[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN PART 3

Index Number : 122439/1999
GASSAB, CHEDLI
VS.
R.T.R.L.L.C.
SEQUENCE NUMBER : 017
VACATE STAY/ORDER/JUDGMENT
9

INDEX NO. 122439/99
MOTION DATE 1/5/09
MOTION SEQ. NO. 017
MOTION CAL. NO.

this motion to/for reargument, renewal + cross-motion for sanctions

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3,4,5,6,7,8
Replying Affidavits	9

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3-6-09

J.S.C.
HON. EILEEN BRANSTEN

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE
----------X
CHEDLI GASSAB,

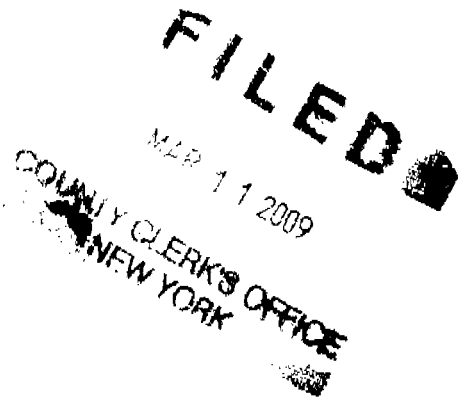
Plaintiff,

-against-

R.T.R.L.L.C.,

Defendants.

Index No.: 122439/99
Motion Date: 1-5-09
Motion Sequence No.: 017



AND THIRD AND FOURTH-PARTY ACTIONS
----------X

PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 2221, plaintiff Chedli Gassab ("Mr. Gassab") moves, for a second time, to renew and reargue his motion to vacate a jury verdict rendered on April 12, 2002 and the resulting judgment of November 24, 2003, which was denied in a Decision and Order dated January 14, 2008 (*see* Affirmation in Support ["Supp"], Ex. A).*

Bronx Builders, R.T.R.L.L.C., Price Thomas Studios, Inc., Katz & Kreinces, LLP, and Steinberg, Finco, Berger & Fischoff, P.C. ("Steinberg, Finco") (collectively "Opponents") oppose the motion and cross-move for costs and sanctions pursuant to 22 NYCRR 130.1.1.

---

* Originally, plaintiff's Notice of Motion stated that the relief requested was an order vacating the underlying verdict. In response to the opposition, plaintiff amended the Notice of Motion to reflect that he is seeking an order pursuant to CPLR 2221 and denominated the motion as his "Second Motion to Renew and Reargue."

DISCUSSION

Renewal

Mr. Gassab argues that renewal is warranted the second time around because his first set of renewal motion papers inadvertently included an incomplete affidavit from Dr. Hibbard that was missing several pages and a signature. Counsel points out that the mistake "could have been simply remedied by a phone call from chambers advising my office that the submission was incomplete and affording me the opportunity to cure the omission" (Affirmation of Michael Flomenhaft ["Supp Aff"] at 2 n1).

It is astonishing to learn, however, that Mr. Gassab's counsel was made aware of the missing pages before the motion's return date.

On March 14, 2008, counsel for Steinberg, Fineo informed plaintiff's attorney that:

> "Your scanned Exhibit C ('Supplemental Affidavit of Mary Hibbard, PhD.') to your latest motion is incomplete. The affidavit provided ends at page 13. The total number pages are unknown and the affidavit lacks a signature page.
>
> "It is expected that you will provide a complete copy" (Affirmation of Sean R. Lasky ["Lasky Aff"], Ex. F).

Plaintiff's attorney never responded to Steinberg, Fineo's letter and, after receiving notice that copies of the papers sent to counsel were missing pages, never ensured that the Court's papers were complete.

Under the circumstances, consideration of the affidavit now, after yet another motion has been made, would not be just. Plaintiff has not provided a reasonable justification for failing to submit a full affidavit after being informed of the problem.

In any event, a complete affidavit would have made absolutely no difference to the outcome of the first motion for renewal, which is the reason no telephone conference to address the incomplete motion papers was ever held. In the July 7, 2008, Decision and Order denying renewal, this Court made clear that "Mr. Gassab failed to provide a reasonable justification for failing to present the information earlier in support of his initial motion" (*see* July 7, 2008 Decision and Order, at 10). Thus, CPLR 2221(e)(3)'s requirement went wholly unsatisfied and the Court would not overlook the statutory mandate because it would not further the interests of justice.

Denial of renewal, once again, is based on CPLR 2221(e). There are no new facts that were "not offered on the prior motion that would change the prior determination."

Reargument

Mr. Gassab argues that this Court overlooked the September 17, 2007 affidavit by Dr. Hibbard that was attached to the reply papers on the motion to vacate the judgment. In that affidavit, Dr. Hibbard "explained that her April, 2002 trial testimony confirmed severe neurocognitive deficits in memory and executive function tantamount to incompetence under

CPLR 1202" (Supp Aff at ¶ 5). Mr. Gassab maintains that the "apparent failure to consider Dr. Hibbard's original Affidavit . . . perhaps explains the court's misapprehension that plaintiff's motion is flawed for apparent disregard of the April, 2002 trial proceedings" (*id.* at 6).

Plaintiff misapprehended the Court's determination. First, Dr. Hibbard did not actually conclude that Mr. Gassab was "incompetent according to CPLR 1201" until September 2007--FIVE YEARS after the jury verdict. It was not until 2007 that she insisted that hypothetically, had she been asked about appointment of a guardian, she would have "emphatically endorsed" the idea (Aff Supp Ex B at ¶ 2).

More significantly, denial of the motion to vacate the verdict and judgment was premised on the fact that in 2007, Dr. Hibbard focused on her own 2002 trial testimony but not once in that submission did she refer to Mr. Gassab's trial testimony and his actual litigation decision making and factor that into her years-after-the-fact CPLR 1201 analysis.

Moreover, Dr. Hibbard's affidavit, which, in any event, was considered by the Court, should not have been submitted for the first time on reply (*see Maldonado v Whitehall Apartment Co.*, 56 AD3d 273 [1st Dept 2008]; *Schirmer v Athena-Liberty Lofts, LP*, 48 AD3d 223, 224 [1st Dept 2008]; *Anderson v Beth Israel Medical Ctr*, 31 AD3d 284, 288 [1st Dept 2006]).

Additionally, reargument of the initial motion for the second time is grossly untimely as the application must be made "within thirty days after service of a copy of the order determining the prior motion and written notice of its entry," which took place in January 2008 (CPLR 2221[d]).

Because the Court did not overlook or misapprehend anything, Mr. Gassab's untimely motion for reargument is denied.

Sanctions

Opponents of the motion cross-move for sanctions. They explain that Mr. Gassab has appealed this Court's initial determination, moved for renewal and reargument once, which was denied, and now again moves for yet the same relief a second time. They maintain:

> "these multiple motions certainly harass and monetarily injure the insurers who are paying lawyers to oppose these motions. Needless legal expenses were generated on behalf of each of the defendants. Defendants should be allowed to recoup these costs" (Affirmation of John W. Hoefling, at ¶ 9).

Opponents further point out that in the underlying decision this Court concluded that:

> "Much tougher than the question of whether Mr. Gassab had the capacity to adequately prosecute his action--undoubtedly he did--is the issue of whether sanctions should be imposed for making this motion, which lacks any merit. In attempting to obtain relief for his client, Mr. Gassab's counsel distorted defense counsel's statement and irresponsibly failed to have the psychiatric experts consider the litigation record and Mr. Gassab's actual conduct in assessing his ability to 'adequately' prosecute this case years ago. Plaintiff's counsel furthermore made a ridiculous cross-motion for sanctions (which itself

could be the basis for sanctions). Because there does not appear to have been any intent to maliciously injure the parties in making this motion, however, plaintiff's counsel **barely** escapes the imposition of costs and sanctions pursuant to 22 NYCRR. 130-1.1" (Lasky Aff. Ex B at 17).

In opposition to the sanctions cross-motions, plaintiff's attorney urges:

- "My essential 'misconduct' has been submitting uncontradicted corroborating evidence in support of Mr. Gassab's prior incompetence" (Reply at ¶ 3);

- "Most respectfully, the succession of plaintiff's motions has been motivated solely by responsible representation of my client and my attempted responsiveness to the court's criticisms and concerns" (*id.* at ¶ 7); and

- Plaintiff's motion practice has also been well grounded in law (*id.* at ¶ 8).

22 NYCRR 130-1.1(a) authorizes the court to award any party "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part." Conduct is deemed frivolous if, among other things, "it is completely without merit in law" or "asserts material factual statements that are false" and includes making a "frivolous motion for costs or sanctions." In determining whether conduct is frivolous, courts must consider "the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

Plaintiff's counsel has engaged in frivolous conduct.

First, in the initial motion to vacate the verdict and judgment, Mr. Gassab's counsel took defense counsel's statements completely out of context. He quoted selectively in a manner that was misleading and inaccurate, claiming that defense counsel admitted that Mr. Gassab had "serious deficits." Counsel failed to quote the rest of defense counsel's statement, which demonstrated the firm belief that Mr. Gassab "presented himself" as a man with deficits but that he actually had capacity. In making that representation to the Court, counsel for plaintiff effectively misstated a material fact (*see Burr v Burr*, 51 AD3d 433, 434 [1st Dept 2008] [sanctions imposed based on arguments that lacked merit and factual contentions were contradicted by the evidence]). Counsel also cross-moved for sanctions when there was absolutely no basis for doing so.

Second, plaintiff's counsel took this Court's decision denying the motion to vacate as an invitation for a do-over and moved for reargument and renewal without paying attention to the CPLR's requirements. To the extent that the Court pointed out defects in the initial submissions, rather than simply appealing, plaintiff's counsel moved to renew, supplying information--albeit incomplete--that was readily available at the time of the initial motion.

Now, plaintiff's counsel moves for reargument and renewal a second time and for the ultimate relief requested--vacatur of the verdict and judgment--for the third time. Again, it appears, that counsel believes that the CPLR authorizes endless renewal and reargument motions until the Court changes its mind. The papers on this motion alone, when stacked up, measure almost a foot high. Opponents' attorneys have already had to counter the same arguments three times, and on appeal, will challenge plaintiff's position for a fourth time.

In this motion, moreover, plaintiff's counsel again fails to have any regard for the CPLR's requirements, which are intended to safeguard precisely against this type of conduct. For a second time, counsel moves for reargument despite the fact that a motion had already been made and denied, and despite the fact that the application is clearly untimely. On renewal, <u>again</u> plaintiff's counsel fails to explain why the evidence submitted on this motion was not provided either on the underlying motion or on the renewal motion after he had notice that papers were missing. Additionally, counsel entirely failed to appreciate that there is no basis for renewal as the evidence submitted would not change the outcome of the prior determination.

In sum, this motion is frivolous. It lacks legal merit, which should have been readily apparent given this Court's prior determination that was based on CPLR 2221's requirements (*see Newman v Berkowitz*, 50 AD3d 479 [1st Dept 2008] [affirming award of costs, including

attorneys' fees, based on frivolous reargument motion]; *see also Burr v Burr*, 51 AD3d at 434 [sanctions imposed because "arguments' lack of merit were apparent or should have been apparent"]). The frivolous motion, moreover, is one example of frivolous activity in a long course of improper litigation conduct detailed above. It is one thing to zealously represent a client, it is entirely another to disregard the CPLR's requirements and move for the same relief multiple times.

There comes a point when the Court can no longer permit counsel to engage in frivolous conduct at a tremendous cost to others. That point has been reached here. A failure to sanction counsel under these circumstances would leave repeated frivolous motion practice undeterred and would wrongly give the impression that such improper conduct will be tolerated (*see Tsabbar v Auld*, 26 AD3d 233, 234 [1st Dept 2006] [imposing sanctions after a motion was made that was "the most recent installment in . . . protracted, highly litigious and uniformly unsuccessful quest" and explaining that inasmuch "as plaintiff, undeterred has, by bringing the instant motion, continued to press the same patently meritless claims, sanctions for frivolous conduct should now be imposed and defendants reimbursed for the reasonable expenses and attorneys' fees incurred by them in responding to the motion"]).

Thus, plaintiff's counsel must pay all of Opponents' costs, including attorneys' fees, incurred in both opposing this motion and cross-moving for sanctions. Opponents must

prepare affirmations detailing such costs and provide them to plaintiff's counsel within 14 days of service of notice of entry of this Decision and Order. Within 30 days of service of notice of entry of this Decision and Order, plaintiff's counsel may serve a copy of this Decision and Order with notice of entry on the Clerk of the Office of Special Referees (Room 119) who shall set the matter down for a hearing concerning the costs and attorneys' fees associated with Opponents' opposition and cross-motions responsive to motion sequence number 017. Failure to serve this Decision and Order on the Office of the Special Referees within 30 days of service of notice of entry shall result in a judgment in favor of each of the Opponents in the amount set forth in their respective affirmations related to costs and attorneys' fees. Failure by the Opponents to serve a costs/fees affirmation on plaintiff's counsel within 14 days of service of notice of entry of this Decision and Order will result in a waiver of recovering costs and fees by that party.

Accordingly, it is

ORDERED that Mr. Gassab's second motion to renew and reargue is denied; and it is further

ORDERED that Opponents' cross-motions for sanctions is granted and must be paid by the firm of Flomenhaft & Cannata, LLP. Opponents must prepare affirmations detailing the costs and expenses of opposing and cross-moving for sanctions in response to this motion

and provide them to plaintiff's counsel within 14 days of service of notice of entry of this Decision and Order. Within 30 days of service of notice of entry of this Decision and Order, plaintiff's counsel may serve a copy of this Decision and Order with notice of entry on the Clerk of the Office of Special Referees (60 Centre Street- Room 119) who shall set the matter down for a hearing concerning the costs and attorneys' fees associated with Opponents' opposition and cross-motions associated with motion sequence number 017. Failure to serve this Decision and Order on the Office of the Special Referees within 30 days of service of notice of entry shall result in a judgment in favor of each of the Opponents in the amount set forth in their respective affirmations related to costs and attorneys fees. Failure by the Opponents to serve a costs/fees affirmation on plaintiff's counsel within 14 days of service of notice of entry of this Decision and Order will result in a waiver of recovering costs and fees by that party.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
March 6, 2009

ENTER

Hon. Eileen Bransten