

Reid v Incorporated Vil. of Floral Park

2011 NY Slip Op 34154(U)

September 12, 2011

Supreme Court, Nassau County

Docket Number: 1981/11

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MICHAEL REID,

Plaintiff,

- against -

INCORPORATED VILLAGE OF FLORAL PARK,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 1981/11
Motion Seq. Nos.: 02, 03
Motion Dates: 07/29/11
07/29/11

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The following papers have been read on this motion:

	Papers Numbered
<u>Order to Show Cause (Seq. No. 02), Affirmation and Exhibits</u>	1
<u>Notice of Cross-Motion (Seq. No. 03), Affirmation and Exhibits</u>	2
<u>Affirmation in Reply to Defendant's Opposition and in Opposition to Cross-Motion</u>	3

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Plaintiff moves (Seq. No. 02), pursuant to CPLR § 2221(e), for an order renewing the Court's June 21, 2011 Decision and Order which granted defendants' motion, pursuant to CPLR §§ 9801 and 9802, for an order dismissing plaintiff's Verified Complaint; and for an order permitting plaintiff's application to submit a cross-motion. Defendant opposes the motion and cross-moves (Seq. No 03), pursuant to CPLR § 2221, for a order granting defendant leave to reargue defendant's prior motion for partial dismissal of plaintiff's complaint to the extent that same was denied by the Court's June 21, 2011 Decision and Order. Plaintiff opposes

defendant's cross-motion.

With respect to plaintiff's motion for renewal (Seq. No. 02), 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." In support of plaintiff's motion for renewal, counsel for plaintiff argues, "[p]laintiff wrongly but reasonably relied on Salesian Soc., Inc. v. Vill. of Ellenville, 41 N.Y.2d 521, 623 N.E.2d 604 (1977), for the proposition that failure to plead compliance with CPLR §§ 9801 and 9802 was not fatal to the complaint. Believing that it would unnecessarily utilize additional judicial resources, Plaintiff did not submit a cross-motion. CPLR 2221(e)(3). This was in error, and the undersigned apologizes for same. Plaintiff now seeks to amend this error by moving to renew the underlying motion to submit the cross motion to amend, and does so timely, within just days of the Court's Order."

In opposition to plaintiff's motion to renew, defendant argues that "[a]bsent from plaintiff's motion papers is any reference to new facts that warrant a change of this Court's prior determination. To the contrary, plaintiff clearly is using the renewal motion as a second chance to explain away his failure to comply with a statutory precedent." Defendant adds that the fact that plaintiff now wishes to cross-move to amend his complaint does not warrant renewal of the underlying motion, nor does the fact that plaintiff chose not to seek leave to amend during the underlying motion warrant renewal at this juncture.

As submitted by defendant, "a motion for leave to renew is not a second chance freely

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given to parties who have not exercised due diligence in making their first factual presentation.” See *Rowe v. NYCPD*, 85 A.D.3d 1001, 926 N.Y.S.2d 121 (2d Dept. 2011) quoting *Elder v. Elder*, 21 A.D.3d 1055, 802 N.Y.S.2d 457 (2d. Dept 2005). In support of his renewal argument, plaintiff’s counsel merely offers the fact that it erred in not submitting a cross-motion and apologizes for same. This does not constitute “new facts” that warrant renewal. Plaintiff’s motion for renewal is devoid of any new facts that would constitute grounds for renewal pursuant to CPLR § 2221(e). Furthermore, the Court does not find that plaintiff has provided a reasonable justification for its lack of due diligence in its opposition to the prior motion. As the Court held in its June 21, 2011 Decision and Order, “[p]laintiff, indicated in his opposition, that he was aware of the pleading requirement and that he did not comply with said requirement. Plaintiff stated that, “[p]laintiff, if the court prefers, will move to amend his Complaint.” The Notice of Claim requirements of CPLR §§ 9801 and 9802 are not a “preference of the Court,” but rather mandated statutory requirements that must be followed. Despite the fact that plaintiff was aware that he should amend his Verified Complaint, he failed to cross-move to ask the Court for such relief.”

Accordingly, plaintiff’s motion, pursuant to CPLR § 2221(e), for an order renewing the Court’s June 21, 2011 Decision and Order which granted defendants’ motion, pursuant to CPLR §§ 9801 and 9802, for an order dismissing plaintiff’s Verified Complaint; and for an order permitting plaintiff’s application to submit a cross-motion is hereby **DENIED**.

With respect to defendant’s motion (Seq. No .03) for re-argument of the portion of its motion that argued that plaintiff is actually claiming that defendant breached his Employment Agreement on an annual basis between 1999-2010 and is precluded from pursuing any claims

based upon purported breaches from 1999 to 2008 pursuant to the applicable statute of limitations, it is settled that “[m]otions for re-argument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon showing that the court overlooked or misapprehended the facts or law for some [other] reason mistakenly arrived at earlier.” See *Carrillo v. PM Realty Group*, 16 A.D.3d 611, 793 N.Y.S.2d 69 (2d Dept. 2005). See also CPLR § 2221 (d)(2); *Barnett v. Smith*, 64 A.D.3d 669, 883 N.Y.S.2d 573 (2d Dept. 2009); *Frisenda v. X Large Enterprises Inc.*, 280 A.D.2d 514, 720 N.Y.S.2d 187 (2d Dept. 2001); *William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22, 588 N.Y.S.2d 8 (1st Dept. 1992); *Foley v. Roche*, 68 A.D.2d 558, 418 N.Y.S.2d 588 (1st Dept. 1979), *appeal after remand*, 86 A.D.2d 887, *app den.* 56 N.Y.2d 507.

Notably, the remedy “is not designed to provide an unsuccessful party with successive opportunities” to make repetitious applications, “rehash questions already decided” or “present arguments different from those originally presented.” See *McGill v. Goldman*, 261 A.D.2d 593, 691 N.Y.S.2d 75 (2d Dept. 1999); *William P. Pahl Equipment Corp. v. Kassis*, *supra*. See also *Gellert & Rodner v. Gem Community Management Inc.*, 20 A.D.3d 388, 797 N.Y.S.2d 316 (2d Dept. 2005); *Pryor v. Commonwealth Land Title Ins. Co.*, 17 A.D.3d 434, 793 N.Y.S.2d 452 (2d Dept. 2005); *Amato v. Lord & Taylor, Inc.*, 10 A.D.3d 374, 781 N.Y.S.2d 125 (2d Dept. 2004).

Defendant has not demonstrated that the Court overlooked or misapprehended the facts (and viable issues thereto) or law relative to its analysis and subsequent decision of defendant’s prior motion to dismiss.

Having reviewed its prior determination and the papers submitted herein, the Court concludes that it has not overlooked or misapplied any controlling principles of law. See

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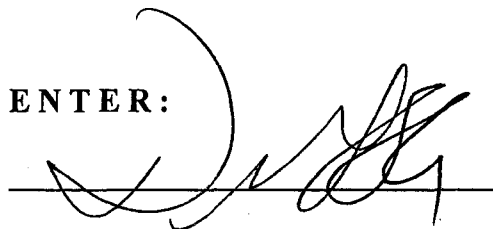
William P. Pahl Equipment Corp. v. Kassis, supra; Foley v. Roche, supra. Nor can the Court glean from the record herein where it had, for some other reason, mistakenly arrived at its earlier decision. *See Long v. Long*, 251 A.D.2d 631, 675 N.Y.S.2d 557 (2d Dept. 1998).

Re-argument is denied as defendant has failed to demonstrate that the Court misapprehended the facts or misapplied the law. *See CPLR § 2221(d)(2)*.

Accordingly, the Court adheres to its original determination and decision and defendant's instant cross-motion (Seq. 03) is hereby **DENIED**.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
September 12, 2011

ENTERED
SEP 15 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE