. The guardian was not present at the deposition of the Plaintiff conducted on April 8, 2019. CPLR § 3211 (a)(3) provides that ‘[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that the party asserting the cause of action has not legal capacity to sue.’ The New York Legislature has determined, through enacting the Civile Practice Law and Rules, that a person judicially declared incompetent must appear by his or her guardian or guardian ad litem appointed by the Court. [citation omitted]. Plaintiff initiated this lawsuit without the involvement of his guardian, despite being judicially declared incompetent. Plaintiff’s Complaint must be dismissed for lack of capacity to sue.”

Counsel for defendant further asserts, in pertinent part, that, “[p]laintiff - represented by the same law firm - commenced a lawsuit in Queens County alleging another ‘slip and fall’ in 2016, Toscano v. Highland Care Center, Index No.: 713786/16, without his guardian’s involvement.... Defendant moved to dismiss - on the grounds of ‘lack of legal capacity.’ The Supreme Court, Queens County dismissed Plaintiff’s complaint on March 13, 2019, with prejudice.... [T]he ruling by the Supreme Court in the Highland Care Center case is ‘res judicata.’” *See* Defendant’s Affirmation in Support Exhibit B.

Counsel for defendant also submits, in pertinent part, that, “[i]t is Plaintiff’s testimony that ‘my right leg buckled; after taking ‘one or two steps’ after getting out of the Ambulette.... Plaintiff made inconsistent statements to attending doctors regarding his fall. Plaintiff’s story changes multiple times depending on which doctor Plaintiff was talking to. Plaintiff’s

'testimony' is all over the place - and not credible as a basis to continue this action. Plaintiff also indicated that he 'passed out.' Some of the attending physicians recounted that Plaintiff stated he fell on the sidewalk; others that Plaintiff fell when stepping down from the curb into the street. Plaintiff could not accurately remember what happened to him. Prior to Plaintiff's fall on August 31, 2015, Plaintiff was hospitalized for constant vomiting, nausea, a low grade fever, bloody vomiting, constipation, a possible benzodiazepine overdose, and not eating for six (6) days.... Plaintiff reported to many of his attending doctors that 'he felt dizzy' and wasn't sure if he lost consciousness but 'it felt like it.'... Plaintiff also made statements to his attending physicians that he fell stepping down from the curb, not on the sidewalk as alleged in Plaintiff's complaint.... Plaintiff also testified, in the proceedings, that he fell after getting down from the ambulette for a 'food stop;' not stepping down off a curb." *See* Defendant's Affirmation in Support Exhibits D-G.

In further support of the motion, defendant submits the affidavit of Bahman Cherazi, Chief Executive Officer of defendant corporation. *See* Defendant's Affidavit in Support.

In opposition to the motion, counsel for plaintiff submits, in pertinent part, that, '[d]efendant fails to advise the Court that the defendant moved for this very same relief by Notice of Motion dated August 2, 2019, filed with the Nassau County Clerk on August 8, 2019. Plaintiff has already submitted an Affirmation in Opposition to the defendant's motion, a copy of which is annexed hereto as Exhibit 'A.'... The first Motion [Seq. No. 01] before this Court is procedurally defective in that it failed to attach as exhibits copies of the pleadings per CPLR 3212(a).... Therefore, that Motion should not be considered by the Court. Defendant cannot now cure the defect by making the same Motion and attaching new documents (*sic*) not part of the first Motion." *See* Plaintiff's Affirmation in Opposition Exhibit A.

The Court notes that, in its October 11, 2019 Decision and Order with respect to Motion Seq. No. 01 in the instant matter, it held that, “[a]t the outset, the Court notes that CPLR § 3212(b) reads, in pertinent part, that, “[a] motion for summary judgment shall be supported by affidavit, *by a copy of the pleadings* and by other available proof, such as depositions and written admissions (emphasis added).” Counsel for defendant has failed to attach any pleadings to the instant motion. Consequently, said motion is defective. Accordingly, defendant’s motion, pursuant to CPLR § 3212, for an order granting it summary judgment and dismissing plaintiff’s Complaint, is hereby **DENIED without prejudice.**”

Since the Court denied Motion Seq. No. 01 on procedural grounds and without prejudice, the Court will entertain the instant motion (Seq. No. 02) before it and, in doing so, will refer to the opposition submitted by plaintiff as to Motion Seq. No. 01. *See id.*

In said opposition, counsel for plaintiff submits, in pertinent part, that “plaintiff’s allegation that he was injured on the sidewalk in front of defendant’s premises due to an unsafe condition has not been refuted by defendant other than by innuendo, false statement, and conjecture. Saying ‘it didn’t happen here’ is not the basis for a summary judgment motion. In fact, it borders on the ridiculous. As to defendant’s claims of incapacity to sue, defendant misleads the Court as to the facts. In the first instance, there is presently a motion to reargue the decision of Justice O’Donoghue who granted the motion based on plaintiff’s late attendance at the motion calendar. Defendant’s motion for lack of capacity on the part of the plaintiff was based upon an Order of the Hon. Bernice D. Siegal, J.S.C., Queens County, dated May 29, 2015. After a hearing on Mr. Toscano’s capacity, Justice Siegal appointed the Jewish Association of Services for the Aged (hereinafter ‘JASA’) as guardian for Mr. Toscano, who was found by the Court to be incapacitated and in need of a guardian. The guardianship was intended to be

temporary to arrange housing. In the Order JASA was appointed as Guardian for the plaintiff (bottom paragraph on page 2). The Guardian (JASA) was given the authority to defend or maintain any civil judicial proceeding on behalf of Mr. Toscano.... A guardian had, in fact, been appointed for Mr. Toscano but it was unknown by any of the attorneys at the time of the commencement of this action. No request was made to the guardian to be retained to represent Mr. Toscano because neither we nor the prior attorney in that case [the Queens County action] knew of the guardianship until defendant's Motion. On 10/15/18, a Stipulation was entered before Justice O'Donoghue to adjourn the said Motion to 11/17/18, and the Court ordered that a representative of JASA appear. An attorney appeared for the Guardian, JASA, and advised the Court that a Petition to Withdraw the Guardianship had been filed but had been withdrawn (for reasons unknown to him). The attorney then told [the] Court that they would make (*sic*) application to Judge Siegal to withdraw the guardianship and to discontinue the legal guardianship. Elovich & Adell contacted JASA on numerous occasions both by telephone and by letter/email for updates on the application to Justice Siegal and advising them to appear in Court. On the return date of the Motion (March 13, 2019) JASA did not respond, and after calling JASA, Mitchel Sommer from Elovich & Adell was told that an attorney was in Judge Siegal's part. After checking in he went to Judge Siegal to try to ascertain if an attorney for JASA was in Judge Siegal's part he could not find him or her. He then tried to ascertain whether an Order had been signed by Judge Siegal to terminate the guardianship. The Clerk told him to go to Room 100 (the guardianship clerk) and have a computer print-out as to the status of the matter. Judge Siegal signed an Order to Show Cause on 12/19/18 based upon the Court's decision dated 11/28/17. Mr. Sommer then returned to Judge O'Donahue's (*sic*) part only to learn he missed the Calendar call and the Motion was granted without opposition. Of equal importance, Judge Sher

was intimately aware of all the details concerning the alleged guardianship. Judge Sher directed the parties to proceed through discovery and certify the case despite the uncertain status of the guardianship.” *See id.*

The Court notes that, on September 19, 2019, Justice Peter J. O’Donoghue, Supreme Court Queens County, denied the above detailed motion to re-argue.

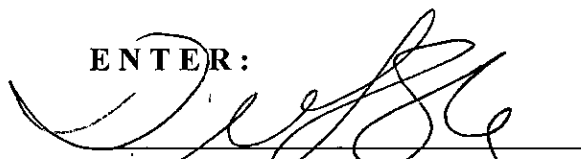
CPLR § 3211(a)(3) states that, “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:… 3. the party asserting the cause of action has no legal capacity to sue.” As asserted by counsel for defendant, in a May 29, 2015 Order issued by The Honorable Bernice D. Siegal, Justice of the Supreme Court, Queens County, plaintiff was “determined to be a person in need of a guardian requiring the appointment of a Special Guardian of the Property as the Court has found that FREDERICK TOSCANO is in need of a guardian and has consented to the appointment of a Special Guardian with limited powers and for a limited duration;… the Special Guardian shall move this court to be discharged as special needs guardian upon the proper placement of FREDERICK TOSCANO, unless a motion is made to extend the term of this guardianship in order to set up a supplemental needs trust;…” *See Defendant’s Affirmation in Support Exhibit A.*

The Court notes that the Guardianship for plaintiff was in effect until December 19, 2018, when The Honorable Bernice D. Siegal, Justice of the Supreme Court, Queens County, signed an Order stating that plaintiff no longer needed a Guardian. Consequently, when the instant matter was commenced, on or about December 27, 2017, plaintiff lacked the legal capacity to sue. *See CPLR § 1201.*

Accordingly, based upon the above, the branch of defendant's motion, pursuant to CPLR § 3211(a)(3), for an order dismissing plaintiff's Complaint on the grounds that plaintiff lacks standing to sue, is hereby **GRANTED**.

The branches of defendant's motion, pursuant to CPLR § 3212, for an order granting it summary judgment dismissing plaintiff's Complaint; and, pursuant to 22 NYCRR 202.21(e), for an order vacating the Note of Issue for good cause as plaintiff was incompetent at every step of this matter and is unable to initiate or continue litigation; and for an order disqualifying plaintiff's attorneys, Elovich & Adell, as plaintiff is unable to retain attorney representation as an incompetent, are hereby **DENIED as moot**.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
November 19, 2019

ENTERED

NOV 20 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE