

Maddock v Haines

2021 NY Slip Op 30807(U)

February 22, 2021

Supreme Court, Suffolk County

Docket Number: 601995/2017

Judge: Carmen Victoria St. George

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**SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY**

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

x

RICHARD MADDOCK and BARBARA MADDOCK,

**Index No.
601995/17**

Plaintiffs,

**Motion Seq:
010 MG
011 MG
012 MG**

-against-

Decision/Order

**DENISE HAINES, as ADMINISTRATOR OF THE
ESTATE OF MICHAEL HAINES, MICHAEL R.
HAINES AGENCY, INC., SCDS ENTERPRISES, LLC,
AKG2, INC., COOL-TEMP MECHANICAL, INC.,
AMERICAN PLUMBING SOLUTIONS, INC., PETER
ALBINSKI, R.A., LLOYD HOWELL, P.E., JOSEPH
LAUTERBORN, BUILT CONSULTING CORP., and
WALTER GIGLIO,**

Defendants.

x

The following electronically-filed papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	292-342; 352-357; 362-366
Answering Papers.....	367-452
Reply.....	458-461; 462; 466-467
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Submitted for this Court's consideration are three motions for renewal and reargument made by plaintiffs and defendants Cool-Temp Mechanical, American Plumbing Solutions and Joseph Lauterborn (Motion Sequences 10, 11 and 12). Sequences 11 and 12 made by Cool-Temp and American Plumbing Solutions adopt and incorporate by reference the arguments made by plaintiffs, together with all supporting exhibits submitted in connection with Sequence 10. These motions are made as a result of this Court's Decision and Order dated May 7, 2020 that granted defendant SCDS's dismissal motion identified as Motion Sequence 001. The Haines and

AKG2, Inc. defendants submit papers in support of Motion Sequence 10. SCDS opposes Sequences 10, 11 and 12.

Background

This action was commenced on February 1, 2017. On April 10, 2017, defendant SCDS filed its pre-answer motion to dismiss the complaint. An initial status conference was held on or about October 24, 2017, and this action came before four different Justices of this Court before this matter was re-assigned to this Court on September 24, 2019 (Administrative Order 70-19). The plaintiffs filed an amended complaint on April 2, 2019, and SCDS joined issue to the amended complaint on or about April 22, 2019. SCDS did not request or move to have its two-year-old pending dismissal motion applied to the amended complaint, nor did SCDS move against the amended complaint.

After having amassed a lengthy history, this action, along with SCDS's pre-answer motion to dismiss (Motion Sequence 001), was transferred to this Court. Unfortunately, some critical portions of the history of this pending matter were not made known to this Court until after the Court issued its May 7, 2020 Decision and Order. Specifically, the events of March 18, 2019 and May 21, 2019, including on and off-the-record discussions between counsel for the parties and the Court (Kevins, J.), ultimately led to the motion sequences now under consideration by this Court (Sequences 10, 11 and 12). This Court notes that when it issued its May 7, 2020 Decision and Order, the Decision and Order was met with an almost immediate flurry of communications expressing a level of what can best be characterized as surprise, given that the parties, including SCDS, were actually engaged in taking plaintiff Richard Maddock's deposition when the Decision and Order was uploaded to NYSCEF. This Court has come to learn that extensive discovery had been exchanged by the parties, including by SCDS, during the lengthy time period preceding this Court's issuance of its May 7, 2020 Decision and Order, despite SCDS's pending dismissal motion (Sequence 001).

In an effort to unravel the procedural history of this matter, this Court entertained in-person oral argument on September 23, 2020. Counsel for the parties discussed their respective recollections of a conference held in Chambers with the Court (Kevins, J.) in March 2019, and all counsel who were present before this Court on September 23, 2020 agreed that the discussions held with this Court, which were placed on the record, could be considered as part of the total record. Virtual oral argument of the pending motions was continued on November 25, 2020, which is also part of the record. At the Court's request, the minutes of the September 23, 2020 and November 25, 2020 proceedings were uploaded to NYSCEF.

Standard for Renewal Pursuant to CPLR § 2221 (e)

CPLR § 2221 (e) provides in pertinent part that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination. . . and shall contain reasonable justification for the failure to present such facts on the prior motion."

While a motion for leave to renew is granted sparingly, and it is “not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (see *Sobin v. Tylutki*, 59 AD3d 701, 702 (2d Dept 2009), quoting *Rubinstein v. Goldman*, 225 AD2d 328, 329 [1st Dept 1996]; see also *Renna v. Gullo*, 19 AD3d 472, 473 [2d Dept 2005]; *Matter of Beiny*, 132 AD2d 190 [1st Dept 1987], *lv dismissed* 71 NY2d 994 [1988]), “ ‘[t]his requirement. . . is a flexible one and the court, in its discretion, may also grant renewal in the interest of justice, upon facts which were known to the movant at the time the original motion was made’ ” (*Vita v. Alston Signaling, Inc.*, 308 AD2d 582, 582 [2d Dept 2003] citing *Tishman Construction Corporation of New York v. City of New York*, 280 AD2d 374, 376 [1st Dept 2001]; see also *Huma v. Patel*, 68 AD3d 821, 822 [2d Dept 2009]; *Kennedy v. Coughlin*, 172 AD2d 666 [2d Dept 1991]; *Hantz v. Fishman*, 155 AD2d 415 [2d Dept 1989]; *Blumstein v. Menaldino*, 144 AD2d 412 [2d Dept 1988]; *Patterson v. Town of Hempstead*, 104 AD2d 975 [2d Dept 1984]; *Esa v. New York Property Insurance Underwriting Association*, 89 AD2d 865 [2d Dept 1982]).

Discussion

The conference held in Chambers (Kevins, J.) on March 18, 2019 and the subsequent conference placed on the record, also on March 18, 2019, both occurred after SCDS’s dismissal motion (Sequence 001) had been fully briefed. The last submissions concerning that motion were filed in NYSCEF on March 1, 2019 (sur-reply and opposition thereto), although Sequence 001 had been marked fully submitted as of August 16 or 17, 2017. Accordingly, the March 18, 2019 minutes and the more recent inquiry made by this Court on September 23, 2020 as to what was discussed in chambers with Justice Kevins constitute “new facts” that could not have been presented upon the prior motion. Notably, the March 18, 2019 minutes were never uploaded to NYSCEF prior to this Court’s issuance of its May 7, 2020 Decision and Order.

The substance of what occurred prior to this Court’s granting of SCDS’s motion would have changed this Court’s determination had the Court been aware of such facts. The March 18, 2019 minutes submitted upon the renewal motions unequivocally establish that Justice Kevins vacated the stay of discovery that had been in place since SCDS filed its pre-answer motion for dismissal. Justice Kevins also stated that,

a read of the papers also had me make the determination that I’m also going to convert the motion to dismiss to a summary judgment motion, and I’m giving everybody notice at this time. You’ll get further notice as well with our motion decision. Additionally, I’ve also given all the counsel my ideas of where I thought this case was going after reading all the papers, and it’s my understanding that counsel is going to enter into a discovery schedule, as well as talk with their clients regarding whether or not they can mediate this case while we’re doing discovery. . .

Following these remarks, Justice Kevins placed on the record that she signed the Preliminary Conference Stipulation and Order and adjourned the case to May 21, 2019. Although timely decisions on the four pending motions, including SCDS’s motion, were promised, SCDS’s motion was not decided until this Court rendered its decision on May 7, 2020, and without the benefit of knowing what had transpired before Justice Kevins.

Insofar as the March 18, 2019 Chambers conference that took place with counsel and Justice Kevins immediately preceding Justice Kevins' on-the-record statements, this Court requested that, on September 23, 2020, counsels state their recollections of that Chambers conference. In addition to counsel for plaintiffs and SCDS, who were both present on March 18, 2019, the other counsel relied upon the notes contained in their respective files that were made at the time of the conference, and one defendant relied on the affirmation of counsel who was present at the March 18, 2019 conference. The minutes adduced on September 23, 2020 reveal that all counsel, except counsel for SCDS, recalled Justice Kevins stating that she intended to deny SCDS's dismissal motion because it was premature, since there were factual issues that she identified when she read the submitted papers. Further according to counsels' recollections, Justice Kevins stated that she was going to convert the dismissal motion to one for summary judgment and then hold the motion in abeyance until the completion of discovery. Plaintiff's counsel recalled that Justice Kevins inquired of SCDS's counsel as to whether SCDS preferred a ruling on the record dismissing the motion or a written decision, and that SCDS's counsel requested that the court issue a written decision.

On September 23, 2020, SCDS's counsel disputed the recollections of the other counsel, but allowed that Justice Kevins said, "I'm probably going to deny the motion." SCDS's counsel recalled that Justice Kevins asked him if he would like the motion converted to one for summary judgment, but that he answered, "no;" he wanted a decision on the dismissal motion.

The next issue discussed at the September 23, 2020 proceeding is what occurred on May 21, 2019, which was the next appearance date after March 18, 2019. There is a so-ordered stipulation dated May 21, 2019 (NYSCEF Doc # 188), issued by Justice Kevins, which reads, in pertinent part, that "SCDS's motion to dismiss the complaint Motion Sequence No. 1 marked submitted as a 3211 motion, not converted to a 3212 motion." It is undisputed that all counsel present, including counsel for the plaintiffs and SCDS, signed the so-ordered stipulation.

This so-ordered stipulation contravenes Justice Kevins' statement on the March 18, 2019 record that she intended to convert the dismissal motion into a summary judgment motion and then hold the summary judgment motion in abeyance until the completion of discovery. In any event, this so-ordered stipulation as to SCDS's pre-answer dismissal motion (Sequence 001) was issued after plaintiffs amended their complaint on April 2, 2019, and after SCDS joined issue by answering the amended summons and complaint on April 22, 2019. Nowhere in the so-ordered stipulation, or anywhere else in the record of this case, is there any statement/request that the pre-answer motion to dismiss be considered *vis a vis* the amended complaint.

An amended complaint supersedes the original pleading and becomes the only complaint in the action (*Mendrzycki v. Cricchio*, 58 AD3d 171, 174 [2d Dept 2008]).

It is well settled that "the filing of [an] amended verified complaint d[oes] not render [a] defendants' motion to dismiss the original verified complaint academic [where] the amended verified complaint d[oes] not substantively alter the [causes of action alleged in the original complaint]" (*EDP Hosp. Computer Sys. v. Bronx-Lebanon Hosp. Ctr.*, 212 AD2d 570, 571 [2d Dept 1995]).

“The court in *Sholom & Zuckerbrot Realty Corp. v. Coldwell Banker Commercial Group, Inc.*, 138 Misc.2d 799, 525 N.Y.S.2d 541 (Sup. Ct., Queens County 1988), held that plaintiff’s amendment of the complaint after the defendant has made a motion under CPLR 3211 to dismiss it does not automatically abate the motion. It says that the ‘better rule’ gives the movant ‘the option of withdrawing its motion or pressing it with regard to the amended pleading,’ observing that a rule that would have the amendment abate the motion automatically would only invite ‘additional motion practice’” (*John R. Higgitt, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:61*).

“The Appellate Division, First Department, adopted this ‘better rule’ in *Sage Realty Corp. v Proskauer Rose* (251 AD2d 35, 38, 675 N.Y.S.2d 14 [1998]), and the Appellate Division, Second Department, in *Livadiotakis v. Tzitzikalakis* (302 AD2d 369, 369, 753 N.Y.S.2d 898 [2003] citing *Sage* 251 AD2d at 38) also embraced this rule where the motion to dismiss is addressed to the merits” (*Gurary v Rendler*, 40 Misc3d 1231[A] [Sup Ct Kings County 2013]).

“Reviewing this subject in *Sage Realty Corp. v. Proskauer Rose LLP*, 251 A.D.2d 35, 675 N.Y.S.2d 14 (1998), the First Department held that the moving party “has the option to decide whether its motion should be applied to the new pleadings.” In *Sage*, the defendant asked the court to treat the original motion as being addressed to the amended complaint as well. This was permissible, held the court. And because plaintiff did not object to the treatment, plaintiff could claim no prejudice. *See Sobel v. Ansanelli*, 98 A.D.3d 1020, 951 N.Y.S.2d 533 (2d Dep’t 2012); *Toikach v. Basmanov*, 31 Misc.3d 615, 918 N.Y.S.2d 844 (Sup. Ct., Kings County 2011). By making such a request, the defendant must of course be satisfied that the amended complaint does not add anything new, or at least does not add any new matter to which the original motion has not addressed itself. But that’s up to the defendant.” (*John R. Higgitt, Practice Commentaries, supra*).

Here, there was no such specific request to the court to treat the original motion to dismiss as being addressed to the amended complaint. Although the May 21, 2019 so-ordered stipulation could be construed to imply that the two-year-old motion was meant to address the amended complaint, the course charted by SCDS, evidenced by its full engagement in matters of discovery to include depositions, contradicts the potential applicability of that stipulation to the amended complaint. SCDS did not unequivocally “elect” to apply its dismissal motion to the amended complaint (*Sobel, supra* at 1022; cf. *Rodriguez v Dickard Widder Indus.*, 150 AD3d 1169, 1170 [2d Dept 2017]). Rather, SCDS answered the amended complaint without adopting the motion as applicable to the amended complaint, and the course charted by SCDS evinced its intent to abandon its prior motion and litigate the causes of action by participating in discovery. For example, SCDS’s November 18, 2019 letter to the Court requests that the Court extend the time for all defendants to complete the plaintiffs’ depositions due to difficulty in scheduling all of the law firms and the plaintiffs’ then-claimed availabilities. Moreover, SCDS responded to the Combined Demands of the other parties served upon it, and SCDS served its own Combined Demands, in addition to providing documents in response to numerous discovery requests.

Accordingly, this Court grants the three motions for renewal. Upon renewal, this Court's Decision and Order dated May 7, 2020 granting SCDS's dismissal motion is hereby vacated. SCDS failed to elect that its 2017 dismissal motion apply to the 2019 amended complaint; instead, SCDS joined issue when served with the amended complaint and embarked on a course indicating that it desired to litigate this action on the merits, after engaging in substantial discovery, which, frankly, was Justice Kevins' original intention.

Having vacated its May 7, 2020 Decision and Order, the Court does not reach those branches of the pending motions seeking reargument.

The parties are directed to continue with discovery with all deliberate speed.

The foregoing constitutes the Decision and Order of this Court.

Dated: February 22, 2021
Riverhead, NY


CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [] NON-FINAL DISPOSITION [X]