Smith v Port Auth. of N.Y. and N.J.
2009 NY Slip Op 33362(U)
October 2, 2009
Supreme Court, New York County
Docket Number: 107940/06
Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ROBERT SMITH,

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY and PORT AUTHORITY TRANS-HUDSON CORPORATION,

Defendants.

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Index No. 107940/06

INTERIM DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendants the Port Authority of New York and New Jersey and Port Authority Trans-Hudson Corporation ("defendants") move for an order, pursuant to CPLR §5519, granting a stay of judgment, and, pursuant to CPLR §4404, setting aside the verdict in favor of plaintiff Robert Smith ("plaintiff"), and granting a new trial, or in the interest of justice, reducing the judgment on damages.

Background[1]

Plaintiff brought a personal injury action against defendants, pursuant to the Federal Employers Liability Act ("FELA"). He alleged that on January 18, 2005, he slipped and injured his shoulder as a result of defendants' negligence. Plaintiff filed a motion for summary judgment against defendants pursuant to FELA, the Boiler Inspection Act ("BIA"), and the Safety Appliance Act ("SAA"). Defendants opposed and cross-moved to dismiss the BIA and SAA claims, as well as to rescind a Stipulation. The Court granted plaintiff's motion, denied

[1] Information is taken from defendants' Amended Affirmation in Support of Motion.

defendants' cross-motion, and ordered an inquest on damages (see "the March 25, 2009 Memorandum Decision"). On June 2, 2009, a jury trial on damages commenced before Honorable Carol R. Edmead, and a judgment was entered in plaintiff' favor on June 16, 2009 (see "the Judgment").

Defendants' Motion

Defendants argue that the jury's award of $275,000 for past pain and suffering and $140,842 over 13 years for future pain and suffering was against the weight of the evidence. Defendants contend that the award must have been influenced by sympathy for the plaintiff as a result of the disclosure of the circumstances surrounding plaintiff's subsequent injury. Before the trial commenced, the parties agreed that there would be no mention of this subsequent injury. However, "plaintiff's counsel used every opportunity to rehash the circumstances of plaintiff's subsequent injury in an apparent effort to win the sympathy of the jury," defendants contend. Thus, the Court, in the interest of justice, should reduce the judgment, and grant an automatic stay pursuant to CPLR §5519(a) or a discretionary stay under CPLR §5519(c).

Plaintiff's Opposition

Plaintiff opposes defendants' post-trial motion at this juncture, solely on the ground that it was untimely made.[2] Plaintiff contends that he has been served with the following documents at the following times: (1) defendants' Notice of Motion, dated June 19, 2009 and received on June 23, 2009 *via* overnight delivery at Ressler & Ressler, the law firm representing plaintiff (see the "Notice of Motion"); (2) defendants' Amended Notice of Motion and an Amended Affirmation

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[2] By a So-Ordered Stipulation dated September 18, 2009, the Court permitted plaintiff to serve defendants an opposition addressed solely to the issue of the timeliness of defendants' post-trial motion, and permitted defendants to serve a reply addressed solely to this issue (the "September 18, 2009 Stipulation").

in Support of Motion (without a cover letter), "both dated June 23, 2009 and received" *via* fax on June 23, 2009[3] (the "Amended Notice and Affirmation"); (3) defendants' second copy of the "Amended Notice and Affirmation" (with a cover letter dated June 23, 2009), and received on June 23, 2009; (4) defendants' third copy of the "Amended Notice and Affirmation" (with a cover letter from defendants dated June 23, 2009) received on June 25, 2009 *via* regular mail.

Plaintiff contends that CPLR §4405 requires that a post-trial motion seeking a new trial, pursuant to CPLR §4404, be made within fifteen days after the verdict, or discharge of the jury, and here, the Judgment reflects a jury verdict date of June 4, 2009, and the jury was discharged immediately after rendering its verdict (see the Judgment, p. 1). Thus, to be timely, defendants' motion had to be served within fifteen days of June 4, 2009, or by June 19, 2009.

As the documents in this record and on file in the Courthouse indicate, defendants first served their post-trial motion papers upon plaintiff on June 22, 2009. These post-trial motion papers, entitled "Notice of Motion" and bearing a typed date of June 19, 2009, were served *via* overnight mail and received on June 23, 2009. This is confirmed by the affidavit of Mary Ann Peduto ("Ms. Peduto"), the Office Manager at Ressler & Ressler, who opens and stamps "Received" on all mail received by the firm (see the "Peduto Aff."), and by the "Received" date of June 23, 2009 stamped on the "Notice of Motion.

Plaintiff further contends that no "Notice of Motion" was filed with the Court's motion clerk in Room 130. Instead, there is a set of motion papers denominated "Amended Notice of Motion," bearing a typed date of June 22, 2009 and showing a "Received" date of June 24, 2009

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[3] Although defendants assert that this Amended Notice and Affirmation, both dated June 22, 2009, was received on June 22, the fax cover page bears the date of June 23.

(see the "Court Clerk's Copy of the Amended Notice"). Plaintiff notes that the back of the document contains the title "Notice of Motion and Affirmation in Support," which further supports plaintiff's contention that the Notice of Motion was not served by defendants on June 19, 2009, but on June 22, 2009, thus rendering it untimely. The affidavit of service, by Lisa Blalock ("Ms. Blalock"), attached to the moving papers on file in Room 130 shows service by overnight mail of a document titled "Amended Notice of Motion and Amended Affirmation in Support."

Nowhere in the motion file is there a document titled "Notice of Motion," or an affidavit of service for service of a document titled "Notice of Motion," plaintiff contends. Thus, there is nothing in the record to support any claim advanced by defendants that any post-trial motion was served by their counsel on or before June 19, 2009, as required by CPLR §4405. The only papers furnished to the Court are the Amended Notice and Affirmation. Thus, the Court may only consider those papers.

Plaintiff further argues that in the absence of a timely served and filed motion, there is nothing for defendants to amend. Any attempt to "amend" the untimely motion by the service of an "amended notice of motion," with or without supporting papers, must be denied based upon the late service of the papers that the Amended Notice and Affirmation purport to amend. Accordingly, the relief sought in the Amended Notice and Affirmation on file with the Court, which is, on its face, served late, cannot be granted since there are no timely served papers to amend.

Finally, plaintiff points out that in a letter to the Court dated September 8, 2009, plaintiff's counsel Bruce Ressler ("Mr. Ressler") explained plaintiff's belief that someone in the

office of defendants' counsel attempted to create a paper trail in order to be able to argue that the untimely post-trial motion, served on June 22, 2009, was actually served on June 19, 2007.

Defendants' Reply

Defendant argues that the Notice of Motion, dated June 19, 2009 was served on June 19, 2009 by delivering the papers to a Federal Express box located at defendants' office. Ms. Blalock, a temporary secretary, prepared and served the motion. The Notice of Motion was then picked up at 9:04 a.m. on June 22, 2009 and delivered to plaintiff on June 23, 2009 (see the "Federal Express Receipt"). Defendants also contend that Ms. Blalock, who no longer works for defendants, "prepared but never executed the affidavit of service" (the "June 19, 2009 Affidavit of Service").

Dave D. Hood ("Mr. Hood"), defendants' counsel, completed work on the motion around 8:00 p.m. on June 19, 2009, signed the papers, and instructed Ms. Blalock to serve the papers prior to her leaving that evening. Mr. Hood was aware that the last pickup by the Federal Express representative for the box located at their office was 7:00 p.m. Because it was after 8:00 p.m., he instructed Ms. Blalock to drop off the moving papers at one of the other Federal Express locations in the neighborhood that has a 9:00 p.m. pickup time (see the "Copy of Federal Express locations and schedules"). According to Mr. Hood, Ms. Blalock ignored his instructions.

On June 22, 2009, when Mr. Hood reviewed the papers and discovered that Ms. Blalock failed to make certain previously requested changes, Mr. Hood requested that she amend the motion and re-serve it. The Amended Notice of Motion was served and filed, but evidently the original Notice of Motion was not filed. It appears that Ms. Blalock served the Amended Notice, and rather than filing the two separate motions, she substituted the Amended Notice of Motion

for the original Notice of Motion. Further, Ms. Blalock evidently annexed her affidavit of service to the Amended Notice of Motion and substituted same for the Notice of Motion (see the "June 22, 2009 Affidavit of Service").

On the eve of plaintiff's time to respond to the motion, Mr. Ressler contacted defendants to advise that the motion was untimely and requested that defendants withdraw the motion. Defendants, *via* counsel, denied that the motion was untimely and requested that the issue of the motion's timeliness be made part of plaintiff's response. Plaintiff requested additional time, and the parties agreed to adjourn the motion to August 20, 2009, with plaintiff's time to respond extended to August 13, 2009. Subsequently, plaintiff's counsel requested additional time, and the motion was again adjourned.

Even if the Amended Notice was served on June 22, 2009, the Court has discretion to extend the fifteen-day limit, pursuant to CPLR §2004. Plaintiff cannot show that he was prejudiced by any delay. Plaintiff has sought "this diversion," rather than extend a simple courtesy, in order to avoid arguing the merits of the motion.

Plaintiff's Sur-Reply

Plaintiff argues that defendants have not come forward with any proof to support the timely service of the motion, and the new documentary evidence supplied in their reply papers raises far more questions than it answers. Plaintiff contends that defendants have been less than forthright with the Court in explaining what they did in serving their papers late.

First, plaintiff notes that defendants concede that Mr. Hood has no personal knowledge of the events surrounding the purported service of defendants' post-trial motion or of the events that took place at his office after he left on June 19, 2009.

Second, there is no "duly executed affidavit" by Ms. Blalock, or anyone else, averring that defendants' post-trial motion was served by defendants on June 19, 2009; instead, defendants provided the unnotarized affidavit of service of Ms. Blalock. The Court should not infer that this was simply an oversight, since it is also possible (and probable) that Ms. Blalock failed to execute the affidavit because she had not, in fact, served the defendants' post-trial motion on September 19, 2009. Plaintiff notes that Ms. Blalock executed the June 22, 2009 Affidavit of Service, when she actually served the Amended Notice of Motion and Affirmation.

Third, plaintiff contends that "the new documentary evidence submitted by defendants in their reply papers show that the Federal Express drop-off used is open until 9 p.m. on weekdays," and June 19, 2009 was a Friday (see Copy of Federal Express locations and schedules, p. 2). The evidence also shows that Ms. Blalock was picked up by car service at 8:38 p.m., nearly one-half hour before the Federal Express drop-off closed (see "the Blalock Car Service Voucher"), and that the package for which tracking information has been supplied to the Court was "Tendered at FedEx Kinko's, now FedEx Office" (see the Federal Express Receipt, p. 3). Plaintiff questions why defendants' papers were not "tendered" to Federal Express until 9:04 a.m. on June 22, 2009, if Ms. Blalock left at 8:38 p.m., and the Federal Express office was open until 9 p.m.

Fourth, plaintiff contends that defendants would have the Court believe that Mr. Hood left the office after giving Ms. Blalock instructions, and that she failed to carry out those instructions. Yet the cab voucher for Mr. Hood shows a pickup time of either 9:00 or 9:08 p.m.. "long after Ms. Blalock was picked up," plaintiff contends.

Finally, plaintiff contends that the signatures that purport to be Ms. Blalock's on the June 19, 2009 Affidavit of Service and the June 22, 2009 Affidavit of Service, appear to be markedly

different.

Analysis

CPLR §4405, titled "Time and judge before whom post-trial motion made," provides that a "motion under this article [such as CPLR §4404][4] shall be made before the judge who presided at the trial within fifteen days after decision, verdict or discharge of the jury. Thus, a post-trial motion to set aside a verdict and grant a new trial must be made "within fifteen days after [the] decision, verdict or discharge of the jury" (*184 West 10th Street Corp. v Marvits*, 18 Misc 3d 46, 852 NYS2d 557 [Sup Ct App Term 2007] [motion made more than seven months after rendition of the court's verdict should have been denied as untimely]; *Brzozowy v Elrac, Inc.*, 39 AD3d 451, 833 NYS2d 590 [2d Dept 2007] [motion made more than two months after the jury verdict on the issue of damages, it was properly denied as untimely]; *Bertan v Richmond Memorial Hosp. and Health Ctr.*, 131 AD2d 799, 800 [2d Dept 1987] ["The application was procedurally defective inasmuch as it was not made within 15 days after verdict, as prescribed by CPLR 4405"]; *Gropper v St. Luke's Hosp. Ctr.*, 255 AD2d 123, 123 [1st Dept 1998] ["The trial court properly denied plaintiff's motion to set aside the reinstated jury verdict as untimely, the motion having been interposed almost one year after the verdict was rendered" (citations omitted); *Pioli v Morgan Guaranty Trust Co. of New York*, 199 AD2d 144 [1st Dept 1993], *lv denied* 87 NY2d 801 [1995] ["While this Court has not seen fit to construe the time limitation of CPLR 4405 strictly by no means can it be said that Supreme Court abused its discretion in declining to

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[4] According to Siegel, McKinney's CPLR Rule 4405, the phrase "under this article" in CPLR 4405 should be read as "under CPLR 4404." CPLR §4404, which governs motions after a jury trial, provides in relevant part:

> [U]pon the motion of any party . . . the court may set aside a verdict . . . or it may order a new trial of a cause of action . . . where the verdict is contrary to the weight of the evidence, in the interest of justice . . . .

entertain a motion made nearly one-and-a-half years after the jury returned its verdict" (citations omitted)]).

Here, the Judgment reflects a jury verdict date of June 4, 2009, and the jury was discharged immediately after rendering its verdict (see the Judgment, p. 1). Thus, to be timely, defendants' motion had to be served[5] within fifteen days of June 4, 2009, or by June 19, 2009.

The record fails to contain sufficient documentary proof establishing that defendants served the Notice of Motion on June 19, 2009. While defendants maintain that the Notice of Motion was served on June 19, 2009 by delivering the papers to a Federal Express box located at defendants' office, defendants do not provide a copy of a sufficient affidavit for the service of the Motion. Instead, defendants provide only the June 19, 2009 Affidavit, which is, without explanation, *not notarized.* Further, according to the Affidavit of Service, the Amended Motion and Affirmation, was untimely served on June 22, 2009. Therefore, as there is no evidence (or proof of service) indicating that defendants' Motion (or Amended Motion) was served by June 19, 2009, the Court deems defendants' instant application untimely.

Extension of the 15-Day Time Limit

In their reply, defendants argue that the Court has discretion to extend the fifteen-day limit, pursuant to CPLR §2004. CPLR §2004 provides: "*Except where otherwise expressly prescribed by law*, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms *as may be just and upon good cause shown*, whether the application for extension is made before or after the expiration of the time fixed" (emphasis added; *see e.g. A &*

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[5] A motion is deemed made when it is served (*see Panicker v Northfield Sav. Bank*, 12 Misc 3d 1153, 819 NYS2d 211 [NY City Civ Ct 2006], citing Siegel, Practice Commentaries McKinney's Consolidated Laws of N.Y. Book 7B CPLR C2211:4]).

J Concrete Corp. v Arker, 54 NY2d 870, 872 [1981] [Court of Appeals holding that it could not say, "as a matter of law, that Supreme Court abused its discretion by granting plaintiffs' motion, made pursuant to CPLR 2004, for an extension of time within which to serve their complaint"]; *Campbell v Starre Realty Co.*, 283 AD2d 161 [1st Dept 2001] [holding that the plaintiff's motion seeking to extend the time to serve the summons and complaint, pursuant to CPLR §2004, was properly granted "upon an adequate showing that her failure to serve defendant within 120 days of filing was due to the dissolution of her attorney's prior law firm, and in the absence of a showing by defendant that it was prejudiced as a result of the slight delay"]). In addition, the Court of Appeals held that a "law office failure" may constitute a showing of good cause justifying the grant of an extension under CPLR §2004 (*see Tewari v Tsoutsouras*, 75 NY2d 1, 12-13 [1989]). The Court of Appeals explained in *Tewari*:

> [T]he Legislature has held that upon a motion to extend the time to appear or plead (CPLR 3012) or to vacate a default (CPLR 5015[a]), the court may excuse a delay or default resulting from "law office failure" (CPLR 2005). We see no reason to impose a more stringent requirement for the showing of "good cause" under *CPLR 2004, particularly where, as here, there is no evidence that defendant was at all prejudiced by plaintiff's delay while plaintiff will be severely prejudiced if the motion is denied.* (*Id.* at 12-13) (Emphasis added)

Here, although defendants did not formally move or cross move for an extension, pursuant to CPLR §2004, they have sufficiently raised this issue in their papers. Further, plaintiff does not object to the Court's consideration of CPLR §2004 on the ground that defendants' application was not made in the form of a motion or cross-motion.

Here, the evidence in the record demonstrates that defendants' failure to timely submit the Notice of Motion and the Amended Notice and Affirmation was a result of law office failure. Defendants state that Mr. Hood's regular secretary, Marilyn Enderby, was on vacation, and Ms.

Blalock, a temporary secretary, was used to prepare the motion. Ms. Blalock failed to mail the Notice of Motion as Mr. Hood instructed, resulting in the delay. Further, Ms. Blalock failed to execute the affidavit of service. The Court notes that defendants point out that "problems related to the preparation and service of this motion, particularly Blalock's unreliability, resulted in her termination" from her job with defendants. Therefore, defendants have demonstrated good cause. In addition, plaintiff has not shown any prejudice by defendants' delay (*Tewari* at 13).

Further, the Court may exercise its discretion here. According to Siegel, NY Prac §405 [4d ed] the "15-day period in which to make a CPLR 4404 motion is not a statute of limitations . . . and so is presumably subject to discretionary extension by the court under CPLR 2004" (*see e.g. Pioli v Morgan Guaranty Trust Co. of New York*, 199 AD2d 144 [1st Dept 1993], *lv denied* 87 NY2d 801 [1995] [holding that the First Department "has not seen fit to construe the time limitation of CPLR 4405 strictly"]). The Court also notes that defendants' delay in serving the Notice of Motion was relatively brief. Defendants missed the deadline by only one day. The deadline to file the Notice of Motion was Friday, June 19, 2009. The evidence in the record shows that the Notice of Motion was served on the next business day: Monday, June 22, 2009.

Accordingly, the Court compels plaintiff to accept defendants' Amended Motion, despite its being untimely served, and reserves decision on the merits of defendants' motion so as to permit plaintiff and defendants to submit further papers in accordance with the schedule below.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff shall accept the Amended Motion of defendants, and said Amended Motion is deemed served; and it is further

ORDERED that plaintiff shall serve upon defendants and file in Part 35 his opposition papers by October 23, 2009, and defendants shall serve upon plaintiff and file in Part 35 their reply papers by November 6, 2009; and it is further

ORDERED that this motion is adjourned to November 6, 2009, on submission only; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within five days.

This constitutes the interim decision and order of the Court.

Dated: October 2, 2009

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD

FILED

OCT 07 2009

COUNTY CLERK'S OFFICE
NEW YORK