

Casas v Consolidated Edison Co. of N.Y., Inc.

2012 NY Slip Op 31627(U)

June 11, 2012

Supreme Court, New York County

Docket Number: 115106/2004

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

LUIS CASAS, By His Guardian, BETTY CASAS,
Plaintiff,

INDEX NO. 115106/2004

-against-

MOTION SEQ. NO. 011

CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC.,
Defendant.

The following papers were read on this motion by defendant to reargue pursuant to CPLR 2221.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo)

Reply Affidavits — Exhibits (Memo)

PAPERS NUMBERED

Cross-Motion: **Yes** **No**

NEW YORK COUNTY CLERK'S OFFICE

By prior Decision and Order, dated September 27, 2011 (Prior Order), this Court consolidated and resolved the motions and cross-motions submitted under motion sequence numbers 008, 009 and 010. Defendant Consolidated Edison Company of New York, Inc. (Con Ed) now moves for an order, pursuant to CPLR 2221, granting reargument of those portions of the Prior Order which were resolved against it, and upon reargument, seeks an order resolving the same issues in its favor. Plaintiff Luis Casas (Casas), by his guardian Betty Casas, opposes Con Ed's motion.

Casas commenced the instant action to recover damages for the serious physical injuries he allegedly sustained on August 6, 2003, when he was struck in the head by a large piece of cement. The cement allegedly fell from the basement ceiling of Con Ed's Waterside facility in lower Manhattan. At the time of his accident, Casas was working as a janitor for nonparty Nelson Maintenance Services (Nelson) and was assigned to the Waterside facility.

Casas's complaint initially alleged negligence and Labor Law violations. The complaint was filed by plaintiff in 2004, and issue was joined by service of Con Ed's answer that same

year. A third-party action against Nelson was commenced and voluntarily discontinued in 2005, and a lengthy period of discovery ensued. As stated in the Prior Order, there were multiple court appearances, discovery motions and court orders. By motion, dated June 23, 2006, Casas moved for an order striking Con Ed's answer and/or related relief, which was resolved pursuant to a handwritten in-court stipulation, dated October 19, 2006. The stipulation was so-ordered on October 26, 2006, by the Hon. Michael Stallman, before whom this matter was then pending. The attorney on the instant motion is the same attorney who represented and negotiated on behalf of Con Ed at the conference leading up to the so-ordered stipulation. An integral part of the resolution of Casas's motion was the inclusion of self-executing language obligating Con Ed to produce specific discovery within a specific time period, warning that a "failure to do so w/ 30 days will result in defendant[s] answer being stricken."

While the details of what transpired after the order was filed with the New York County Clerk's office on October 31, 2006 are set forth in the Prior Order, familiarity with which is presumed, the parties sought further discovery-related court intervention under motion sequence numbers 008, 009 and 010 (Prior Motion), dated December 14, 2010; December 22, 2010 and April 6, 2011, respectively. Through the Prior Motion, plaintiff essentially sought an order confirming and declaring that: (1) Con Ed's answer was stricken in 2006, due to Con Ed's failure to produce the discovery as set forth in a stipulated discovery order, dated October 19, 2006, and so-ordered on October 26, 2006 (October 26th Order), resolving the then-pending motion by plaintiff for an order striking defendant's answer based upon its repeated failures to produce demanded discovery and to produce a witness for deposition; (2) a declaration that Casas had, at no time, waived or abandoned the relief in that self-executing, so-ordered stipulation; (3) the trial would only pertain to the issue of damages; and (4) Con Ed should pay sanctions for making a motion to dismiss his Labor Law claims. Con Ed essentially sought: (1) an order and declaration to the effect that the answer had not been stricken pursuant to the

October 26th Order; (2) declaring the disclosure which was the subject of the October 26th Order, which defendant served in February 2010, was timely, nunc pro tunc; (3) additional discovery and a trial on both liability and damages; and (4) a determination that Casas is collaterally estopped from litigating claims for injuries arising after September 4, 2008.

In the Prior Order, this Court granted the motions and cross-motions to the extent of declaring that Con Ed's answer was stricken pursuant to the terms of the October 26th Order and that the trial of the action would be limited to the issue of damages. This Court also granted that aspect of Con Ed's motion which sought a summary judgment dismissal of the Labor Law claims (second, third and fourth causes of action). In all other respects, the motions and cross motions were denied.

Although Con Ed now seeks to reargue every aspect of the motions underlying the Prior Order, except those which pertain to the now-dismissed Labor Law claims, there are two main components to the motion. The first is that this Court erred in striking Con Ed's answer, pursuant to the provisions set forth in the October 26th Order, on the ground that the record does not reveal that its failure to produce the discovery within 30 days constituted willful and contumacious conduct on its part, and because the October 26th Order was not self-executing. The second is that the Court erred by failing to collaterally estop plaintiff from offering evidence at trial that his post-September 5, 2008 disability was causally related to his August 6, 2003 accident.

CPLR 2221 provides, in relevant part, that a motion for leave to reargue a prior motion "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]). A motion for leave to reargue must also "be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry" (CPLR 2221[d][3]).

Notably absent from Con Ed's motion papers is any indication that it met the statute's timeliness requirement (see CPLR 2221[d](3)). Notice of entry of the Prior Order, dated September 27, 2011, is dated October 3, 2011. The motion for leave to reargue, dated November 7, 2011, was not filed until November 22, 2011, well over 30 days after notice of entry. It is, therefore, appropriate to deny the instant motion based solely on Con Ed's failure to demonstrate compliance with CPLR 2221(d)(3).

Moreover, even if timely made, Con Ed's motion for leave to reargue would, nevertheless, be denied. It is well settled that a motion to reargue is not a means by which an unsuccessful party can obtain a second opportunity to argue the issues previously decided, nor is it an opportunity for it to present new or differently worded facts or arguments relating to the same issues previously argued (see *McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; 15 E. 63 St. Co. v *Cook*, 120 AD2d 442, 443 [1st Dept 1986]; *Foley v Roche*, 68 AD2d 558, 567 - 568 [1st Dept 1979]). Rather, it is an opportunity to show the motion court that it overlooked relevant facts or misapprehended relevant applicable law (see *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]; *Foley v Roche*, 68 AD2d at 567).

Con Ed asserts that its intent is not to rehash old arguments or to reargue the law previously argued. However, in support of its motion, Con Ed submits a series of explanations, justifications and rationales for its repeated failures to comply with outstanding discovery demands and orders, including the October 26th Order, which are substantively similar to those it submitted in the Prior Motion. Inasmuch as production of the discovery listed in the October 26th Order was required by no later than November 25, 2006, Con Ed's failure to produce the discovery until February 2010 cannot be considered reasonably prompt, in good faith or justifiable under the circumstances of this case.

Furthermore, Con Ed errs in its reading of Justice Stallman's order dated July 29, 2010, as meaning that the October 26th Order was not self-executing. In denying Con Ed's motion for

vacatur of the October 26th Order and referring to this Court the issue of whether Con Ed had complied with the terms and conditions of the October 26th Order, Justice Stallman admonished defendant as follows:

Here, there is no cause to justify vacating the stipulation dated October 19, 2006 and so-ordered on October 26, 2009. It cannot be said that defendant acted with reasonable promptness under the circumstances, because defendant's motion was made more than three years after the stipulation was so-ordered. Defendant-movant should not be heard to complain that the consequences of its failure to comply with the terms of providing discovery were too harsh, when movant's counsel agreed to those terms, including the amount of time to comply with the discovery. Faced with a motion to strike its answer for allegedly not having complied with discovery, defendant bargained for and accepted a conditional order striking its answer. In sum, defendant essentially argues that it should be excused from the consequences of any noncompliance because it has meritorious defenses. This argument is unavailing: "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v. Pfeffer*, 94 NY2d 118, 123 [1999]).

As stated above, on October 26, 2006, when faced with plaintiff's motion to strike its answer for failure to comply with previous discovery orders, counsel for Con Ed negotiated a resolution of the then-pending motion. Con Ed stipulated to the terms and parameters of its production of certain documentary discovery and a particular deposition witness, and then failed to follow through. Neither the specified discovery nor the time requirement for its production were optional, and contrary to Con Ed's assertion (now and on the Prior Motion), the agreed upon sanction for its failure to produce the discovery pursuant to the terms of the stipulation (strike answer) was self-executing. No additional court intervention was required.

It is well settled that a "[d]efendant's disobedience of a series of court orders directing the production of documentary material and the appearance of the [defense witness] for deposition constitute[s] precisely the sort of dilatory and obstructive, and thus contumacious, conduct warranting the striking of [its] answer" (*Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 [1st Dept 1996], *lv denied* 88 NY2d 802 [1996]).

Con Ed's effort to obtain leave to reargue is based upon its rewording of its prior arguments and its attempt to shift blame to plaintiff for its failure to produce previously ordered discovery. Con Ed's suggestion that plaintiff was somehow responsible for Con Ed's discovery failings, ignores the multiple discovery orders and motion upon which the negotiated penalty was premised, and which caused the answer to be stricken. Con Ed's answer was stricken, not due to one or two lapses over a course of years, but as the result of a history of noncompliance. Con Ed fails to demonstrate how the Court overlooked relevant facts or misapprehended applicable law by finding that Con Ed failed to produce the discovery on a timely basis and by enforcing the terms and conditions of the order which mandated striking of the answer.

Con Ed also fails to establish that this Court misapprehended either facts or the law with respect to offering evidence at trial regarding Casas's post-September 5, 2008 disability. Con Ed's motion to preclude this evidence was based upon the March 19, 2009 determination of a Workers' Compensation Law Judge (WC Judge). The WC Judge made findings of fact which included a determination that Casas's disability after September 5, 2008 was not causally related to his August 6, 2003 accident.

Con Ed argued that because the fact-based findings were affirmed and made part of a final administrative finding, plaintiff could not re-litigate the duration of his disability (past September 5, 2008) at the time of trial. Casas argued that the determination was not entitled to preclusive effect because, like the WC Board's determination in *Auqui v. Seven Thirty One Ltd Partnership* (83 AD3d 407 [1st Dept 2011]), it was based upon findings of mixed law and fact. This Court adhered to the holding in *Auqui* on the ground that it is bound to follow its precedent until the Court of Appeals or the First Department pronounces a contrary rule. Con Ed asks this Court to grant it leave to reargue, and upon reargument, to reverse its determination on this issue because *Auqui* is now on appeal to the Court of Appeals.

In addition to arguing that *Auqui* is good law, Casas asserts that the Workers' Compensation determination was not final, as his case has recently been reopened, and that following a hearing on November 1, 2011, the Workers' Compensation Board authorized surgical treatment for his back based upon injuries he sustained on August 6, 2003 (Plaintiff's Opp., exhibit A). For its part, Con Ed objects to the introduction of this evidence as the information/argument was "never before raised in the court below," and is based upon "new Workers Compensation records, never before disclosed to defendant" (Reply Aff., ¶¶ 7, 8).

Inasmuch as Con Ed provides little guidance, other than repeating its prior arguments, as to how this Court misapprehended either the facts or the law on this issue, the motion for leave to reargue this aspect of the Prior Order is also denied. Con Ed's ultimate dissatisfaction with the ruling contained in the Prior Order does not constitute a ground for either reargument or resolving this issue in its favor. If and when the Court of Appeals issues a ruling contrary to that expressed by the First Department in *Auqui*, the parties will be entitled to seek appropriate relief and to offer evidence they deem appropriate and necessary for the Court's determination.

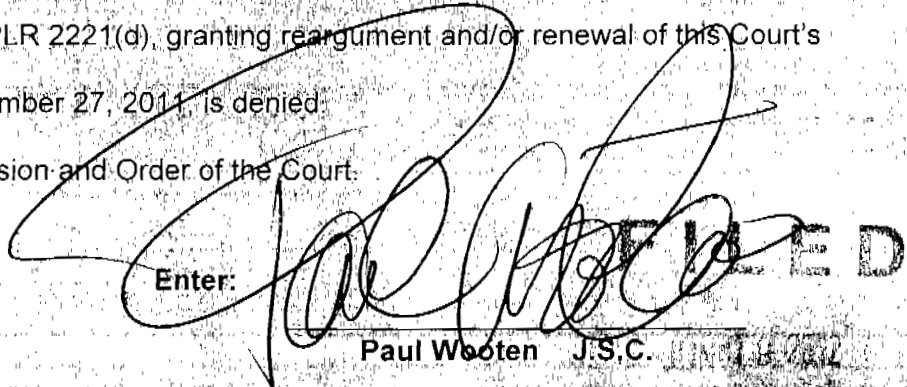
Accordingly, based upon the procedural and substantive grounds set forth above, it is

ORDERED that the motion by defendant Consolidated Edison Company of New York, Inc. for an order, pursuant to CPLR 2221(d), granting reargument and/or renewal of this Court's decision and order, dated September 27, 2011, is denied.

This constitutes the Decision and Order of the Court.

Dated: 6-11-12

Enter:



Paul Wooten J.S.C.

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