SCAW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

TRIAL/IAS PART 6

ALEXANDER BLADYKAS,

INDEX NO. 12994/04

Plaintiff(s),

MOTION SEQUENCE NO. 5

- against -

COUNTY OF NASSAU,

MOTION SUBMISSION DATE: September 9, 2011

Defendant(s).

The following papers read on this motion:

Order to Show Cause	**X**
Affirmation in Opposition	**X**

Upon the foregoing papers, the motion by the Defendant brought by Order to Show Cause for an Order pursuant to CPLR 2221 for leave to reargue and for leave to renew the Court's August 11, 2011 Order dismissing Defendant's April 2011 Order to Show Cause due to Defendant's failure to submit an affidavit of service attesting to service of the Order to Show Cause, and upon granting Defendant's motions for leave to reargue and for leave to renew, that the Court determine the motions presented in Defendants' April 2011 Order to Show Cause on their merits; staying jury selection and the trial of this action pending the hearing and determination of Defendant's motion pursuant to CPLR 2221 for leave to reargue and leave to renew; staying jury selection and the trial of this action pending the hearing and determination of Defendant's motion to plead its Verified Answer pursuant to CPLR 3012(d) submitted in Defendant's April 2011 Order to Show Cause; staying jury selection and the trial of this action pending the hearing determination of Defendant's motion to disqualify Thomas Liotti, Esq. from representing Plaintiff at trial pursuant to Rules of Professional Conduct, 22 NYCRR § 1200.29 [Rule 3.7], "Lawyer as Witness," presented in Defendant's April 2011 Order to Show Cause is determined as hereinafter provided.

Based upon the affirmation of the Defendant's counsel as to the alleged service of the Defendant's Order to Show Cause to the extent that the Defendant seeks renewal said application is granted.

The Defendant's requested relief in the Defendant's Order to Show Cause seeks an Order:

"(1) Granting defendant's motion pursuant to CPLR 3012(d) to plead its Verified Answer in this action;

(2) Disqualifying Thomas Liotti, Esq. from representing plaintiff at trial pursuant to Rules of Professional Conduct, 22 NYCRR § 1200.29 [Rule 3.7], "Lawyer as Witness;"

(3) Staying jury selection and the trial of this action pending the hearing and determination of defendant's motion to plead its Verified Answer pursuant to CPLR 3012(d), and

(4) Staying jury selection and the trial of this action pending the hearing and determination of defendant's motion to disqualify Thomas Liotti, Esq. from representing plaintiff at trial pursuant to Rules of Professional Conduct, 22 NYCRR § 1200.29 [Rule 3.7], "Lawyer as Witness."

The Defendant through counsel sets forth the procedural history of the instant action:

"On September 15, 2003 plaintiff filed a Notice of Claim with the County claiming that he was entitled to a pension benefit based on over 20 years of service credit, based on 19.98 years of actual service time, plus "accumulated time" for which the County did not credit him when he was terminated in December 2001. Plaintiff claimed that this "accumulated time would and should be attributed to his retirement and would significantly and substantially affect the amount of his monthly pension benefit to be paid by the New York State and Local Retirement Systems. Exhibit "A, Notice of Claim, ¶ 2.

Plaintiff commenced this action by service of only a Summons only in September 2004. After demand by the County, plaintiff served a Verified Complaint. Exhibit "B," in which he alleged that he "was just shy of completing twenty (20) years of service with the County. With accumulated vacation time, sick days and the like, if properly credited for them by the County, [he] would have been employed by the County and served in excess of twenty (20) years, affording him and providing for more pension money and benefits for him." *Id.*, ¶ 12.

The Complaint sought a declaratory judgment that the County breached an unidentified "contract of employment, *id.*, ¶ 14, and a declaratory judgment "crediting him with a loss of vacation and sick time and the like, to which he is entitled pursuant to his contract with the County, thereby giving him over twenty (20) years of employment service." *Id.*, ¶ 24.

This action has been the subject of a pre-answer motion to dismiss in 2004 (denied by Hon. Daniel Martin on August 29, 2005), a motion for-summary judgment in 2006 (denied by Judge Martin on March 30, 2007), and was marked ready for trial in 2007. However, trial was stayed pending the County's appeal of Judge Martin's decision to the Appellate Division, Second Department. That appeal was denied on January 15, 2008.

The case remained off the trial calendar because, for reasons unknown, plaintiff waited nearly three years, to January 4, 2011, to move to restore the case to the trial calendar. Plaintiff's motion to restore the case to the trial calendar was granted

by Hon. Roy S. Mahon on February 24, 2011. On March 31, 2011, the Trial Assignment Part scheduled the case for jury selection on June 6, 2011, and for trial on June 8, 2011.

As the Deputy County Attorney presently assigned to the case, I began to prepare for trial. On March 24, 2011, I reviewed the County's files and, for the first time, discovered that the County never filed an Answer to the Complaint. I confirmed this by examining the court file in the County Clerk's Office on March 25, 2011.

The apparent reason for this oversight is that on December 8, 2004, Carl Sandel, Esq., the first Deputy County Attorney assigned to this case, filed a pre-answer motion to dismiss under CPLR 3211(a)(5) and 3211(a)(10), in lieu of answering the Complaint. After the County's motion to dismiss was denied by Judge Martin's August 29, 2005 Order (Exhibit "C"), Mr. Sandel apparently never filed an Answer.

However, plaintiff failed to move for a default judgment within one year of Judge Martin's August 29, 2005 Order as required by CPLR 3215©. Plaintiff thereby forfeited his right to take a default against the County.

After the County's motion to dismiss was denied, Judge Martin certified the case ready for trial on April 7, 2006. Mr. Sandel, who had filed the motion to dismiss, left the County Attorney's Office in April 2006, at which time the case was assigned to a Joanne Oweis, Esq., another Deputy County Attorney.

On September 21, 2006, Ms. Oweis filed a motion for summary judgment on September 21, 2006, attaching plaintiff's Complaint to the motion papers, but no Answer. The County's summary judgment papers included the 2000 Confidential Stipulation, but not the 2001 Cooperation Agreement executed by plaintiff, Mr. Liotti and the District Attorney's Office. The County's motion papers incorrectly included the collective bargaining agreement between the County and the Civil Service Employees Association, instead of the correct collective bargaining agreement between the County and the Sheriff Officers Association (the "ShOA Agreement"), to which plaintiff belonged in the relevant time period.

After submitting the County's summary judgment motion, Ms. Oweis left the County Attorney's Office in February 2007.

Shortly thereafter, on March 30, 2007, Judge Martin issued an Order (Exhibit "D") denying the County's motion for summary judgment, finding the issues of fact existed as to exactly what agreement, or agreements, were relevant to plaintiff's claims. Again, Judge Martin was not presented with the Cooperation Agreement in determining the motion.

After Judge Martin denied summary judgment on March 30, 2007, the case was assigned to the Trial Assignment Part calendar for May 2, 2007.

At this point, I was assigned as the successor, and third, Deputy County Attorney on the case. In preparing for trial, I investigated the background of the case with officials from the District Attorney's Office and discovered the existence of the Cooperation Agreement. I also interviewed James Whiston, the police officer/

investigator who dealt with plaintiff under the Cooperation Agreement. Mr. Whiston assured me, first, that he never made any "oral promise" to plaintiff about crediting him with unused leave time and, second, that the District Attorney's Office has no power to bind the County or the Sheriff's Department relative to plaintiff's service record or unused leave time. *See* Affidavit of James Whiston, submitted herewith.

After reviewing Judge Martin's Order denying summary judgment, I determined that if the County were permitted to appeal the decision, and submit the Cooperation Agreement and the correct collective bargaining agreement as evidence, the County would be entitled to judgment as a matter of law, negating the need for a trial.

On April 27, 2007 another Deputy County attorney, from the Appeals Bureau, applied to the Appellate Division for a stay of trial pending the County's appeal from Judge Martin's decision denying summary judgment. The Appellate Division granted a Temporary restraining order and thereafter a stay of trial pending determination of the County's appeal from Judge Martin's decision.

In its appeal papers, the County included the 2001 Cooperation Agreement and correct ShOA collective bargaining agreement, which had not been included in the County's summary judgment motion before Judge Martin.

In a decision issued January 15, 2008 (Exhibit "E") the Appellate Division denied the County's appeal, finding that the County "did not tender sufficient evidence to demonstrate the absence of any material issues of fact." However, the court continued, "In reaching our determination herein, we have not considered evidence which is dehorn the record with respect to the order appealed from." It is obvious that the appeals court was referring to the Cooperation Agreement and the ShOA Agreement which, had they been included in the County's summary judgment motion, would have resulted in the County's motion being granted, and the case dismissed.

Nothing happened in the case for nearly three years until January 4, 2011, when plaintiff moved to restore the case to the trial calendar. As stated, that motion was granted by Judge Mahon (Exhibit "F"), and the case is now scheduled for jury selection on June 6, 2011, with trial to commence on June 8, 2011."

The Court observed that the Defendant subsequent to the denial of its application to dismiss the Complaint on September 21, 2006 moved for summary judgment notwithstanding the statutory requirement that the pleadings be included with the application (see CPLR § 3212(b); also see *Freeman v. Easy Glider Roller Rink*, 114 AD2d 436, 494 NYS2d 351 (Second Dept, 1985)). As such the Defendant should have been on notice of the fact that it had not served an Answer. Notwithstanding this infirmity the Defendant took an appeal of the denial of its summary judgment motion and sought a stay of the trial of the action from the Appellate Division, Second Department.

The Court finds that based upon the foregoing and given that the Plaintiff filed the Note of Issue on July 25, 2006, that the Defendant's application to file a Verified Answer with certain affirmative defenses constitutes prejudice to the Plaintiff. As such to the extent that the Defendant seeks an Order granting defendant's motion pursuant to CPLR 3012(d) to plead its Verified Answer in this action, is **denied**.

The Defendant seeks an Order disqualifying Thomas Liotti, Esq from representing plaintiff at trial pursuant to Rules of Professional Conduct, 22 NYCRR §1200.29 [Rule 3,7], "Lawyer as Witness". Based upon the fact that the contents of the respective agreements speak for themselves the Court at this time can not discern the basis by which the Plaintiff's attorney will be called as a witness. As such that branch of the Defendant's application which seeks an Order staying jury selection and the trial of this action pending the hearing and determination of Defendant's motions pursuant to CPLR 2221 for leave to reargue and leave to renew, is **denied without prejudice to renew** at the time of trial.

In light of the foregoing those portions of the Defendant's motion which seeks an Order staying jury selection and the trial of this action pending the hearing and determination of Defendant's motion to plead its Verified Answer pursuant to CPLR 3012(d) submitted in Defendant's April 2011 Order to Show Cause and an Order staying jury selection and the trial of this action pending the hearing and determination of Defendant's motion to disqualify Thomas Liotti, Esq. from representing Plaintiff at trial pursuant to Rules of Professional Conduct, 22 NYCRR § 1200.29 [Rule 3.7], "Lawyer as Witness," presented in Defendant's April 2011 Order to Show Cause, are both respectively **denied**.

SO ORDERED.

DATED: 11/7/2011

Ray S. Mallon
J.S.C.

ENTERED
NOV 17 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE