

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D21671
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_____AD3d_____

Argued - November 17, 2008

STEVEN W. FISHER, J.P.
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON
ARIEL E. BELEN, JJ.

2007-08102

DECISION & ORDER

Kwame Boakye-Yiadom, appellant, v Roosevelt
Union Free School District, et al., respondents.

(Index No. 131/07)

The Law Offices of Louis D. Stober, Jr., LLC, Garden City, N.Y. (Sheila S. Hatami of counsel), for appellant.

Miranda Sokoloff Sambursky Slone Verveniotis LLP, Mineola, N.Y. (Steven C. Stern and Steven Verveniotis of counsel), for respondents.

In an action to recover damages for breach of contract, promissory estoppel, and defamation, the plaintiff appeals from an order of the Supreme Court, Nassau County (Palmieri, J.), entered July 30, 2007, which (a) denied his motion denominated as one for leave to reargue, but which was, in actuality, one for leave to renew and reargue his opposition to the defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (7), which motion had been granted in an order dated April 18, 2007, (b) denied his separate motion for leave to serve a late notice of claim or, in the alternative, to deem the notice of claim dated November 3, 2006, timely served, and (c) denied his separate motion for leave to amend the complaint and replead.

ORDERED that the appeal from so much of the order as denied that branch of the plaintiff's motion which was for leave to reargue is dismissed, as no appeal lies from an order denying reargument; and it is further,

ORDERED that the order is affirmed insofar as reviewed; and it is further,

December 30, 2008

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ORDERED that one bill of costs is awarded to the respondents.

After the Supreme Court, by order dated April 18, 2007, granted the defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and(7), the plaintiff filed three separate motions. The first motion was denominated as one for leave to reargue, but in actuality, it was one for leave to renew and reargue his opposition to the defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). The second motion was for leave to serve a late notice of claim, or in the alternative, to deem the notice of claim dated November 3, 2006, timely served. The third motion was for leave to amend the complaint and replead. The Supreme Court denied all three motions.

The denial of a motion for leave to reargue is not appealable (*see Lago v City of New York-Workers' Compensation Div.*, _____AD3d_____, 2008 NY Slip Op 08491 [2d Dept 2008]), and, therefore, the plaintiff's appeal from so much of the order as denied that branch of his motion which was for leave to reargue must be dismissed. In his motion, however, the plaintiff sought to raise new matter and, to that extent, his motion was, in fact, also one for leave to renew (*see* CPLR 2221[e]). When a motion for leave to renew is grounded on new facts not presented on the prior motion, the movant must provide a reasonable justification for failing to present the new facts on the prior motion (*see* CPLR 2221[e][2], [3]; *Lardo v Rivlab Transp. Corp.*, 46 AD3d 759). Here, the court properly denied that branch of the plaintiff's motion which was, in effect, for leave to renew, as the plaintiff failed to provide a reasonable justification for not alleging the new facts, which were known to him when he opposed the defendants' motion to dismiss the complaint, in his original opposition to the motion (*see Tricoche v Warner Amex Satellite Entertainment Co.*, 48 AD3d 671, 673; *Lardo v Rivlab Transp. Corp.*, 46 AD3d at 759).

A claimant who has failed to serve a timely notice of claim may seek leave of the court to serve a late notice of claim so long as the statute of limitations has not run on the claim itself (*see* Education Law § 3813[2-a]; General Municipal Law § 50-e[5]; *Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 143). Here, the plaintiff's notice of claim was untimely (*see Boakye-Yiadam v Roosevelt Union Free School Dist.*, _____AD3d_____, [Appellate Division Docket No. 2007-04190, decided herewith]). Under the particular circumstances of this case, the Supreme Court did not improvidently exercise its discretion in denying the plaintiff's motion for leave to serve a late notice of claim or, in the alternative, to deem the notice of claim dated November 3, 2006, timely served (*see Matter of Roland v Nassau County Dept. of Social Servs.*, 35 AD3d 477, 478; *Matter of Belenky v Nassau Community Coll.*, 4 AD3d 422).

Our determination that the Supreme Court did not improvidently exercise its discretion in denying the motion pertaining to the late notice of claim leads directly to our conclusion that the Supreme Court likewise did not improvidently exercise its discretion in denying the plaintiff's motion for leave to amend the complaint and replead. Although leave to replead or amend pleadings should be "freely given" (CPLR 3025[b]; *see Janssen v Village of Rockville Centre*, _____AD3d_____, 2008 NY Slip Op 09962, *8 [2d Dept 2008]), a court should deny such a motion when the proposed amendment or repleading is palpably insufficient or patently without merit (*see Janssen v Village of Rockville Centre*, _____AD3d_____, 2008 NY Slip Op 09962, *8 [2d Dept 2008]; *Brooks v Robinson*, _____AD3d_____, 2008 NY Slip Op 08439 [2d Dept 2008]; *Scofield*

v DeGroodt, 54 AD3d 1017). Here, inasmuch as the plaintiff may not maintain causes of action for which he failed to serve a timely notice of claim (*see* Education Law § 3813[1], [2]; General Municipal Law § 50-e[1]; *cf. Mezzacappa Bros., Inc. v City of New York*, 29 AD3d 494, 494-495), the repleading of those causes of action, the amendment of the complaint with respect to them, or the addition of new claims similarly barred by the failure to timely serve a notice of claim, would be palpably insufficient. Thus, the plaintiff's motion for leave to amend the complaint and replead was properly denied.

The plaintiff's remaining contention is without merit.

FISHER, J.P., ANGIOLILLO, DICKERSON and BELEN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court