

Paredes v Benasher

2011 NY Slip Op 30441(U)

February 16, 2011

Sup Ct, Queens County

Docket Number: 24042/08

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

ACTION NO. 1

JOSE PAREDES,

Plaintiff,

-against-

FARHAD BENASHER, DANIEL BENASHER,
HATZOLAH VOLUNTEER AMBULANCE CORP.
and CHEVRA HATZALAH,
Defendants.

Index No. 24042/08

Motion

Date December 7, 2010

Motion

Cal. No. 18

Motion

Sequence No. 5

JOSE PAREDES,

Plaintiff,

-against-

HATZOLAH VOLUNTEER AMBULANCE CORP.
and CHEVRA HATZALAH,
Defendants.

ACTION NO. 2

Index No. 3093/10

PAPERS
NUMBERED

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Upon the foregoing papers it is ordered that this motion by defendants Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah for an order pursuant to CPLR 3211(a)(5) dismissing the plaintiff's Amended Complaint, all causes of action, and any cross claims as against defendants, Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah, because all causes of action were commenced after the expiration of the three year statute of limitations and the action is time barred and pursuant to CPLR 3212 granting defendants, Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah, summary judgment because plaintiff's lawsuit was

commenced against defendants, Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah, after the expiration of the three year statute of limitations and the action is time-barred are hereby granted.

Plaintiff, Jose Paredes, alleges that he sustained personal injuries in a motor vehicle accident on February 7, 2007. Pursuant to the Verified Bill of Particulars, plaintiff was a passenger in the vehicle of his employer, Forest Hills Community House Corp. The other vehicle involved in this accident was owned by defendant, Farhad Benasher and was being driven by defendant, Daniel Benasher. At the time of the accident, the vehicle in which plaintiff was a passenger was owned by Forest Hills Community House Corp. and operated by Stefanie A. Favors and defendant, Daniel Benasher was responding to an emergency call as a volunteer for defendant, Chevra Hatzalah.

It is undisputed that the statute of limitations for plaintiff's claims expired on February 7, 2010. Plaintiff commenced an action on September 29, 2008, against defendants Farshad Benasher and Daniel Benasher. Defendants Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah assert that plaintiff's attempt to commence a lawsuit for the first time against defendants Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah, via filing a Supplemental Summons and Amended Complaint with the Queens County Clerk on April 8, 2010 was done after the expiration of 3-year statute of limitations; therefore, the action is time-barred and should be dismissed. Additionally CPLR 201 states: "No court shall extend the time limited by law for the commencement of an action." Plaintiff asserts in opposition that the action was timely commenced against Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah within the applicable statute of limitations as Action No. 2 was commenced on February 5, 2010, 2 days prior to the expiration of the statute of limitations. Additionally, plaintiff asserts that on March 17, 2010, plaintiff's application to add Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah to Action No.1 was granted and plaintiff was directed to file and serve the Amended Complaint in Action No. 1 within 30 days of the entry of the order. Plaintiff further asserts that he filed a Supplemental Summons and Amended Complaint with the Court on April 8, 2010 and served it on April 2, 2010.

The Court finds that the defendants' motion is granted and the action under Index No. 24042/08 is dismissed as against defendants Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah, as it is time-barred since it was commenced after the expiration of the 3-year statute of limitations period. The

Court notes as shall be fully set forth hereinafter, the action under Index No. 3093/10 as against defendants Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah, is not dismissed by this order and decision.

That branch of plaintiff's cross motion for an order consolidating Action No. 2 with Action No. 1 is hereby granted. Plaintiff has demonstrated that the matters involve common questions of law and fact, in that they involve common parties and arise out of the same motor vehicle accident. Action No. 1 under Index No. 24042/08 and Action No. 2 under Index No. 3093/10 are hereby consolidated for all purposes under Index No. 24042/08 in IAS Part 6.

The caption of the consolidated action shall be:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

JOSE PAREDES,

Index No. 24042/2008

Plaintiff,

-against-

FARHAD BENASHER, DANIEL BENASHER,
HATZOLAH VOLUNTEER AMBULANCE CORP.
and CHEVRA HATZALAH,

Defendants.

It is further ordered that a copy of this order with notice of entry shall be served, within thirty (30) days of entry of this order, on all parties to the consolidated actions, on the Clerk of Queens County and at the time of filing of the note of issue, upon the Clerk of the Trial Term office of the Supreme Court, Queens County, and it is further

ORDERED that upon being served with a copy of this order, the Clerk of the Supreme Court, Queens County, is directed to transfer all papers filed under Index No. 3093/10 to the file under Index No. 24042/08.

That branch of plaintiff's motion for an order compelling defendants Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah's appearance at the depositions is hereby denied without

prejudice as plaintiff has failed to include an affirmation of good faith that he attempted to communicate with defendants to resolve the discovery dispute (see, 22 NYCRR 202.7; *Barnes v. NYNEX, Inc.*, 274 AD2d 368 [2d Dept 2000]; *Cerreta v. New Jersey Transit Corp.*, 251 AD2d 190 [1st Dept 1998]). Uniform Rules 202.7, states in relevant part,

"[N]o motion shall be filed with the court unless there have been served and filed with the motion papers (1) a notice of motion and (2) with respect to a motion relating to disclosure..., an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion."

(See also, *Eaton v. Chahal*, 146 Misc 2d 977 (stating, "The 'good faith' requirement is intended to remove from the court's work load all but the most significant and unresolvable disputes over what has been the most prolific generator of pretrial motions: discovery issues. Most seasoned litigators know that, with a modicum of good sense, discovery disputes can and should be resolved by the attorneys without the necessity of judicial intervention"). Pursuant to 22 NYCRR 202.7[c]: "The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held." Plaintiff fails to give any details as to time, place, or nature of any consultation or to give any reason as to why no such conferral was held. Plaintiff therefore "failed to demonstrate that [he] made a diligent effort to resolve the discovery dispute.'" (*Amherst Synagogue v. Schuele Paint Co., Inc.*, 30 AD3d 1055 [4th Dept 2006]).

Accordingly, this branch of plaintiff's motion is denied with leave to renew upon submission of an affirmation of good faith.

That branch of plaintiff's motion for an order deciding whether Smith, Mazure, Director Wilkins, Young and Yagerman, P.C. can represent Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah in the above-referenced matter is hereby denied.

Plaintiff contends that Smith, Mazure, Director Wilkins, Young and Yagerman, P.C. ("Smith Mazure") previously represented Forest Hills Community House Corp. and Stephanie A. Favors in the

same matter and that the interests of the former clients, Forest Hills Community House Corp. and Stefanie A. Favors, are adverse to the interests of the present clients, Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah. Forest Hills Community House Corp. and Stefanie A. Favors owned and operated one of the vehicles involved in the accident and Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah were affiliated with a different vehicle involved in the same accident. Plaintiff further argues that pursuant to DR 5-108 of the New York Lawyer's Code of Professional Responsibility, "a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure: 1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client."

Defendants Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah contend in opposition that this branch of the motion should be denied in its entirety because Smith Mazure's representation of the prior third-party defendants Forest Hills Community House Corp. and Stefanie A. Favors began and ended prior to plaintiff initiating any legal action against defendants Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah. Smith Mazure obtained summary judgment on behalf of the third-party defendants pursuant to Workers' Compensation Law § 11, which barred the third-party action. Defendants Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah further contend that plaintiff cannot show "the existence of a prior attorney-client relationship between the movant and opposing counsel." At no time has Smith Mazure represented the plaintiff. Defendants allege that plaintiff also fails to demonstrate that "the interest of the present client and former client are materially adverse," since the defense of the third-party defendants was based solely upon Workers' Compensation Law § 11.

Plaintiff replies that Rule 1.9 of the New York Rules of Professional Responsibility require former client's consent for representation by the same counsel of a new party with adverse interests to be in writing, and that there is no doubt that the interest of the third party defendants and the main defendants Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah are adverse to each other since third-party defendants were the driver and owner of one of the vehicles and defendants Hatzolah Volunteer Ambulance Corp. and Chevra Hatzalah are affiliated with the other vehicle involved in this two-vehicle collision accident. Further, plaintiff states that defense of the third-

party action was not based purely on the worker's compensation defense since third-party defendants' answer contained multiple defenses as well as a counter-claim as against the third party plaintiffs.

The Court finds that Smith Mazure shall not be disqualified. Rule 1.9(a) of the New York Rules of Professional Conduct states: "(a) [a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a former client unless the former client gives informed consent, confirmed in writing." "The party requesting disqualification bears the burden of proving '(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse.'" (*Legend Merchant Group, Inc. v. Earlybirdcapital, Inc.*, 2010 NY Slip Op 32467U [Sup Ct, NY County 2010]). The Court finds that the plaintiff has failed to prove the existence of a prior attorney-client relationship between the movant and opposing counsel, since Smith Mazure has not represented the plaintiff at any time. Therefore, this branch of the motion is denied.

This constitutes the decision and order of the Court.

Dated: February 16, 2011

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Howard G. Lane, J.S.C.