New York Hosp. Med. Ctr. of Queens v Country Wide Ins. Co.
2011 NY Slip Op 30609(U)
March 2, 2011
Supreme Court, Nassau County
Docket Number: 011656/10
Judge: Palmieri

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

MD, MD

TRIAL TERM PART: 45

THE NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS, a/a/o KHAIZRAN AGHA; MARY IMMACULATE HOSPITAL - CARITAS HEALTH CARE, a/a/o RAFAEL ALVARENGA; THE NEW YORK AND PRESBYTERIAN HOSPITAL, a/a/o JINYONG KIM,

Plaintiffs,

-against-

INDEX NO.: 011656/10

MOTION DATE:2-23-11
SUBMIT DATE: 2-25-11
SEQ. NUMBER - 003 & 004

COUNTRY WIDE INSURANCE COMPANY,

Defendant.

The following papers have been read on this motion:

Notice of Motion, dated 1-24-11.....1
Notice of Cross Motion, dated 2-9-11.....2
Reply and Opposition to Cross Motion, dated 2-14-11.....3

Plaintiff's motion for summary judgment on the second cause of action on behalf of assignor Alvarenga (Seq. 003), incorrectly denominated as a motion to renew pursuant to CPLR §2221 (presumably subsection e) is denied.

Defendant's motion (Seq. 004), to reargue denial of defendant's previous cross motion for summary judgment pursuant to CPLR §2221(d)(2) is also denied.

The facts and circumstances giving rise to the instant motions are set forth in this

Court's Decision and Order dated November 15, 2010 (Prior Decision) which denied plaintiff's motion and defendant's cross motion for summary judgment because there was no statement from one Dahl, former employee of Hospital Receivables Systems, Inc., (HRS) to support plaintiff's contention that the claim assignment was mailed to defendant.

On this motion plaintiff submits an affidavit dated January 24, 2011, subsequent to the Prior Decision, from another employee of HRS, which plaintiff argues cures the omission because the assignment was mailed on November 30, 2010 - also after this Court issued the Prior Decision.

By cross motion, defendant contends that it was error for the Court to simply deny the plaintiff's motion and that the Court should have also dismissed the claim as being premature.

A 1999 amendment to CPLR 2221 addresses the rules for making a motion to reargue or a motion to renew and describes the differences. Paragraph (f) of CPLR 2221 permits the movant to combine in one motion both reargument and renewal requests, but adds the requirement that the movant "identify separately and support separately each item of relief sought". David Siegel, Esq. suggests the most practical method of dealing with this requirement is by separately labeling each segment of the motion and referring to the separate segments in any accompanying memorandum. See, *Siegel's Practice Review, No. 86, August 1999 p. 2.* See also, *Aloe, Revamping Motions to Reargue or Renew, NYLJ, October 1, 1999 p. 1.* The Court is directed to decide the combined motion as if separately made and to address each separately.

A motion to reargue is designed to afford a party an opportunity to establish that the

Court overlooked or misapprehended the relevant facts or misapplied principles of law. It is not a vehicle to permit a party to argue again the very questions previously decided *Foley v. Roche*, 68 AD2d 558 (1st Dept. 1979); see also *Frisenda v. X Large Enterprises Inc.*, 280 AD2d 514 (2d Dept.2001) and *Rodney v. New York Pyrotechnic Products Co., Inc.*, 112 AD2d 410 (2nd Dept. 1985) or to offer an unsuccessful party successive opportunities to present arguments not previously advanced. *Giovanniello v. Carolina Wholesale Office Mach. Co., Inc.*, 29 AD3d 737 (2d Dept. 2006).

A motion to renew must be based on new facts not offered in the prior motion that would change the prior determination. Renewal should be denied in the absence of a reasonable justification for not submitting the additional facts upon the original application *Ellner v. Schwed*, 48 AD3d 739 (2d Dept. 2008). CPLR 2221(e) see, *Foley v. Roche, supra, Kwang Bok Yi v. Ahn,* 278 AD2d 372 (2nd Dept. 2000) and *Wavecrest Apartments Corp.* v. *Jarmain*, 183 AD2d 711 (2nd Dept. 1991). A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation *Renna v. Gullo*, 19 AD3d 472 (2d Dept. 2005).

Examples of what constitutes reasonable justification include the locating of a witness, *Szentmiklosy v. County Neon Sign Corp.*, 276 AD2d 406 (1st Dept. 2000); *Tesa v. NYCTA*, 184 AD2d 421 (1st Dept. 1992) or the appearance of a further medical report from the defendant, *Puntino v. Chin*, 288 AD2d 202 (2nd Dept. 2001). Provided supporting facts are offered, law office failure can be accepted as an excuse as to why the additional facts were not submitted on the original application but mere neglect is not an acceptable excuse. *Morrison v. Rosenberg*, 278 AD2d 392 (2nd Dept. 2000); *Cole-Hatchard v. Grand Union*,

270 AD2d 447 (2nd Dept. 2000).

Renewal may also be granted in rare instances, in the interest of justice upon facts which were known to the movant at the time of the original motion in order to avoid substantive unfairness. *See Tishman Construction Corp v. City of New York*, 280 AD2d 374 (1st Dept. 2001). See also *Ramos v. Dekhtyar*, 301 AD2d 428 (1st Dept. 2003) granting renewal where an unsworn affirmation of a chiropractor was initially inadvertently submitted and later resubmitted in affidavit form, and *Mejia v. Nanni,* 307 AD2d 870 (1st Dept. 2003), granting renewal because the newly submitted evidence was overwhelming and not contradicted. In *Ortiz v. Tusa*, 300 AD2d 288 (2nd Dept. 2002) renewal was denied where no justification was offered for failing to submit chiropractic affidavits on the original motion. Even a motion to renew dismissal of a cause of action pursuant to CPLR §3211 (a)(7) on the basis of newly discovered evidence is permissible, notwithstanding that such a motion is addressed to the pleadings. *Blume v. A & R Fuels, Inc.*, 32 AD3d 811 (2d Dept. 2006).

With respect to renewal, plaintiff relies on evidence in the form of a new affidavit created after the Prior Decision based on facts that were known institutionally to plaintiff before the motion was submitted. The Court finds that the reasons for failing to present these facts was known to plaintiff when the original motion was made, hence, there is no justifiable reason for not having done so. *Johnson v. Marquez*, 2 AD3d 786 (2d Dept. 2003).

To the extent that plaintiff's motion relies on newly created evidence or facts, *ie* the new affidavit, this motion violates the well-established prohibition against the making of successive motions for summary judgment. *Central Equities Credit Corp., v. B & N*

Properties LLC, 66 AD3d 943 (2d Dept. 2009).

The defendant's motion to reargue denial of its motion for summary judgment is premised on the contention that the Court misapplied and misapprehended applicable law and should have granted defendant's cross motion for summary judgment. It contends that dismissal of the cause of action was appropriate because defendant's time to pay or deny the claim had not yet started to run, rendering the action premature. *St. Vincent Medical Care, P.C. v. Country Wide Ins. Co.* 80 AD3d 599 (2d Dept. 2011). However, this argument fails because unlike the cases relied upon, this Court found that a question of fact existed as to whether there was compliance by the plaintiff with respect to defendant's request for a verification of the assignment - and thus a question of fact as to whether the insurer's time to pay or deny the claim had or had not begun to run.

In sum, while there were issues of fact regarding whether plaintiff complied with a verification of assignment request that bars the granting of summary judgment in favor of plaintiff, the evidence is not dispositive in defendant's favor as to require summary judgment dismissing the cause of action.

This shall constitute the Decision and Order of this Court.

DATED: March 2, 2011

ENTER

HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: Joseph Henig, P.C.
By: Marc Henig, Esq.
Attorney for Plaintiffs
1598 Bellmore Avenue
P.O. Box 1144
Bellmore, NY 11710

Jaffe & Koumourdas, LLP
Attorneys for Defendant
40 Wall Street, 12th Floor
New York, NY 10005