

Lewis-EI v State of New York

2012 NY Slip Op 31385(U)

May 8, 2012

Supreme Court, Nassau County

Docket Number: 12765/11

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

DARRYL LEWIS-EL,

Plaintiff(s),

-against-

Index No. 12765/11

**Motion Submitted: 3/14/12
Motion Sequence: 003**

**THE STATE OF NEW YORK, COUNTY OF
NASSAU, NASSAU COUNTY POLICE
DEPARTMENT, POLICE OFFICER HOWARD
FRIEDBURG SHIELD #2222, HOWARD
FRIEDBURG, OFFICER DOE, JOHN, OFFICER,
JANE DOE #1, JANE #2, ASTORIA FEDERAL
SAVINGS BANK [2090 MERRICK ROAD,
MERRICK, NEW YORK REPUBLIC, 11566-4737]
MONIKA SHAH, MONIKA SHAH, [2090
MERRICK ROAD, MERRICK, NEW YORK
REPUBLIC, 11566-4737] AMY SUAU, AMY SUAU
[2090 MERRICK ROAD, MERRICK NEW YORK
REPUBLIC, 11566-4737],**

Defendant(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Plaintiff, appearing *pro se*, has filed a "Notice of Motion to Restore to the Calendar for Re-Determination Because of Error." Defendants Astoria Federal Savings Bank, Monika Shah and Amy Suau ("the Bank defendants") oppose the requested relief.

Upon review of plaintiff's papers, it appears that plaintiff seeks reargument of the denial of his motion for leave to amend the complaint, and for reargument of his opposition to the Bank defendants' motion to dismiss the complaint as against them.

The Bank defendants' motion to dismiss the original complaint was received in the Nassau County Clerk's Office on September 30, 2011, in response to the complaint filed on September 2, 2011.¹ The Bank defendants' motion is designated by the Court as Motion Sequence 1. By its Decision and Order dated January 24, 2012, the Court granted the Bank defendants' motion to dismiss the original complaint against them. The original complaint alleged four causes of action.

Plaintiff's motion to amend the complaint was received in the Nassau County Clerk's Office on October 20, 2011, and is designated as Motion Sequence 2. By the same Decision and Order dated January 24, 2012, the Court denied plaintiff's motion to amend the complaint to include two additional causes of action.

Considering first that aspect of plaintiff's motion to reargue his opposition to the dismissal of the original complaint (Motion Sequence 1), the Court recognizes that, it is settled that "[m]otions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision" (*Carrillo v. PM Realty Group*, 16 A.D.3d 611, 793 N.Y.S.2d 69 (2d Dept., 2005); see *CPLR § 2221[d][2]*; *Barnett v. Smith*, 64 A.D.3d 669, 883 N.Y.S.2d 573 (2d Dept., 2009); *Frisenda v. X-Large Enterprises*, 280 A.D.2d 514, 720 N.Y.S.2d 187 (2d Dept., 2001); *William P. Pahl Corp. v. Kassis*, 182 A.D.2d 22, 588 N.Y.S.2d 8 (1st Dept., 1992); see also *Foley v. Roche*, 68 A.D.2d 558, 418 N.Y.S.2d 588 [1st Dept., 1979]).

Notably, the remedy "is not designed to provide an unsuccessful party with successive opportunities" to make repetitious applications, "rehash questions already decided" or "present arguments different from those originally presented" (*V. Veeraswamy Realty v. Yenom Corp.*, 71 A.D.3d 874, 895 N.Y.S.2d 860 (2d Dept., 2010); *William P. Pahl Equipment Corp. v. Kassis*, *supra*; see *Gellert & Rodner v. Gem Community Mgt.*, 20 A.D.3d 388, 797 N.Y.S.2d 316 (2d Dept., 2005); *Pryor v. Commonwealth Land Title Ins. Co.*, 17 A.D.3d 434, 436, 793 N.Y.S.2d 452 (2d Dept., 2005); *Amato v. Lord & Taylor, Inc.*, 10 A.D.3d 374, 375, 781 N.Y.S.2d 125 [2d Dept., 2004]).

The Court finds that in his motion for leave to reargue, plaintiff has failed to

¹It appears from a review of the Court's file on this matter that the summons and complaint was served upon the Bank on or about September 8, 2011.

demonstrate that this Court overlooked or misapprehended any matters of law or fact applicable to this action in determining the Bank defendants' original motion to dismiss the complaint that was filed on September 2, 2011 (*CPLR § 2221(d)(2)*; *McGill v. Goldman*, 261 A.D.2d 593, 691 N.Y.S.2d 75 (2d Dept., 1999); *Amato v. Lord & Taylor*, 10 A.D.3d 374, 781 N.Y.S.2d 125 [2d Dept., 2004]). Rather, it appears that plaintiff repeats the earlier arguments advanced in his original opposition, and advances new arguments.

For all the foregoing reasons, plaintiff's motion for reargument of Motion Sequence 1 (the dismissal motion) is denied.

Turning now to plaintiff's motion for reargument of the denial of his motion for leave to amend the complaint (Motion Sequence 2), it is conceded by the Court that it made a misstatement of fact as to when the proposed amended complaint was received by the Nassau County Clerk's Office in relation to the filing of the original complaint.

In their opposition, the Bank defendants concur with plaintiff that the Court misstated that the proposed amended complaint was filed more than one year after the original complaint was filed.

Accordingly, this Court has determined that it would be a provident exercise of its discretion to grant that aspect of plaintiff's motion for reargument, based on the finding that this Court overlooked or misapprehended matters of fact related to the length of the time period between the filing of the original complaint and the filing of the proposed amended complaint (*see Matter of Bastien v. Motor Veh. Acc. Indem. Corp.*, 62 A.D.3d 791, 877 N.Y.S.2d 905 (2d Dept., 2009); *Barrett v. Jeannot*, 18 A.D.3d 679, 795 N.Y.S.2d 727 [2d Dept., 2005]). Thus, plaintiff's motion to reargue Motion Sequence 2 is granted.

In its earlier Decision and Order dated January 24, 2012, the Court correctly stated that "[p]laintiff filed his original complaint with the Nassau County Clerk's Office on September 2, 2011," and duly determined that the proposed amendment was received by the Clerk's Office on October 20, 2011. In an apparent typographical error, the Court stated that the proposed amendment was received by the Clerk's Office "more than one year after the original complaint was filed" (emphasis added). This is an obviously incorrect statement of the time period between the two filings, as the time period should have been stated to be "more than one month," not more than one year.

Thus, the Court hereby amends its Decision and Order dated January 24, 2012, in accordance with the foregoing, in order to correct the error.

Upon review of its prior Order, and having granted reargument to correct the factual

misstatement outlined above, the Court has also determined that plaintiff was not required to seek leave of the Court to amend the complaint.

CPLR § 3025(a) provides for amendments without leave. “A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.”

In this case, plaintiff served the summons and complaint upon the Bank defendants on September 8, 2011. The Bank defendants did not serve a responsive pleading, but instead moved to dismiss the complaint pursuant to CPLR § 3211. The Bank defendants’ motion was received by the Nassau County Clerk on September 30, 2011.

“If the pleading to be amended does require a response. . . and the defendant, instead of answering, moves to dismiss the complaint under CPLR 3211. . . , the making of [that] motion automatically extends the defendant’s responding time, and by so doing extends as well the time in which the plaintiff may amend the complaint as of course” (*Siegel, New York Practice* § 236, at 408 (5th ed); *CPLR § 3211 (f)*; *CPLR § 3024 (c)*).

Thus, plaintiff was not required to seek leave of the Court to amend the complaint at the time he filed the amended complaint on October 20, 2011.

Nonetheless, the Bank defendants’ opposition to plaintiff’s reargument motion concerning the denial of leave to amend requests that this Court adhere to its determination of the original motion.

The Court’s Decision and Order dated January 24, 2012 made various determinations addressed to the merits of plaintiff’s fifth and sixth causes of action sounding in civil rights’ violations and negligence.

Thus, the Bank defendants’ opposition to the instant motion to reargue serves as a motion to strike the amended complaint containing the original four causes of action, plus the fifth and sixth causes of action.

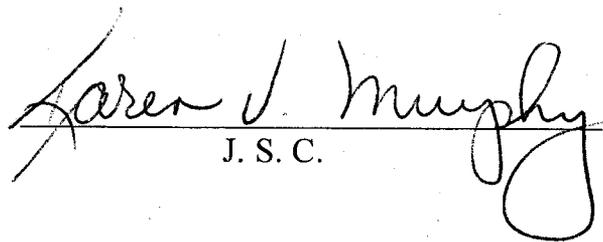
Plaintiff’s papers, including his memorandum of law in support of the motion to reargue, addresses the Court’s previous determinations made as to the merits of plaintiff’s fifth and sixth causes of action.

Upon reargument, and with respect to the merit of plaintiff’s fifth and sixth causes of action, the Court adheres to its original determinations.

Having denied reargument as to dismissal of the original complaint containing the first four causes of action, and adhering to its original determinations regarding the merits of the fifth and sixth causes of action contained in the amended complaint, it is the determination of this Court that the amended complaint against the Bank defendants is dismissed in its entirety.

The foregoing constitutes the Order of this Court.

Dated: May 8, 2012
Mineola, N.Y.


J. S. C.

ENTERED
MAY 14 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE