

Janssen v Incorporated Vil. of Rockville Ctr.
2007 NY Slip Op 34398(U)
April 27, 2007
Supreme Court, Nassau County
Docket Number: 004151/06
Judge: Thomas P. Phelan
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

HARRY JANSSEN,

Plaintiff(s),

-against-

INCORPORATED VILLAGE OF ROCKVILLE CENTRE,
ANGELO TAYLOR, PETER KUNZE, KEVIN O'ROURKE
and TIMOTHY SEAMAN, Individually,

Defendant(s).

ORIGINAL RETURN DATE: 03/19/07
SUBMISSION DATE: 03/19/07
INDEX No.: 004151/06

MOTION SEQUENCE #4

The following papers read on this motion:

Notice of Motion.....	A
Answering Papers.....	B
Reply.....	C

Motion by plaintiff for an order pursuant to CPLR 3025 (c) granting him leave to amend his complaint to reinstate the previously dismissed first cause of action and to reinstate the previously dismissed 42 USC § 1983 claim contained in the second cause of action is granted.

This motion will be treated as a motion to replead pursuant to CPLR 3211 (e). A cause of action that has been dismissed cannot be amended.

Since the 2005 amendment to CPLR 3211 (e) (L 2005, ch 616), it is no longer required that a party seeking to replead make a showing that he or she has "good ground to support his [or her] cause of action or defense." (See **Andux v Woodbury Auto Park, Inc.**, 30 AD3d 362, 363). As plaintiff has now supplied the allegations found missing in the dismissed causes of action, leave to replead is granted.

Defendants' contention that the causes of action asserted in plaintiff's proposed repleaded complaint would be barred by the applicable three-year Statute of Limitations (CPLR 214 [2]) is unpersuasive. Pursuant to CPLR 203 (f) "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." In this case, the original

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pleading gives the requisite notice. (see, **Proskauer Rose Goetz & Mendelsohn LLP v Munao**, 270 AD2d 150, 151). Moreover, the merits of such defense “must be litigated on trial or by appropriate motion.” (**Rice v Spencer**, 43 Misc2d 331, 332; see, also, **Harriss v Tams**, 258 NY 229, 240-241).

As to the doctrine of law of the case, it does not apply to the proposed repleaded complaint. “The law of the case doctrine does not require that a determination made with respect to the sufficiency of a pleading be followed when an amended version of the same pleading, substantially different from the original one, is subsequently before the court for consideration.” (28 NY Jur2d, Courts and Judges § 266). Moreover, “the doctrine of law of the case applies only to legal determinations resolved on the merits.” (**Thompson v Cooper**, 24 AD3d 203, 205). In this case, only the 42 USC § 1983 claim based solely upon plaintiff being ordered to undergo drug testing was dismissed on the merits and that claim has not been reasserted.

With respect to the delay between the entry of the order dismissing most of the causes of action asserted in plaintiff’s complaint (i.e., September 13, 2006) and the service of this motion seeking leave to replead (i.e., March 2, 2007), this is not an extended period of delay in view of the fact that plaintiff retained new counsel and was deprived of prompt access to his file. In the absence of prejudice to defendants caused by the delay, this period of delay will be excused.

Accordingly, plaintiff is granted leave to replead his first and second causes of action as set forth in the proposed repleaded complaint. Service of the repleaded complaint shall be deemed complete upon defendants’ receipt of a copy of this order from any source.

This decision constitutes the order of the court.

Dated: 4-27-07

HON THOMAS P. PHELAN

Thomas P. Phelan

J.S.C.

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