Halper v JPMorgan Chase Bank, N.A.
2011 NY Slip Op 31861(U)
July 5, 2011
Supreme Court, New York County
Docket Number: 103893/08
Judge: Debra A. James
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SCANNED ON 7/11/2011

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

DAN HALPER, as Guardian of the Person and Property of JAN SLONIOWSKI,,
Plaintiff,

- v -

JPMORGAN CHASE BANK, N.A., GAIL STELIGA, ANNA ZIKO and HUMAN RESOURCES ADMINISTRATION OF THE CITY OF NEW YORK,
Defendants.

Index No.: 103893/08

Motion Date: 04/05/11

Motion Seq. No.: 05

J P MORGAN CHASE BANK, N.A.,
Third-Party Plaintiff,

- v -

INTEGRATED PAYMENT SYSTEMS, INC.,
Third-Party Defendant.

Third-Party Index No.: 590909/09

FILED
JUL 11 2011
NEW YORK
COUNTY CLERK'S OFFICE

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

The following papers, numbered 1 to 6 were read on this motion to renew and reargue.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s). 1, 2
Answering Affidavits - Exhibits	No(s). 3, 4
Replying Affidavits - Exhibits	No(s). 5, 6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is

Plaintiff moves, pursuant to CPLR 2221, for leave to renew and reargue this court's earlier decision, entered on July 13, 2010, dismissing the action as against defendant J P MORGAN Chase Bank, N.A. (Chase).

Plaintiff is the court-appointed guardian for Jan

1. CHECK ONE: .... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .... MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

Sloniowski, who was declared an Incapacitated Person (IP), pursuant to Article 81 of the Mental Hygiene Law. The substance of this lawsuit is the allegation that the individual defendants used undue influence to cause the IP to transfer over $100,000.00 in funds to them from the IP's Chase bank accounts. Allegedly, the IP endorsed Chase checks to the individual defendants.

The thrust of plaintiff's argument to vacate the dismissal of the action as against Chase is twofold: (1) plaintiff's counsel avers that, during the relevant period, he was forced to relocate his law office, which, in turn, caused him to misplace court dates, and that the IP himself was forced to change housing situations; and (2) that, during the relevant period, plaintiff's counsel was not properly served with a "Consent to Change Counsel" form, so that he refused to deal with the law firm that alleged that it was Chase's new counsel.

In late August of 2009, plaintiff's counsel states that he received a fax from the law firm of Stagg, Terenzi, Confusione & Wabnik (STCW), saying that they were Chase's new counsel. In that correspondence, STCW objected to the responses that plaintiff's counsel made to certain discovery demands made by Chase's predecessor law firm. Plaintiff's counsel contends that he did not feel any obligation to respond to STCW, because they were not the attorney of record.

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In the fall of 2009, plaintiff's counsel was served with a motion to dismiss by STCW, to which plaintiff's counsel "did not feel obligated to respond to a motion by a law firm that was clearly not the attorney of record for the purported movant." Defendant Chase made two such motions, correcting certain procedural deficiencies in its first application. Plaintiff's counsel failed to appear for the hearing on that motion, asserting that he chose instead to address the concerns of another client who needed a commercial lease signed immediately. Nonetheless, Chase's first motion was denied. However, as plaintiff's counsel failed to appear for a duly noticed discovery compliance conference on November 17, 2009, by way of the Compliance Conference Order of November 17, 2009, the court granted Chase an ex parte dismissal. Then on November 24, 2009, the court granted STCW's second motion on notice to dismiss on the default of plaintiff's counsel to either appear at the hearing or oppose the motion.

On January 11, 2010, plaintiff moved to vacate the dismissal, claiming that he served his opposition papers on both Chase's first counsel and STCW. At the hearing of that motion that took place on March 23, 2010, Chase was represented by STCW only. Although plaintiff's counsel insisted that he had not been properly served with notification of the change of attorneys, an

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order vacating the dismissal was granted on the following condition:

> that no later than April 23, 2010, the plaintiff serves a supplemental affidavit (that appends relevant records) responding to each discovery demand in the letter dated August 21, 2009 from counsel for defendant J.P. Morgan Chase Bank, N.A. {"STCW"]. On or before May 14, 2010, counsel for defendant J.P. Morgan Chase Bank, N.A. shall serve an affirmation as to plaintiff's (non)compliance with the aforesaid condition. The parties shall appear on May 25, 2010 ... for a Status Conference as to plaintiff's compliance with the condition and whether the default must be reinstated . . .

Rather than serving the responses to the discovery demands on STCW and still insisting that STCW was not Chase's counsel of record because he had not been properly served with notice of the change of counsel, plaintiff's counsel served the material on the Clerk of the Court. On May 13, 2011, STCW served an affirmation that plaintiff had failed to follow the conditional vacate order.

The May 25, 2010 Status Conference was adjourned to the morning of June 29, 2010. However, as the court was unable to reach the matter on its morning calendar, the conference was postponed until the afternoon. In the afternoon, having reviewed the affirmation of non-compliance submitted by STCW, the court notified the parties that no conference would be necessary since court was reinstating the dismissal. On that date, the court issued the following order:

> It is Ordered that the default of November 24, 2009 is hereby reinstated ... [because] plaintiff failed to satisfy the condition set forth in this Court's order dated March 23, 2010 that required that he serve a

supplemental affidavit no later than April 23, 2010. Moreover, plaintiff's counsel failed to serve defense counsel with his responses, unilaterally determining that defense counsel had not complied with CPLR 321 (d). It is further ordered that the complaint is dismissed and the Clerk shall enter judgment accordingly.

Plaintiff's counsel maintains that the court overlooked his argument regarding STCW's failure to follow the procedures of CPLR 321 (d), thereby relieving him of serving or responding to STCW as Chase's counsel. In addition, plaintiff's counsel provides some of the documentation that had been required, asserting that it only became available after the IP's move and his goods were unpacked.

In opposition, Chase states that plaintiff has been given numerous opportunities to comply with the court's directives, which he has failed to do, and should not be given yet another chance. Further, according to Chase, plaintiff has presented no new facts that would warrant granting leave to renew, nor has he established that the court overlooked any material evidence or principle of law to warrant reargument. In addition, Chase asserts that the motion to reargue is untimely, having been served more than 30 days after plaintiff was served with the court's order with notice of entry.

In reply, plaintiff reiterates his earlier arguments regarding STCW not following the mandates of CPLR 321 (d), but does not address Chase's arguments regarding the timeliness of

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the motion to reargue or the alleged deficiencies of the motion to renew.

CPLR 2221 (d) (2) permits a party to move for leave to reargue a decision of a court upon a showing that the court misapprehended the law in rendering its initial decision.

> A motion for leave to reargue pursuant to 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 law or for some reason mistakenly arrived at its earlier decision. Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted.

William P. Pahl Equipment Corp. v Kassis, 182 AD2d 22, 27 (1st Dept 1992) (internal citations and quotation marks omitted)

That branch of plaintiff's motion seeking leave to reargue shall be denied, as the motion is untimely, having not been served within 30 days after service of the initial order with notice of entry upon plaintiff's counsel. Such order with notice of entry was served by first class mail on July 19, 2010. Although plaintiff's motion is dated August 24, 2010, the affirmation of plaintiff's counsel is dated August 31, 2011. Hence, regardless of the date appearing on the face of the motion, the motion could not have been served as complete until August 31, 2011, more than a week after the expiration of the 30-day time limit. In any event, plaintiff failed to reply to the untimeliness argument posited in Chase's opposition, and in that

manner admits the untimeliness. As plaintiff's reargument application was made after the time to appeal from the order had expired, it must be denied. Glicksman v Board of Education/ Central School Board of Comsewogue Union Free School District, 278 AD2d 364 (2d Dept 2000).

Further, the court's order of June 29, 2011, specifically referenced plaintiff's argument regarding Chase's counsel's alleged failure to follow the procedures of CPLR 321 (d). Therefore this legal argument was not overlooked by the court. Moreover, in its conditional vacate order of March 23, 2011, the court made specific reference to the letter sent to plaintiff's counsel by STCW, finding that it was a letter from Chase's counsel. Plaintiff cannot use a motion to reargue as a vehicle to argue for a second time an issue that was previously addressed and decided. Foley v Roche, 68 AD2d 558 (1st Dept 1979).

As to the branch of plaintiff's motion seeking leave to renew, CPLR 2221 (e) states:

> A motion for leave to renew:
>
> 1. shall be identified specifically as such;
>
> 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
>
> 3. shall contain reasonable justification for the failure to present such facts on the prior motion.

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Not only has plaintiff's counsel failed to present any new facts to support such a motion (Matter of Brooklyn Welding Corp. v Chin, 236 AD2d 392 [2d Dept 1997]), but also he has failed in his reply to address defendant's argument with respect to the absence of any new facts.

Nevertheless, the court now reviews the Court Evaluator Report Court Evaluator Report dated July 11, 2007 of Marvin Bernstein, Director of Mental Hygiene Legal Services (by Lisa D'Urso, LMSW) in the Application of Daniel Muskin, Administrator, Bialystoker Nursing Home, Petitioner for the Appointment of a Guardian of the Person and Property of Jan Sloniowski, An Alleged Incapacitated Person, Index No. 500048/2007, which is appended to plaintiff's papers. In the Report, the Court Evaluator stated "The Guardian should make a top priority following up with the District Attorney as well as Chase Bank as to the investigation into the apparently stolen funds from [IC]'s account."

The court has also retrieved the court file for the above captioned action, which contains the Order of July 20, 2007 (Wilkins, J.) that appointed plaintiff as guardian of the IC. The file also contains an Order dated February 20, 2008, approving the retention of Mayne Miller, Esq. as counsel.

The Complaint in the action at bar alludes to an ongoing District Attorney investigation, but does not offer any specifics as to the status of such investigation. Nonetheless, plaintiff

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is correct that the possibility that the District Attorney may issue criminal charges against the individual defendants neither tolls the statute of limitations for a civil action for damages nor precludes the commencement of such civil action. Accordingly, as the Order of July 20, 2007 found that the IC lacks the capacity to engage the court and the subsequent February 20, 2008 Order approved plaintiff's retention of Mayne Miller, Esq., the court grants renewal, denies Chase's motion to dismiss and reinstates the complaint against it but directs plaintiff's counsel Mayne Miller, Esq. to pay Chase $500 as costs of the motion.

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion to renew is granted and the Order dated June 29, 2010 is hereby vacated, and the complaint against defendant J. P. Morgan Chase Bank, N.A. is reinstated; and it is further

ORDERED that defendant J. P. Morgan Chase Bank, N.A. is awarded five hundred dollars ($500) to be paid by plaintiff's counsel Mayne Miller, Esq. as costs of its motions to compel and dismiss; and it is further

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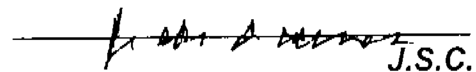
ORDERED that the parties must appear in IAS Part 59, 71 Thomas Street, Room 103, for a Status Conference on August 30, 2011, 10 AM.

This is the decision and order of the court.

Dated: July 5, 2011 ENTER:



J.S.C.

DEBRA A. JAMES

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