Coaxum v Nor-Topia Serv. Station, Inc.
2011 NY Slip Op 33862(U)
July 6, 2011
Sup Ct, Bronx County
Docket Number: 309385/09
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 7

Index No. 309385/09
Motion Calendar No.
Motion Date:

HENRY COAXUM,

Plaintiff,

-against-

NOR-TOPIA SERVICE STATION, INC., DARRYL A. ROBINSON, the Administrator of the Estate of WILLIAM ROBINSON and MICHAEL VAZQUEZ,

Defendants

DECISION/ORDER
Present:
Hon. Wilma Guzman
Justice Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for summary judgment:

Papers	**Numbered**
Nor-Topia Notice of Motion, Affirmation in Support, and exhibits thereto	**1**
Robinson Notice of Motion, Affirmation in Support, and exhibits thereto	**2**
Coaxum Affirmation in Opposition and exhibits thereto	**3**
Nor-Topia Reply Affirmation	**4**
Robinson Reply Affirmation	**5**

Upon the foregoing papers, and after due deliberation, and following oral argument, the Decision/Order on this motion is as follows:

Defendants Nor-Topia Service Station, Inc., (hereinafter Nor-Topia) and Michael Vazquez move pursuant to CPLR § 2221 to reargue and/or renew this Court's prior Order dated September 30, 2010. Defendant Robinson separately moves for similar relief. Plaintiff submitted written opposition to both motions. .

A combined motion for leave to reargue shall identify separately and support each item of relief sought. C.P.L.R. § 2221. A motion for leave to reargue under C.P.L.R. § 2221(d) shall be identified specifically as such and shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion. A motion for leave to renew under C.P.L.R. § 2221 shall be identified specifically as such and 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 shall contain reasonable justification for the failure to present such facts on the prior motion.

A motion seeking leave to reargue is addressed to the court's sound discretion and can be granted only if it is shown that the court overlooked or misapprehended the facts or the law or was otherwise mistaken in its earlier decision; the motion does not allow reargument of issues previously decided or consideration of arguments different from those originally entertained. *See*, Rule 2221 of the C.P.L.R. and William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22, 588 N.Y.S.2d 8, (1st Dept. 1992), leave to appeal dismissed in part and denied in part, 80 N.Y.2d 1005, 592 N.Y.S.2d 665, 607 N.E.2d 812, reargument denied, 81 N.Y.2d 782, 594 N.Y.S.2d 714, 610 N.E.2d 387. A motion to renew should be based on newly discovered facts but it is within the court's discretion to grant renewal even upon facts that were known to the movant at the time the original motion was made. Lupoli v. Venus Labs., 264 A.D.2d 820, 695 N.Y.S.2d 598. The arguments made in the instant motion are not based upon facts unknown or new law at the time the original motion was made and as such, this Court denies the motion as one to renew and considers it as a motion to reargue.

Defendants Nor-Topia and Vasquez argue that this Court overlooked the affidavit of service which indicates that the defendants were served by plaintiff on December 4, 2009. As such, the defendant's response to the plaintiff's complaint was not untimely. This affidavit of service was not submitted in support of the underlying motions. However, defendant asserts that the affidavit of service was available to the Court through the Court file. It should be noted that it is not the Court's position to search for documents not submitted with motions that are under consideration by the Court. Notwithstanding, as the affidavit of service does evince a timely response to the plaintiff's pleadings, and plaintiff does not oppose the motion to reargue by defendants Nor-Topia and Vasquez, this Court grants defendants Nor-Topia and Vasquez' motion to reargue and conditions the underlying motion on the merits and decides as follows:

Defendants Nor-Topia and Vazquez move for an Order dismissing the plaintiff's complaint pursuant to CPLR §3211 and for costs and sanctions against plaintiff. Defendant Robinson brings a similar motion for an Order granting summary judgment dismissing the suit pursuant to CPLR §3211 and/or 3212. Plaintiff submitted an 'unofficial reply', to which defendant Robinson replied.

Plaintiff then submitted an 'official reply', the submission of which defendant Robinson and Not-Topia objected to. Robinson also moves to reject Coaxum's 'official reply', to which Coaxum submitted written opposition.

Plaintiff commenced a cause of action on January 17, 2002 seeking damages for injuries allegedly sustained as the result of a motor vehicle accident which occurred on Tiemann Road at or near its intersection with Boston Road, Bronx County, NY on April 7, 2001. That action was dismissed by Justice Tuitt on October 8, 2009 after plaintiff repeatedly ignored seven different court orders to appear for a deposition, appear for a physical examination and provide full basic discovery. When plaintiff did finally appear for a deposition five years after the initial court order, he did not complete this deposition because he fell ill. Plaintiff subsequently ignored two further court orders to complete his deposition and discovery. Nonetheless, plaintiff filed a Note of Issue that claimed that discovery was complete and that physical examination had been waived by defendants. Justice Tuitt struck this Note of Issue on June 5, 2008. On October 8, 2009, Justice Tuitt dismissed the action, concluding that "in the instant action, it is considerably clear that plaintiff violated numerous Court orders. This pattern of non-compliance warrants the dismissal of plaintiff's action. It is clear from plaintiff's continuous disregard of numerous Court orders ordering the same discovery over the course of seven years, that plaintiff's conduct has been willful and contumacious." [October 8, 2009 Tuitt Order]. Plaintiff did not appeal this decision.

On November 4, 2009, plaintiff re-filed an action based on the same 2001 accident, adding a second cause of action against Not-Topia for negligently entrusting its vehicle to an unsuitable driver. The summons was filed on November 4, 2009 with a verified compliant served on November 18, 2009. All defendants herein move to dismiss the plaintiff's November 4, 2009 complaint on the grounds that the October 8, 2009 Order of Justice Tuitt precludes the instant action.

This Court will not and can not revisit the determinations made by the Hon. Alison Tuitt and any basis for which that Court held that plaintiff's actions in prosecuting the underlying case had been "wilfull and contumacious" thus resulting in a dismissal of the action. This Court must merely determine whether based upon the dismissal of the Hon. Alison Tuitt, the plaintiff is now precluded from bringing the November 4, 2009 action.

CPLR 205(a) indicates in pertinent part

> "If an action is timely commenced and is terminated in any other manner than by . . . a dismissal of the complaint for neglect to prosecute the action, ... the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period. Where a dismissal is on e for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specif conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

A second action will be precluded under CPLR 205(a) where the first action was dismissed for the neglect to prosecute. A dismissal based upon plaintiff's failure to comply with disclosure orders has been held to evince an unwillingness to prosecute the action in a timely fashion. Andrea v. Arnone, et al., 5 N.Y.3d 514 (2003). Santiago v. City of New York, 77 A.D.3d 561 (1st Dept. 2010); Berman v. Szpilzinger, 200 A.D.2d 367 (1st Dept. 1994). "While not denominated as such, however, the order dismissing the first action was tantamount to an order of preclusion, the dismissal of the action having been premised on plaintiff's action, on plaintiff's unjustified , unexplained refusal to comply with certain relevant discovery requests . . ." Perez v. New York City Housing Authority, 302 A.D2d 210 (1st Dept. 2003).

C.P.L.R. 205(a) precludes the plaintiff's second complaint brought on November 4, 2009. The October 8, 2009 Order of Hon. Alison Tuitt, for all intense and purpose is an Order dismissing the complaint for the neglect to prosecute. Based upon plaintiff's willful and contumacious conduct which resulted in the dismissal of the underlying complaint for neglect to prosecute, the plaintiff can not now avail himself of the six month extension of the statue of limitations. As noted above, this Court can not decide whether the underlying dismissal was appropriate and notes that plaintiff did not take an appeal of the October 8, 2009 Order. As such, defendants Nor-Topia and Vasquez' motion to dismiss plaintiff's complaint is granted as plaintiff's November 4, 2009 complaint is precluded from the benefit of the "relation back statute" under C.P.L.R. 205(a). It should be noted that notwithstanding any procedural defect in the underlying moving papers of defendant Robinson, as plaintiff's action is barred by CPLR 205(a), the same relief of dismissal is extended to defendant Robinson.

22 NYCRR 130-1.1 states in pertinent part that

> (a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart.
>
> (c)For purposes of this Part, conduct is frivolous if
>
> 1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false.

Although, unsuccessful, this Court does not find that plaintiff's motion was without merit in law and unsupported by a reasonable argument. As plaintiff indicated in it's opposition papers, several cases in other departments have held in facts similar to plaintiff's that preclusion of the second action was not warranted. However, these cases are not binding on the plaintiff. As such, that part of defendant Nor-Topia and Vasquez' motion which seeks costs and sanctions is denied.

Accordingly, it is

ORDERED that defendants Nor-Topia and Vasquez' motion to reargue is hereby granted without opposition and this Court's September 30, 2010 decision is vacated. It is further

ORDERED that defendants Nor-Topia and Vasquez' motion to dismiss the plaintiff's November 4, 2009 complaint is hereby granted. It is further

ORDERED that defendants Nor-Topia and Vasquez' motion for costs and sanctions is hereby denied. It is further

ORDERED that defendant Robinsons motion to reargue is hereby granted and this Court's September 30, 2010 decision is vacated. It is further

ORDERED that defendant Robinson's motion to dismiss the plaintiff's November 4, 2009 complaint is hereby granted. It is further

ORDERED that defendants Nor-Topia and Vasquez serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days of entry of this Order.

The Clerk of the Court shall mark the Court file accordingly.

This constitutes the Decision and Order of the Court.

7/6/11
DATE

HON. WILMA GUZMAN
Justice Supreme Court