

Kaplansky v Steinbok
2010 NY Slip Op 34116(U)
November 12, 2010
Supreme Court, New York County
Docket Number: 116118/2009
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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ANNA KAPLANSKY,

Plaintiff,

Index No. 116118/2009

-against-

DECISION/ORDER

DAVID STEINBOK, JOHN DOE, and JANE DOE,

Defendants.

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

MEMORANDUM DECISION

In this action for *inter alia*, assault, battery and invasion of privacy arising out of an incident for which defendant David Steinbok (“defendant”) was indicted, defendant now moves to reargue this Court’s October 18, 2010 Order granting the application of plaintiff Anna Kaplansky (“plaintiff’s) to voluntarily discontinue this action.

Factual Background

On September 14, 2010, the parties appeared before this Court on defendant’s motion to compel disclosure. After oral argument, the Court ordered plaintiff to produce documents by October 4, 2010 and appear for a on October 24, 2010. Plaintiff served her discovery response on October 4, 2010, which defendant claims was inadequate.

Thereafter, the parties appeared in Court on October 14, 2010 on defendant’s motion to preclude. After oral argument, the Court issued an order directing defendant to provide, *inter alia*, certain emails and authorizations by October 18, 2010 and appear for a deposition on October 25, 2010. Notably, the Court Order indicated in bold letters: “the failure of plaintiff to comply with this order, absent a showing of good cause, shall result in preclusion of her use of

any evidence, not provided, at trial.”

On October 18, 2010, the deadline for plaintiff to produce discovery, the Court held a telephonic conference with counsel. During this conference call, plaintiff moved for a voluntary discontinuance, which the Court granted.

In support of reargument, defendant claims that following the conference call, he electronically filed a letter with the Court, arguing that discontinuance was unwarranted because plaintiff was simply seeking to avoid compliance with the Court's Order. On October 19, defendant telephoned the Court to confirm that the Court had received his letter, at which time, he was informed that while the Court had received the letter, an order on the application to discontinue had already been signed. Defendant is unclear whether the Court considered the letter in ruling on plaintiff's application to discontinue.

Defendant argues that the Court overlooked two critical principles of law regarding voluntary dismissal, namely, that a voluntary discontinuance should not be granted where (1) a party seeks discontinuance to avoid complying with a court's order, or (2) where a discontinuance would result in unfair prejudice to the adverse party. CPLR 3217 provides that if the plaintiff's time to vacate by notice has expired and if the defendant will not stipulate to the discontinuance, "an action shall not be discontinued by a party asserting a claim except upon order of court and upon terms and conditions, as the court deems proper." Caselaw holds that a party should not be permitted to discontinue an action for the purpose of circumventing an order of the court, and plaintiff seeks to discontinue this action precisely for the reason of evading the Court's discovery order. Since defendant first served his discovery requests more than five months ago, plaintiff has stopped at nothing to avoid producing discovery. Plaintiff ignored not only defendant's

document requests and a notice of deposition, but also this Court's September 14, 2010 Order directing her to produce certain documents. Defendant was forced to engage in additional motion practice to obtain discovery. This Court granted defendant's sanctions motion by issuing a conditional order to preclude; yet, to avoid complying with the Court's discovery order, plaintiff sought a discontinuance on the very day that her discovery was due. That plaintiff waited until the Court's discovery deadline to bring this request for a discontinuance is clear evidence of inappropriate gamesmanship. If plaintiff had a motive to discontinue other than to avoid compliance with the Court's Orders, she could have moved for discontinuance months ago.

Further, allowing plaintiff to discontinue the case now that the Court has issued discovery rulings favorable to defendant would result in unfair prejudice to defendant. Defendant has been seeking discovery from plaintiff for more than five months, forcing defendant to engage in extensive discovery motion practice. And as a result, if plaintiff continues to resist discovery, she will be precluded from introducing evidence at trial. However, if the discontinuance were permitted, defendant would be deprived of this favorable posture, which he gained by expending considerable resources; defendant would be forced to spend additional resources defending a new action; and defendant would be back at square one with respect to seeking discovery from the recalcitrant plaintiff. Further, caselaw holds that an error by plaintiff's counsel, such as commencing an action prematurely, is not a basis for a discontinuance. The prejudice to defendant outweighs plaintiff's interest in a discontinuance.

In opposition, plaintiff argues that defendant's motion is premature and procedurally defective since defendant failed to serve notice of entry of the subject Order.

Further, in defendant's e-filed letter, he offers the same arguments that were offered

orally in opposition to plaintiff's motion for leave to voluntarily discontinue and again here in this application. There is no basis to suggest that the Court did not consider such letter. And, even assuming this Court did not consider such letter, all of the arguments therein were repeatedly made to the Court.

Defendant's motion is also flawed in that there is no ground to support the contention that this Court overlooked or misapprehended a fact or the law when it exercised its broad discretion to permit plaintiff to discontinue her action. Defendant's objection is premised on the same arguments offered in opposition to plaintiff's application.

CPLR § 215 (8) reflects the public policy of excusing a victim of criminal conduct from having to simultaneously participate in criminal and civil proceedings. Because plaintiff's prior counsel was concerned with preserving plaintiff's civil claim in view of the one year statute of limitations, he believed in good faith that he was compelled to commence this action, and did so on the last day of the one year period—despite the fact that there was a pending criminal investigation and proceeding. However, under CPLR § 215 (8), the time within which a victim, such as plaintiff in this case, has to commence civil claim (such as, for example, assault, battery and invasion of privacy) arising out of the same event or occurrence for which criminal proceeding is pending is tolled until one year following the conclusion of the criminal proceeding. The tolling provision exists to relieve a victim of a crime, such as plaintiff in this case, from the "burden" of participating simultaneously in a criminal and civil proceeding. Another purpose of the tolling provision "was to cut down on the cost of civil litigation by facilitating a plaintiff's ability to take advantage of the potential collateral-estoppel effect of a prior conviction, thereby eliminating the need to relitigate facts that have already been

established against the defendant with respect to his...conduct.” For these reasons, plaintiff repeatedly discussed with defendant and the Court of his intent to discontinue this action and sought defendant’s consent to discontinue this action, and defendant refused to agree.

Further, several months prior to the instant motion, defendant had proposed a settlement that would have resolved this civil matter. Defendant changed his mind and in seeking to adjourn the criminal trial and subpoena documents from plaintiff in the criminal case at the very same time that he indicated that the civil case was settled suggests that defendant never intended to follow through on the settlement.

While defendant was seeking discovery in this civil action claiming that he was being prejudiced by plaintiff’s failure to do so, defendant failed to advise the Court that he was making a similar motion at the same time in Criminal Court.

Courts have broad discretion under CPLR § 3217 to grant a party’s request to voluntarily discontinue its action. There was good reason for this Court to permit plaintiff to withdraw her action without prejudice since such a request is consistent with her right as a victim of defendant’s criminal conduct. Plaintiff’s ability to proceed with her civil case in the absence of access to the critical evidence in this case held by the District Attorney (i.e., the pictures that defendant took on his cell phone) would be severely, if not completely hindered. Defendant would also certainly assert his 5th Amendment privilege in response to some of plaintiff’s attempts to secure discovery from him.

Further, defendant’s argument regarding prejudice is illogical and was either offered previously and rejected or constitutes an inappropriate attempt to advance a new argument under CPLR §2221. Defendant is merely frustrated at not being able to utilize the broad discovery

devices available in a civil action to use to his advantage to intimidate plaintiff from proceeding with the criminal charges. And, defendant has already obtained plaintiff's medical and other documents in connection with the criminal case. The District Attorney's Office has provided discovery to defendant, including *Brady* material, results of plaintiff's physical examination and other medical records, transcripts of a telephone conversation, the information contained on the PDA that defendant wrongfully transmitted to third parties, and, plaintiff's grand jury testimony. The District Attorney has been hesitant to share or otherwise provide information or evidence that it or the police have gathered with respect to the pending criminal trial. Thus, plaintiff has not had access to such information or evidence.

In reply, defendant points out that the Notice of Entry of the subject order was entered on October 19 and served on plaintiff's counsel via the Court's E-Filing System. This stamped copy of the order constituted written notice of entry. Further, the CPLR 2221 (d)(3) does not mandate that notice of entry must be served by the movant for leave to reargue; the only requirement is that the order and notice of entry be served on the nonmoving party. If defendant's counsel's claim that he did not receive service is his fault for failing to enter a Notice of Appearance and for registering with the Court's E-Filing System. The Court's records indicate that counsel for plaintiff is David C. Holland. When the Court filed the stamped copy of the order via the E-Filing System, the document was sent to Mr. Holland, and not to plaintiff's current counsel. Thus, the argument that the motion to reargue is procedurally defective should be rejected.

Defendant points out that his motion raises two principles of law which were overlooked by the Court. Further, plaintiff cites no portion of the record where defendant advanced either of these arguments to the Court, or where the Court considered these principles. When the parties

appeared before the Court on October 14 to argue defendant's sanctions motion, plaintiff stated that she wished to withdraw her complaint without prejudice. Defendant stated that he would oppose a motion to discontinue, but not having researched the issue, he did not present the arguments that the Court should deny a motion for voluntary discontinuance where the movant seeks to avoid a court order or where the nonmoving party would be prejudiced. Defendant did not raise these arguments because the parties were before the Court on defendant's motion for discovery sanctions, and defendant was not prepared to argue a motion for discontinuance.

At the conclusion of the oral argument, plaintiff moved by order to show cause to discontinue the action. Defendant planned to research the issue of voluntary discontinuance if and when the Court entered the proposed order to show cause. On October 18, the day plaintiff was to produce documents pursuant to the Court's conditional order, the Court held a telephonic conference with the parties. Although the Court had not yet entered plaintiff's proposed order to show cause, the Court raised the issue *sua sponte* during the conference call. The Court asked plaintiff if she still sought to discontinue the action, and plaintiff answered in the affirmative. Because the order to show cause had not yet been signed or served, there was no motion pending. Thus, defendant had not made any legal arguments as to why the order to show cause should be denied. Nevertheless, the Court granted plaintiff's request to discontinue the lawsuit.

Following the telephonic conference, defendant researched voluntary discontinuance and E-filed the subject letter with the Court. However, the order granting discontinuance had already been signed. Since the Court stated during the telephonic conference that the motion to discontinue would be granted, defendant understood that the Court had not considered the letter in ruling on the motion to discontinue. Thus, the motion to reargue neither raises arguments

previously asserted, nor assumes a position inconsistent with arguments originally asserted. Rather, the motion sets out two principles of law which apply to the motion for a voluntary discontinuance, but which were overlooked by the Court.

Discussion

At the outset, defendant's motion is not premature or procedurally defective. Under the Court's E-filing system, once the subject Order was e-filed on October 19, 2010, the Order is deemed served upon all parties.

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept] *lv. denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]).

Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588; *William P. Pahl Equipment Corp. v Kassis*, *supra*). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]). In light of defendant's claim that this Court overlooked the prevailing caselaw governing the voluntary discontinuance of an action, which defendant did not raise before the Court prior to the Court's Order, leave to reargue is granted.

It is undisputed that CPLR § 3217 provides that where the plaintiff's time to discontinue

its claim has expired (§ 3217(a)(1)), and if the defendant will not stipulate to the discontinuance (§ 3217(a)(2)), "an action shall not be discontinued by a party asserting a claim except upon order of court and upon terms and conditions, as the court deems proper" (§ 3217(b)).

A "party should not be permitted to discontinue an action for the purpose of circumventing an order of the court" (*Aison v Hudson River Black River Regulating Dist.*, 279 AD2d 754, 755 [3d Dept 2001] citing *Hirschfeld v Stahl*, 242 AD2d 214, 215 [1st Dept 1997]; *NBN Broadcasting, Inc. v Sheridan Broadcasting Networks, Inc.*, 240 AD2d 319 [1st Dept 1997]). "Ordinarily, a plaintiff has a right to discontinue a pending action at any time unless substantial rights have accrued or his adversary's rights would be prejudiced thereby" (*Louis R. Shapiro, Inc. v Milspemes, Corp.*, 20 AD2d 857, 857 [1st Dept 1964]).

However, it cannot be said that plaintiff's application to discontinue this action was motivated solely for the purpose of avoiding discovery. First, plaintiff has provided some, albeit, incomplete discovery. Second, plaintiff has articulated her intent to discontinue this action on several occasions, prior to the Court's conditional order. It is noted that as early as the first oral argument on September 14, 2010, plaintiff sought a stay of discovery due to the pending criminal action (which this Court denied, nonetheless). In seeking a stay of discovery, plaintiff pointed out the potential collateral effect any conviction would have in this action, a factor consistent with the purpose of CPLR § 215 (8): (1) relieve the criminal victim of the burden of participating simultaneously in the criminal and civil trials for fear of the civil claim being time-barred and (2) facilitate the civil trial by allowing the criminal victim to use the criminal judgment as proof in order to avoid the expense of relitigating proven facts (*Robinson v Franklin General Hosp.*, 160 Misc 2d 893, 611 NYS2d 778 [Sup Ct Nassau County 1994] citing Memorandum of

Assemblyman Richard N. Gottfried, *New York State Legislative Annuals*, p. 61 (1983); *Alford v St. Nicholas Holding Corp.*, 218 AD2d 622, 631 NYS2d 30 [1st Dept 1995] (“One of the purposes of CPLR 215(8) is to relieve the criminal victim of the burden of participating simultaneously in two totally separate legal proceedings based on identical facts in order to avoid the expiration of the Statute of Limitation in the civil action”). Plaintiff further suggested that she withdraw the action (Transcript, page 20). Therefore, plaintiff’s intent to withdraw her action preceded the conditional preclusion Order dated October 14, 2010.

The submissions indicate that although plaintiff’s delayed in producing discovery, which necessitated motion practice at the expense of defendant, plaintiff is entitled to discontinue her civil action, without prejudice. The criminal proceeding against defendant, which arises from his alleged assault and battery of the plaintiff, is pending and plaintiff should be permitted to exercise her rights under CPLR § 215 (8) to forego this action until the criminal proceeding is concluded. The legislative history reveals that the drafters of CPLR 215(8) intended to benefit the criminal complainant who wished to pursue a civil suit against the criminal defendant (*Robinson, supra*). The submissions also indicate that plaintiff did not have access to evidence which is in the custody and control of the District Attorney’s Office. Further, there is no indication that defendant would not invoke his constitutional rights against self incrimination if questioned on the incident. Any favorable posture defendant’s obtained thus far, does not outweigh or overcome the favorable posture plaintiff has been granted under CPLR § 215 (8), especially since plaintiff was entitled to await the commencement of this civil action until one year after the conclusion of defendant’s criminal proceeding in any event. Thus, plaintiff’s prior counsel’s commencement of this action upon his alleged mistaken belief that the one-year statute

of limitation was about to expire, coupled with the rights afforded to plaintiff under CPLR § 215

(8) warrant a discontinuance of this action, without prejudice.

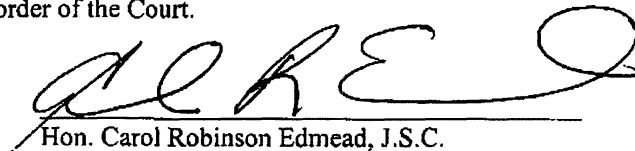
Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant's motion for leave to reargue this Court's Order, dated October 18, 2010 which granted plaintiff's application to withdraw this action without prejudice, is granted. However, upon reargument, the Court adheres to its determination.

This constitutes the decision and order of the Court.

Dated: November 12, 2010



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

~~INTERIM ORDER~~
HON. CAROL EDMOAD