Pena v New York Mexicana Car & Limousine Service Corp.
2004 NY Slip Op 30240(U)
August 24, 2004
Supreme Court, Queens County
Docket Number: 0023819/2001
Judge: Patricia P. Satterfield

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA PART 19
Justice

HERIBERTO PENA,	:	Index Number 23819 2001
Plaintiff,	:	Motion Date June 9, 2004
- against -	:	
NEW YORK MEXICANA CAR & LIMOUSINE SERVICE CORP., et al.	:	Motion Cal. Number 25
Defendants.	:	

The following papers numbered 1 to 3 read on this motion by plaintiff Heriberto Pena for, inter alia, an order permitting him to reargue and to renew his opposition to a previous motion by the defendants for summary judgment dismissing the complaint against them.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Reply Affidavits	3

Upon the foregoing papers it is ordered that:

That branch of the motion which is for an order permitting the plaintiff to renew his opposition to the defendants' prior motion for summary judgment is denied.

That branch of the plaintiff's motion which is for an order permitting him to reargue his opposition to the previous motion is granted. Upon reargument, the court adheres to its previous decision.

That branch of the motion which is for an order, inter alia, disqualifying Lorenzo Casanova, Esq. as the attorney for the defendants in this action is denied.

(See the accompanying memorandum.)

Dated: August 24, 2004

PPS

J.S.C.

M E M O R A N D U M

SUPREME COURT : QUEENS COUNTY
IA PART 19

X

HERIBERTO PENA,

Plaintiff,

- against -

NEW YORK MEXICAN CAR & LIMOUSINE SERVICE CORP., et al.,

Defendants.

X

INDEX NO. 23819/01

BY: SATTERFIELD, J.

MOTION DATE: 6/9/04

MOTION CAL NO: 25

DATED: August 24, 2004

Plaintiff Heriberto Pena has moved for, inter alia, an order permitting him to reargue and to renew his opposition to a previous motion by the defendants for summary judgment dismissing the complaint against them.

On October 8, 1998, plaintiff Pena and twenty-nine other individuals executed a shareholders' agreement relating to defendant Mexicana Car & Limousine Service Corp., a taxi and limousine company. Section 30 of the shareholders' agreement provided in relevant part: "It is specifically understood and agreed by and between the parties hereto that if there arises any dispute between the parties which cannot be reconciled amongst them, all parties hereby submit themselves to binding arbitration before a panel of three (3) arbitrators to be selected from the American Arbitration Association."

The defendants allege that the owner of an auto repair

shop located at 104-32 45th Avenue, Corona, New York expressed an interest in selling the shop to defendant Mexicana Car & Limousine Service Corp., which had been looking for such an opportunity. On November 16, 2000, the shareholders passed a resolution approving the purchase of the shop for $23,000. The defendants allege that the plaintiff and two other shareholders met with the seller and "either made a better offer than the $23,000 previously accepted by the seller or somehow convinced the owner of the shop not to sell to NY Mexican Car & Limousine Service Corp." After a shareholders' meeting, where it was found that the plaintiff had interfered with the corporation's business opportunity, "[i]t was agreed and resolved that the Plaintiff and two co-conspirators could no longer continue as shareholders of the Corporation and their undated resignations were accepted by an overwhelming majority vote of the shareholders." (Pursuant to paragraph 8 of the shareholders' agreement, each shareholder had previously signed an undated resignation.)

On September 14, 2001, the plaintiff began this action by the filing of a summons and a complaint. The complaint alleged, inter alia, that defendant Diego Delgado, the controlling shareholder of the defendant corporations, had breached his fiduciary duties and had engaged in fraudulent and oppressive conduct. Plaintiff Pena sought, inter alia, a judgment directing an accounting and awarding damages. On the same day, Mario

Opereza, one of plaintiff Pena's alleged co-conspirators, began a similar action in the New York State Supreme Court, County of Queens (Opereza v New York Mexicana Car & Limousine Service Corp., [Index No. 23820/01]).

On January 30, 2002, the defendants in this action moved for summary judgment dismissing the complaint against them on the ground that the arbitration clause in the shareholders' agreement had the effect of barring the plaintiff from resorting to the courts. This court granted the defendants' motion by decision and order (one paper) dated March 14, 2002. The defendants in Opereza v New York Mexicana Car & Limousine Service Corp. also moved to dismiss that action as barred by the arbitration clause, and Mr. Justice Kitzes granted the motion by decision and order (one paper) dated March 19, 2002.

The plaintiff submitted this motion to reargue and to renew on June 9, 2004, over two years after this court rendered its decision and order dismissing this action. The plaintiff admittedly seeks to amend the complaint to add nine other shareholders as plaintiffs and eight other shareholders as defendants to this action. Moreover, the plaintiff now seeks to bring this action as a shareholder's derivative action.

That branch of the motion which is for an order permitting the plaintiff to renew his opposition to the defendants' prior motion for summary judgment is denied. The new evidence is

the actual videotape of the first shareholders' meeting on April 8, 1998. A party who seeks leave to renew must demonstrate both new facts to support the motion and a justifiable excuse for not initially placing such facts before the court. (N.A.S. Partnership v Kligerman, 271 AD2d 922; Wagman v Village of Catskill, 213 AD2d 775.) Where a party does not offer a valid excuse for failing to submit new facts on the original motion, his motion to renew may not be entertained. (See, CPLR 2221[e][3]; Linden v Moskowitz, 294 AD2d 114; Delvecchio v Bayside Chrysler Plymouth Jeep Eagle, Inc., 271 AD2d 636.) In the case at bar, the plaintiff's allegation that he was not aware of the contents of the shareholders' agreement when he signed it is not new, having been raised on the original motion. Moreover, the plaintiff failed to offer a valid excuse for not raising new allegations (if any) regarding fraud and duress previously. Although the plaintiff has allegedly only recently come into possession of a videotape of the first shareholders' meeting where the fraud and duress were allegedly perpetrated, nevertheless, he was present at that meeting.

That branch of the plaintiff's motion which is for an order permitting him to reargue his opposition to the previous motion is granted. Upon reargument, the court adheres to its previous decision. A motion to reargue may be brought where "the court overlooked or misapprehended the facts or the law or for some

reason mistakenly arrived at its earlier decision." (Schneider v Solowey, 141 AD2d 813; see, CPLR 2221[d]; Grassel v Albany Med. Ctr. Hosp., 223 AD2d 803; William P. Pahl Equipment Corp. v Kassis, 182 AD2d 22.) The plaintiff opposed the original motion on the grounds that he "was not aware of the contents of the shareholders' agreement *** and a copy of the agreement was never provided by the defendants." The plaintiff contends that the defendants' conduct amounted to fraud. "[W]here a challenge is made to the validity of the arbitration clause itself, such as fraud in the inducement, the issue is for the court to decide ***." (Arc Elec. & Mechanical Contractors Corp. v Invensys Bldg. Systems, Inc., 2 AD3d 314; see, Utica Mut. Ins. Co. v Gulf Ins. Co., 306 AD2d 877.) "Under CPLR article 75 *** the court must decide the challenge where it is to the validity of the arbitration clause itself, or where the alleged illegality permeates the contract as a whole ***." (Matter of Teleserve Systems, Inc. (MCI Telecommunications Corp., 230 AD2d 585, 592; see, Silverman v Benmor Coats, Inc., 61 NY2d 299.) In order to establish fraud, the plaintiff had to show (1) the false representation or concealment of a material existing fact, (2) scienter, (3) deception, (4) reliance, and (5) injury. (See, Lama Holding Co. v Smith Barney, 88 NY2d 413; New York Univ. v Continental Ins. Co., 87 NY2d 308; New York City Transit Authority v Morris J. Eisen, P.C., 276 AD2d 78; American Home Assur. Co. v Gemma Const. Co., Inc., 275 AD2d 616; Swersky v

Dreyer & Traub, 219 AD2d 321.) The plaintiff failed to make this showing. The plaintiff's other arguments are new and may not be raised for the first time on a motion to reargue. "A motion to reargue does not afford an unsuccessful party an opportunity to advance arguments different from those proffered in the original application ***." (People v Cordes, 270 AD2d 430; McGill v Goldman, 261 AD2d 593; William P.Pahl Equip. Corp. v Kassis, 182 AD2d 22.)

That branch of the motion which is for an order, inter alia, disqualifying Lorenzo Casanova, Esq. as the attorney for the defendants in this action is denied. The court notes that Mr. Casanova died in November, 2003.

Short form order signed herewith.

PPS

J.S.C.