

Malcolm v Rite Aid of N.Y., Inc.
2011 NY Slip Op 33635(U)
November 21, 2011
Supreme Court, Kings County
Docket Number: 3287/07
Judge: Larry D. Martin
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of November, 2011.

P R E S E N T:

HON. LARRY D. MARTIN,
Justice.

-----X

ALVIN MALCOLM,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 3287/07

RITE AID OF NEW YORK, INC.
and CARLYLE BYRON,

Mot. Seq. #4

Defendants.

-----X

Alvin Malcolm
Plaintiff Pro Se
1363 East 103rd Street
Brooklyn, NY 11236

Jeffrey Samel & Partners
Attorneys for Defendants
150 Broadway, 20th Floor
New York, NY 10038

The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

1-2 _____
3 _____
4 _____

In this action, inter alia, to recover damages for negligence, false arrest, and battery, the defendants Rite Aid of New York, Inc. and Carlyle Byron (collectively, defendants) move, pursuant to CPLR 2221 (d), for leave to reargue defendants' motion in sequence No. 2 for an order, pursuant to CPLR 3216, dismissing the amended complaint of the plaintiff

Alvin Malcolm (plaintiff) for failure to file a note of issue following defendants' service upon plaintiff of a 90-day notice, or, in the alternative, pursuant to CPLR 3212, granting summary judgment to defendants (defendants' prior motion), and, upon reargument, granting either branch of their prior motion and dismissing the amended complaint. For the reasons set forth below, the court grants defendants leave to reargue. Upon reargument, however, the court adheres to its original determination.

Background

On January 30, 2006, plaintiff, an off-duty and non-uniformed police officer then on paternity leave to care for his four-month old son, was detained by the defendant Carlyle Byron (Byron) and by other Rite Aid employees inside a store at 960 Halsey Street in Brooklyn, New York, for the suspected attempted theft of several cans of baby formula. Upon defendants' written complaint to the police, plaintiff was arrested for attempted petit larceny (a misdemeanor) and taken to a precinct where he was processed and released with a desk appearance ticket for March 7, 2006 at the Brooklyn Criminal Court. Plaintiff's case was not heard on that day, however, because the District Attorney's Office was not ready. By the time of plaintiff's pretrial deposition 2½ years later on November 14, 2008, he still had not heard back from either his criminal defense lawyer or the District Attorney's Office about the status of his criminal case.

Nonetheless, the arrest had serious repercussions on plaintiff's career with the NYPD. As a result of the arrest, he was stripped of his gun and badge, suspended without pay for

30 days, and thereafter placed on administrative duty. He was ultimately charged by the NYPD's Patrol Bureau Brooklyn North with bringing cans of baby formula to a Rite Aid store without a receipt. The record before the court is silent concerning the outcome of the NYPD administrative charges.

Plaintiff commenced the instant action by filing a summons and complaint in January 2007, as amended in April 2007. Defendant Rite Aid interposed an answer in May 2007. Defense counsel stipulated on September 6, 2007 that he represented both defendants (Rite Aid and its employee Byron) and that the case caption should be amended to that effect; yet, a necessary stipulation was not filed with the County Clerk. Some time thereafter, the action was marked "inactive." By notice dated January 29, 2009, defendants demanded that plaintiff resume prosecution of this action as well as serve and file a note of issue within 90 days after receipt of such notice. On June 3, 2009, defendants served their prior motion. On August 15, 2009, plaintiff cross-moved for an order: (1) restoring the case to active calendar, (2) accepting for filing the September 6, 2007 stipulation which added Byron as co-defendant, (3) extending the time for plaintiff to file a note of issue, and (4) granting plaintiff summary judgment and scheduling an inquest on damages (plaintiff's prior cross motion).

In a single order dated April 7, 2010 (the prior order), the court addressed both the defendants' prior motion and the plaintiff's prior cross motion. In the prior order, the court held that:

“After oral argument, a review of the pleadings herein, including the videotaped store surveillance of plaintiff on the date in question, January 30, 2006 at a Rite Aid store located at Halsey Street, Brooklyn, New York, and consideration of the applicable statutory and case law, the court denies both plaintiff’s motion for summary judgment on the issue of liability and defendants’ summary judgment to dismiss plaintiff’s complaint sounding in false arrest and false imprisonment at the subject location.

The court finds there remain material issues of fact including, but not limited to, plaintiff’s actions and intent[,] and defendant’s liability for his detention. (See CPLR 3212; Zuckerman v City of New York, 49 NY2d 557 [1980]).

The case is restored to active status.”

The prior order was entered on April 19, 2010. It does not appear from the County Clerk’s records that the prior order was served with notice of entry. The instant motion to reargue was served on May 24, 2010.

The Parties’ Contentions

Defendants seek leave, pursuant to CPLR 2221 (d), to reargue both branches of their prior motion. Defendants maintain that the court, in the prior order, overlooked the initial branch of their prior motion which was to dismiss pursuant to CPLR 3216. In this regard, defendants contend that the initial branch of their prior motion which was to dismiss pursuant to CPLR 3216 should have been granted because plaintiff missed the 90-day deadline within which to file a note of issue, and he presented no reasonable excuse for such failure. Separately, defendants contend that the court misapprehended the facts and the law in denying the alternative branch of their prior motion which was for summary judgment. In

particular, defendants contend that the alternative branch of their prior motion which was for summary judgment should have been granted because plaintiff's mental state was not a material triable issue of fact and because the resolution of this branch of their prior motion did not depend on that issue.

In opposition, plaintiff contends that leave to reargue should be denied. With respect to the CPLR 3216 branch of defendants' prior motion, plaintiff points out that the court did not overlook that argument because the prior order restored the case to active status. Moreover, plaintiff asserts that he has submitted a justifiable excuse for the delay in filing a note of issue and a good and meritorious cause of action. With respect to the alternative branch of defendants' prior motion which was for summary judgment, plaintiff maintains that his intent was only one of the many reasons for the court's decision, noting that the prior order uses the phrase "including, but not limited to," to describe some, but not all, of the extant material issues of fact justifying the denial of summary judgment to defendants.

Analysis

A motion for leave to reargue will be granted if it is based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion (*see* CPLR 2221 [d]). The court agrees with defendants that the prior order did not sufficiently address the CPLR 3216 branch of their motion and, in the exercise of its discretion, grants them leave to reargue (*see Ruggiero v Long Is. R.R.*, 161 AD2d 622 [2d Dept 1990]).

Defendants' Request to Dismiss for Plaintiff's Failure to Comply with CPLR 3216

CPLR 3216, which is the general statutory authority for neglect-to-prosecute dismissals, provides, in relevant part, that:

“(a) Where a party . . . unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party’s pleading on terms. . .

(b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with: . . .

(3) The court or party seeking such relief, as the case may be, shall have served a written demand *by registered or certified mail* requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand . . .

* * *

(e) In the event that the party upon whom is served the demand specified in subdivision (b) (3) of this rule fails to serve and file a note of issue within such ninety day period, the court may take such initiative or grant such motion *unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action*” (emphasis added).

The court holds that dismissal of plaintiff’s amended complaint pursuant to CPLR 3216 is unwarranted. As an initial matter, there is no evidence before the court that defendants served their 90-day demand by registered or certified mail as required by CPLR 3216 (b) (3). More importantly, the court, in the exercise of its discretion, finds that, in opposition to defendants’ prior motion and in support of his prior cross motion, plaintiff

established both a reasonable excuse for his delay in responding to the notice and that he had a potentially meritorious cause of action.¹ With respect to the reasonable excuse prong of CPLR 3216 (e), plaintiff demonstrated, in opposition to defendants' prior motion and in support of his prior cross motion, the following:

Existence of Parallel Litigation: After defendants' service of the 90-day notice on January 29, 2009, plaintiff had an administrative trial at the NYPD in April 2009 to resolve the charge against him stemming from the underlying incident, but that no decision was rendered by August 15, 2009, when he served his prior cross motion for an order, inter alia, restoring the case to active calendar and extending his time to file a note of issue.

Other Pretrial Activity: Plaintiff obtained and subsequently served defense counsel in August 2009 with transcripts of the initial interviews of two Rite Aid employees, thus rendering the filing of a note of issue before August 2009 premature.

¹ See *Gagnon v Campbell*, 86 AD3d 623, 624 (2d Dept 2011) ("Upon receipt of the 90-day demand, the plaintiff was required to comply with it either by serving and filing a timely note of issue or by moving, before the default date, to vacate the demand or to extend the 90-day period pursuant to CPLR 2004. Having failed to pursue any of the foregoing options, the plaintiff was obligated to demonstrate a reasonable excuse for the delay and a potentially meritorious cause of action to avoid the sanction of dismissal.") (internal citations omitted).

Disabling Circumstances: Plaintiff's then counsel Erika McDaniel Edwards, Esq., had lost her father in January 2009 and her mother-in-law in June 2009, in each case, because of illness.²

Law Office Failure: Because of defendants' failure to file with the County Clerk the September 6, 2007 stipulation adding Byron as co-defendant, there was an inconsistency in the outdated caption as shown in the County Clerk's records and the correct caption of the case as reflected in a note of issue which plaintiff sought to file with the County Clerk, and that, as a result of this inconsistency, the note of issue which plaintiff had previously served on defendants was rejected for filing by the County Clerk.

While the court agrees that plaintiff's counsel should have expeditiously moved to restore the case and to extend the note of issue filing date, the court notes that defendants have not articulated any real prejudice. Notably, plaintiff has complied with all document discovery and needs only to file a note of issue. Viewing the record as a whole, the lack of plaintiff's diligence did not rise to the level of failure to prosecute the action.

Separately, the court finds that plaintiff has a potentially meritorious cause of action. As can be gleaned from plaintiff's pretrial deposition testimony, he was detained by defendants and arrested, at defendants' request, on the allegedly unfounded suspicion that

² By order, dated April 12, 2011 and entered April 15, 2011, the court granted the motion of plaintiff's counsel to withdraw, stayed this action for 45 days, and directed plaintiff to proceed with, or without counsel, after the expiration of the 45-day stay.

he had attempted to steal several cans of baby formula from a Rite Aid store. The alleged scheme, as outlined by defendants, was fairly complex for the petty crimes of this type. Specifically, plaintiff was accused of secreting cans of baby formula in his bag and/or under his arm, approaching the check-out counter, emptying his bag and placing the cans on the counter, and requesting the cashier to exchange these cans for several cans of another brand of baby formula. At his pretrial deposition, plaintiff denied a sinister or dishonest motive. He explained that on the day in question he initially had bought several cans of baby formula at a Rite Aid Fulton Street store; he then returned to the Fulton Street store to exchange the cans for another brand of baby formula but was able to exchange only some of the cans because the Fulton Street store lacked a sufficient number of cans to effectuate the full exchange; he ultimately went to the store at issue (the Rite Aid Halsey Street store) to exchange the remaining cans of baby formula. If plaintiff's version of events is credited, defendants' acts of detaining and searching plaintiff, a 12-year veteran with the NYPD, for 40 minutes and then having him arrested – all for allegedly stealing merchandise hardly worth more than \$30 – were tortious. Given the foregoing, the policy of deciding cases on their merits, and the absence of an intent on the part of plaintiff to abandon this action, the initial branch of defendants' prior motion which is to dismiss plaintiff's amended complaint for failure to timely file a note of issue is denied (*see Giannoccoli v One Cent. Park W. Assoc.*, 15 AD3d 348, 349 [2d Dept 2005]).

Defendants' Alternative Request to Dismiss on Summary Judgment

Defendants' sole argument in support of reargument of the denial of this branch of their prior motion is that the court's statement in the prior order that "there remain material issues of fact including, but not limited to, plaintiff's actions and intent," indicates that the court misapprehended the facts and law. Defendants argue that plaintiff's mental state is not a triable issue of fact and cannot be crucial to the issue of their potential liability.

As an initial matter, the court notes that ascertaining plaintiff's "actions and intent," specifically with regard to whether plaintiff secreted the cans intending to steal them or whether plaintiff merely intended to exchange the cans, would serve to elucidate whether defendant Byron acted reasonably in detaining plaintiff and subsequently causing his arrest. Equally important, there are other issues of material fact, precluding the grant of summary judgment in defendants' favor, such as: (1) whether plaintiff was attempting to steal the cans of baby formula, (2) whether Byron was justified in detaining plaintiff, and (3) whether Byron and other Rite Aid employees were justified in causing plaintiff's arrest. Accordingly, the alternative branch of defendants' motion which was for summary judgment was properly denied.

Conclusion

Accordingly, it is

ORDERED that leave to reargue defendants' prior motion is granted; and it is further

ORDERED that, upon reargument, the court adheres to its original determination and denies defendants' prior motion in all respects; and it is further

ORDERED that plaintiff's time to file the note of issue is enlarged, and a note of issue is to be filed by no later than February 29, 2012.

The foregoing constitutes the decision and order of the court.

E N T E R,

NOV 21 2011



J. S. C.

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT

KINGS COUNTY CLERK
FILED

2011 DEC -6 AM 9:04

A handwritten signature in black ink, appearing to be 'DNY' or similar, written in a cursive style.