Dennis v 44th Enters. Corp.
2020 NY Slip Op 33040(U)
September 16, 2020
Supreme Court, New York County
Docket Number: 153420/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2EFM**

Justice

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LOUISA DENNIS,

Plaintiff,

- v -

44TH ENTERPRISES CORP. and ANTHONY CAPECI,

Defendants.

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INDEX NO. 153420/2016

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114, 115

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

In this putative class action commenced by plaintiff Louisa Dennis pursuant to Labor Law §§ 190 et seq, 652, and 653, defendants 44th Enterprises Corp. d/b/a Lace II Gentlemen's Club ("the club") and Anthony Capeci ("Capeci") (collectively "defendants-stakeholders") move: 1) pursuant to CPLR 2221(e), for renewal of the motion by cross-defendants-claimants the New York State Department of Taxation and Finance and its Commissioner (collectively "the DTF") seeking dismissal of the interpleader complaint, or, in the alternative; 2) pursuant to CPLR 5015(a)(2), seeking to vacate the decision and order of this Court entered August 13, 2019; 3) to reinstate their interpleader complaint; and 4) for such other relief as this Court deems proper.

Defendant-claimant Metro Enterprises Corp. ("Metro") supports the motion by the club and Capeci and cross-moves, pursuant to CPLR 2215, to reinstate its answer to the interpleader complaint and claim-in-interpleader.

The DTF opposes the motion and cross motion.

After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion and cross motion are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The facts of this matter are set forth in detail in the decision and order of this Court entered August 13, 2019 ("the 8/13/19 order"), which 1) denied the motion by the club and Capeci seeking a preliminary injunction pursuant to CPLR 6311 (motion sequence 002); 2) denied the cross motion by Metro seeking a preliminary injunction pursuant to CPLR 6311 (motion sequence 002); 3) granted the cross motion by the DTF, pursuant to CPLR 3211(a)(2) and (a)(7), seeking to dismiss the interpleader complaint filed by the club and Capeci (motion sequence 002); and 4) denied as moot Metro's motion seeking a temporary restraining order (motion sequence 003). Docs. 97-98. In dismissing the interpleader complaint, this Court held, inter alia, that the DTF did not violate the constitutional rights of defendants-stakeholders because "[t]o the extent that [defendants-stakeholders] may provide documentation to the [DTF] that specific scrip transactions constituted gratuities to their dancers, those transactions would not be subject to sales tax payable by [defendants-stakeholders]." Docs. 97-98 at 18. Any additional relevant facts are set forth below.

On July 15, 2019, a hearing was conducted before Administrative Law Judge Barbara Russo in connection with an administrative tax appeal taken by Metro and its principal, John Scarfi. Doc. 105. At the hearing, the auditor who examined Metro's records testified that all sales of scrip were taxable. Doc. 105 at 22-23, 31, 141-142. However, Capeci testified (Doc. 105 at 160) that the auditor failed to consider the factors set forth in the decision of the Appellate Division, Third Department in *Metro Enterprises Corp. v. N.Y. State Dept. of Taxation & Finance*, 171

A.D.3d 1377 (3d Dept. 2019) ("the Third Department order"), in which it held that the DTF was to determine the taxability of scrip "based on the relationship between [Metro], the dancers and the registered clubs."[1]

On September 13, 2019, the club and Capeci moved, pursuant to CPLR 2221(e), to renew the DTF's motion to dismiss of the interpleader complaint, or, in the alternative; 2) pursuant to CPLR 5015(a)(2), seeking to vacate the decision and order of this Court entered August 13, 2019; 3) to reinstate their interpleader complaint; and 4) for such other relief as this Court deems proper. Metro supports the motion by the club and Capeci and cross-moves, pursuant to CPLR 2215, to reinstate its answer to the interpleader complaint and claim-in-interpleader. The DTF opposes the motion and cross motion.

In support of their motion, defendants-stakeholders argue that they are entitled to renewal of the DTF's motion to dismiss pursuant to CPLR 2221(e) since the hearing testimony establishes that "the administrative process is not generating the factual record anticipated by [this] Court when it dismissed [the interpleader complaint]." Doc. 107 at 2. Additionally, they assert that this Court should not have dismissed the interpleader complaint on the ground that they had the opportunity to commence an Article 78 proceeding because they stated in their papers that they could not afford to post the bond necessary for them to do so. Further, the defendants-stakeholders argue that renewal must be granted in the interest of justice.

Alternatively, the club and Capeci argue that the 8/13/19 order must be vacated pursuant to CPLR 5015(a)(2) since the hearing testimony constituted "newly-discovered evidence which . . . probably would have produced a different result." Finally, the defendants-stakeholders argue that the 8/13/19 order must be vacated pursuant to CPLR 5015(a) in the interest of justice since

[1] Capeci admitted, however, that the audit predated the Third Department order entered April 18, 2019. Doc. 105 at 160.

they "face[ ] a substantial likelihood that [they] will be bound by conflicting judgments arising from the conflicting duties imposed upon [them] under the tax and labor laws." Doc. 107 at 6.

In support of its cross motion, Metro relies on the arguments by the defendants-stakeholders. Doc. 111.

In opposition to the motion and cross motion, the DTF argues, inter alia, that the club, Capeci, and Metro have failed to present any new facts warranting the granting of their motions. Doc. 113 at 3. It further maintains that, even if the movants had presented new facts, this Court would still be without jurisdiction over the subject tax dispute since defendants-stakeholders failed to exhaust their administrative remedies. Doc. 113 at 4-6. Further, the DTF asserts that the club and Capeci failed to set forth any basis on which to vacate the 8/13/19 order in the interest of justice. Doc. 113 at 10.

In reply, the defendants-stakeholders argue, inter alia, that the transcript of Metro's tax appeal hearing constitutes new evidence warranting the granting of their renewal motion. Doc. 114.

LEGAL CONCLUSIONS:

Motions for Renewal of the 8/13/19 Order

CPLR 2221(e) provides as follows:

> (e) A motion for leave to renew:
>
> 1. shall be identified specifically as such;
>
> 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
>
> 3. shall contain reasonable justification for the failure to present such facts on the prior motion.

As defendants-stakeholders concede (Doc. 107 at 3), the determination whether to grant a renewal motion rests within the sound discretion of the court. *See Matter of Yu Chan Li v New York City Landmarks Preserv. Commn.*, 182 AD3d 478 (1st Dept 2020).

As the DTF correctly asserts, that branch of the motion by the defendants-stakeholders seeking renewal must be denied on the ground that they do not offer any new evidence in connection with the instant motion. Renewal is not to be granted "[i]f the allegedly new facts were available while the initial motion was pending but were not presented because of the movant's lack of diligence." *Cooke Ctr. for Learning & Dev. v Mills*, 19 AD3d 834, 837 (3d Dept 2005); *see also Parkinson v Fedex Corp.*, 184 AD3d 433, 434-435 (1st Dept 2020) (citations omitted) (Appellate Division, First Department refused to deem motion as one for renewal where "new facts" movant claimed to have submitted were obtained while his underlying motion was pending).

As noted above, the tax appeal hearing, at which Capeci was a witness, was conducted on July 15, 2019. Doc. 105. Therefore, the defendants-stakeholders and Metro were clearly aware of the evidence adduced at the hearing while their motions seeking injunctive relief, which were decided by the order entered 8/13/19, were still pending. However, neither the motion papers nor NYSCEF reflect that the club, Capeci, or Metro made attempted to supplement their papers in connection with the underlying motion after July 15, 2019, when the hearing was conducted, and August 13, 2019, when the 8/13/19 order was issued. Thus, they cannot argue that the testimony adduced at the hearing constituted "new facts" within the meaning of CPLR 2221(e), and the branch of their motion and Metro's motion seeking relief under this section are denied.[2]

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[2] Even in the event that the hearing transcript constitutes "new facts" for the purposes of CPLR 2221(e), this Court notes that defendants-stakeholders misrepresent facts to this Court in support of their argument that renewal must be granted based on the testimony given at that proceeding. Specifically, the defendants-stakeholders assert that "[t]he [DTF] also conceded that it had not undertaken an analysis of the relationship between the dancers, the clubs, and Metro, as required by the Third Department, in determining the taxability of scrip in [their] clubs. [Doc. 105] at

Additionally, as the DTF argues, no new facts have been presented by the defendants-stakeholders since their own interpleader complaint alleged that the DTF considered that "the full amount of scrip transacted in the club [was] subject to sales tax on the basis that it constitutes an amusement charge under Tax Law § 1101(d)(2) and (3)." Doc. 23 at par. 37; Doc. 113 at 6-7. Thus, the testimony by the DTF's auditor that the scrip was subject to taxation could not have been a revelation to the club and Capeci.

Even assuming, arguendo, that the hearing transcript constituted "new facts", defendants-stakeholders fail to explain how the proffered hearing testimony "would change [this Court's] prior determination". CPLR 2221(e).

Despite the language of CPLR 2221(e), this Court "has discretion to relax the requirement that a motion to renew be based on newly discovered evidence or evidence not previously available, and to grant such a motion in the interest of justice, absent prejudice to the opposing party resulting from any delay." *Hines v New York City Transit Authority*, 112 AD3d 528 (1st Dept 2013) (citations omitted). Here, this Court declines to grant renewal in the interest of justice since, as noted previously, the defendants-stakeholders seek to introduce the hearing transcript to establish, among other things, that the DTF conceded that it did not undertake an analysis of the relationship between Metro, the dancers, and the club, as required by the Third Department order. However, as noted previously, the defendants-stakeholders made no such concession. See Footnote 2, supra.

In support of their motion for renewal, the club and Capeci rely, inter alia, on *J.D. Structures, Inc. v. Waldbum*, 282 A.D.2d 434 (2nd Dept. 2001), in which the Appellate Division

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160." Doc. 107 at 2. However, this representation is utterly disingenuous, since this was not a concession by the DTF but rather part of Capeci's testimony at the hearing. Doc. 105 at 160.

held that renewal should have been granted to allow the movant the opportunity to submit evidence which it had reasonably believed was not necessary to establish its prima facie entitlement to summary judgment in lieu of complaint. However, this case is clearly distinguishable, since the club and Capeci argue that they are seeking to introduce what they characterize as new facts, and not evidence which they claim was unnecessary to submit in opposition to the DTF's motion to dismiss the interpleader complaint.

Finally, although the club and Capeci argue that they are entitled to renewal on the ground that this Court failed to consider the fact that they were unable to post a bond, this contention should have been raised by a motion for reargument. See CPLR 2221(d)(2).

Motions to Vacate the 8/13/19 Order

CPLR 5015(a)(2) provides that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of . . . newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404." In order to establish his or her entitlement to relief under this provision, a movant must establish that the new evidence could not have been discovered by the exercise of due diligence. *See Mauro v Mauro* 148 AD2d 684 (2d Dept 1989). A determination pursuant to CPLR 5015(a) is "necessarily discretionary". *Alliance Property Mgmt. & Dev. v Andrews Ave. Equities, Inc.*, 70 NY2d 831, 832 (1987).

This Court declines to grant defendants-stakeholders and Metro relief pursuant to this section. Initially, as explained above, defendants-stakeholders did not introduce any newly-discovered evidence. Even if the hearing transcript were to be considered newly-discovered

evidence, defendants-stakeholders fail to establish that it "probably would have produced a different result." Doc. 107 at 4. Although they assert that "[h]ad the Court been apprised of the insufficiency of the administrative process, and the rigidity of the [DTF's] policy, it likely would not have dismissed the interpleader" (Doc. 107 at 4), this contention is utterly conclusory and speculative and fails to warrant relief pursuant to CPLR 5015(a)(2). *See generally Ejam Holding Co. v Gilbert*, 26 Misc3d 141(A) (App Term 1st Dept 2010).

Finally, although CPLR 5015(a) empowers this Court to vacate an order in the interest of justice (*see Woodson v Mendon Leasing Corp*., 100 NY2d 62, 68 [2003]), it declines to do so here since the club and Capeci fail to substantiate their claim that they "face[ ] a substantial likelihood that [they] will be bound by conflicting judgments arising from the conflicting duties imposed upon [them] under the tax and labor laws." Doc. 107 at 6.

The remainder of the parties' contentions are either without merit or need not be addressed in light of the findings above.

Therefore, in light of the foregoing, it is hereby:

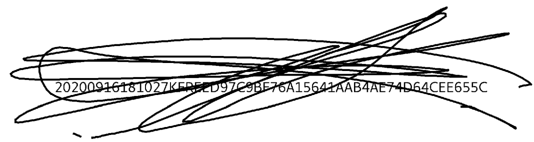
ORDERED that the motion by defendants 44th Enterprises Corp. d/b/a Lace II Gentlemen's Club and Anthony Capeci is denied in all respects; and it is further

ORDERED that the cross motion by defendant-claimant Metro Enterprises Corp. is denied in all respects; and it is further

ORDERED that the parties shall participate in a telephonic compliance conference on October 26, 2020 at 4:30 p.m. unless the parties, prior to that day, provide the court with a discovery stipulation by emailing it to jjudd@nycourts.gov to be so-ordered, leaving blank spaces for the compliance conference date and note of issue filing deadline; and it is further

ORDERED that if the parties cannot so stipulate, then they are to provide the court with a dial-in number and access code OR must have all parties on the line and then patch the court in at (646) 386-5655; and it is further

ORDERED that this constitutes the decision and order of the court.



9/16/2020		KATHRYN E. FREED, J.S.C.
DATE		

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☒ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
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