

Cruz v Allstate Ins. Co.
2014 NY Slip Op 33265(U)
March 25, 2014
Supreme Court, Bronx County
Docket Number: 305264/09
Judge: Wilma Guzman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 7**

Index No. 305264/09
Motion Calendar No. 4
Motion Date: 1/27/13

DENNIS CRUZ and JOSEPH CRUZ,
Plaintiff,

-against-

ALLSTATE INSURANCE COMPANY,
Defendants,

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

Recitation, as required by C.P.L.R. 2219(a), of the papers considered in the review of this motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Defendant's Notice of Motion, Affirmation in Support, and Exhibits in Support.....	1
Plaintiff's Affirmation in Opposition and Exhibits.....	2
Reply Affirmation.....	3

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

Defendant moves this Court pursuant to C.P.L.R. 2221 for an Order granting renewal of this Court's Order dated may 15, 2012 and upon renewal for an Order granting summary judgment and dismissing the plaintiff's fifth cause of action.

Plaintiff cross-moves this court for an Order striking the defendant's Answer for its wilful failure to respond to plaintiff's post-deposition demand dated August 18, 2011 and granting the plaintiff summary judgment on their first cause of action.

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 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.

This Court's May 15, 2012 Order denied the defendant's motion for summary judgment to dismiss the plaintiff's fifth cause of action on the grounds that the report of R. Hein, submitted in support of the defendant's motion was insufficient in that it was not sworn to or signed nor did it include the full name of the purported preparer of the report. Although, defendant now seeks to submit information which would cure this procedural deficiency, the motion to renew is nonetheless denied. This Court's May 15, 2012 Order also denied the defendant's motion due to the conclusory opinions contained within the Hein report. Furthermore, defendant's submission of the affidavit of Gerard Ball is inappropriately submitted at this time. Defendant itself asserts that the affidavit is based upon the August 17, 2011 deposition of Mr. Ball, and yet neither were submitted in support of the underlying summary judgment 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. It is also clear that re-argument is not permitted simply to afford the unsuccessful party a second opportunity to restate the issues previously decided or to present different arguments from those originally asserted. Foley v. Roach, 68 A.D.2d 558(1st Dept. 1979).

As a motion to reargue, defendant's motion is untimely and defendant has failed to indicate that this Court has misapprehend the facts or law. As such, defendants motion is denied.

The drastic sanction of striking a pleading is inappropriate where there is no showing that the failure to comply with disclosure demands was willful, contumacious or in bad faith. Failure to comply with discovery obligations or demands may be considered willful or contumacious where there has been the destruction of evidence or the repeated failure to appear for depositions. *See*, Perez v. New York City Transit Authority, 73 A.D.3d 529 (1st Dept.. 2010) *citing* Cespedes v. Mike & Jac Trucking Company, 305 A.D.2d 222 (1st Dept. 2003).

Although, plaintiff has annexed a copy of the August 18, 2011 post-discovery demands, plaintiff has not annexed any further proof which would rise to the level of wilful or contumacious behavior on the behalf of the defendant. Nonetheless, defendant is directed to comply with the post-discovery demand within sixty days of service of this Order with notice of entry or its Answer will be stricken.

Plaintiff's cross motion for summary judgment is denied. Plaintiff's cross-motion is procedurally defective in that it fails to submit a copy of the summons and complaint upon which this Court would issue summary judgment on the first cause of action. A review of the summons and complaint properly submitted with the defendant's motion reveals that the plaintiff's first cause of action is for Breach of Contract. However, neither party, with plaintiff bearing the burden has submitted a copy of the contract for this Court's review. As such, this Court denies the plaintiff's cross-motion for summary judgment. See also, Washington Realty Owners, LLC. v. 260 Washington Street, LLC., 105 A.D.3d 675 (1st Dept. 2013).

Accordingly, it is

ORDERED that defendant Allstate's motion to renew is denied in its entirety. It is further

ORDERED that plaintiffs cross-motion to strike the defendant's Answer is granted to the extent that defendant is directed to respond to the August 18, 2011 post-discovery demand within sixty (60) days of service of this Order with Notice of Entry or the Answer will be stricken. It is further

ORDERED that all other portions of plaintiff's cross-motion are denied. It is further

ORDERED that defendant Allstate shall serve a copy of this Order with Notice of Entry upon plaintiffs within thirty (30) days of entry of this Order.

This constitutes the decision and order of this Court.

MAR 25 2014

DATE


HON. WILMA GUZMAN, J.S.C.