Altime v Vazquez
2015 NY Slip Op 31118(U)
June 25, 2015
Supreme Court, New York County
Docket Number: 152842/2014
Judge: Kathryn E. Freed
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This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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LIONEL ALTIME,

Plaintiff,

-against-

DECISION AND ORDER
Index No. 152842/2014
Mot. Seq. No. 002

POF LINDA VAZQUEZ (Shield No. 3022), PO ISIDRO CARRION, (Tax ID #: 905907), THE NEW YORK CITY POLICE DEPARTMENT and THE CITY OF NEW YORK,

Defendants.

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KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED..................	1-2 (Exs. A-F)
ANSWERING AFFIDAVITS..	3 (Ex. A)
REPLYING AFFIDAVITS..	4 (Ex. A)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action, plaintiff Lionel Altime alleges personal injuries as the result of an alleged false arrest for fare evasion in a subway station by defendants POF Linda Vasquez ("Vazquez") and PO Isidro Carrion ("Carrion"), who are employed by the New York City Police Department ("NYPD") and the City of New York (the "City"). Defendants move, pursuant to CPLR 2221, to renew and/or reargue[1] plaintiff's prior motion seeking an order to extend the time to perfect service upon

[1]Although the motion seeks an order, pursuant to CPLR 2221, granting leave to renew and/or reargue plaintiff's prior motion, no grounds are set forth for renewal. *See* CPLR 2221(e)(2). However, the motion merely asserts grounds for reargument pursuant to CPLR 2221(d).

defendant Carrion. Upon a review of the papers submitted and the relevant statutes and case law, the motion is **denied** in all respects.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from personal injuries allegedly sustained by plaintiff on March 29, 2011 at approximately 10:30 a.m. when he was arrested by Vazquez and Carrion for allegedly walking through an exit gate to take the subway without paying a fare in the subway station located at West 42nd Street and 8th Avenue, in the County, City and State of New York.

Plaintiff filed a notice of claim on October 5, 2011. Ex. C.[2] The captioned action was commenced by plaintiff's filing of a summons with notice against Vazquez, PO "John/Jane" Carrion, actual first name unknown (Shield No. 7677), the NYPD, and the City on March 26, 2014, in which he alleged that he suffered personal injuries, emotional and mental distress, injury to reputation and character, and related damages as a result of defendants' negligence, recklessness, carelessness, and intentional conduct in arresting plaintiff. Ex. D. Plaintiff filed an amended summons with notice against the captioned defendants on July 18, 2014, in which he set forth the same allegations. Ex. D. Issue was joined by defendants by service of their answer on or about October 9, 2014. Ex. E.

On or about July 18, 2014, plaintiff moved, pursuant to CPLR 306-b and 2004, for an order granting plaintiff an extension of time to perfect service upon defendant Carrion. Ex. B. Defendants opposed plaintiff's motion. Porcelli Aff. Ex. A.

By order dated February 3, 2015 and entered February 5, 2015, this Court granted plaintiff's

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[2]Unless otherwise noted, all references are to the exhibits annexed to the affidavit of defendants' attorney submitted in support of their motion.

motion in part, holding, *inter alia*, that:

> [Plaintiff's] motion is granted in part to the extent that [plaintiff] may interpose 28 USC 1983 claims against P.O. Carrion. The City accepts service on behalf of P.O. Carrion and [plaintiff] shall perfect service for the federal claims at the Office of the Corporation Counsel, 100 Church Street, NY, NY 10007.

Ex. A.

POSITIONS OF THE PARTIES:

Defendants now move, pursuant to CPLR 2221, for reargument of plaintiff's prior motion on the ground that this Court overlooked the requirements for personal service under CPLR 308(2) in granting plaintiff's motion to extend the time to perfect service on Carrion. Defendants argue that service of Carrion at the Office of the Corporation Counsel, located at 100 Church Street, New York, New York 10007, is insufficient under CPLR 308(2) because said office does not qualify as Carrion's actual place of business or last known residence as defined by the statute.

Plaintiff opposes defendants' motion on several grounds. First, plaintiff argues that the instant motion does not meet the criteria under CPLR 2221(d) for a motion to reargue because this Court did not overlook or misapprehend any issue of fact or law relevant to the determination of the prior motion. Second, plaintiff argues that defendants' motion is defective and must be denied in its entirety because defendants have failed to annex to the instant motion all papers considered by this Court in arriving at its previous decision, as required by CPLR 2214(c).[3] Third, plaintiff argues that defendants' motion must be denied because the Court, in its February 5, 2015 order, provided defendants with the relief they requested: that the City be allowed to accept service on behalf of

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[3]This Court notes, however, that plaintiff annexed the missing papers as Exhibit A to its affirmation in opposition.

Carrion. Fourth, plaintiff argues that whether service of process on Carrion at the Office of the Corporation Counsel is proper service under CPLR 308(2) is irrelevant. Plaintiff asserts that, since defendants' prior opposition papers were silent as to where service should be made on the City, serving the City at 100 Church Street is proper as it is the address for the Office of the New York Corporation Counsel, the attorney for Carrion, as evidenced by the backing of defendants' motion. Plaintiff urges that, if defendants were to now argue that the City attorney did not agree to accept service on his client's behalf, at his office address, that this would be a matter of fact not offered on the prior motion in violation of CPLR 2221(d)(2). Fifth, plaintiff argues that defendants fail to explain the relevancy of CPLR 308(2) to the instant action. Instead, plaintiff asserts, the relevant provision governing service upon Carrion in the instant action is CPLR 308(5) by direction of this Court's February 5, 2015 order.

In reply, defendants argue that the record is sufficiently complete for this Court to decide the instant motion on its merits because the case is electronically filed and all of the prior motion papers are available online, and in addition, defendants have attached the missing motion papers to their reply. Defendants also argue that they never specified where service should be perfected for Carrion in their opposition papers to the underlying motion. Specifically, defendants never indicated that Carrion should be served at the Office of the Corporation Counsel at 100 Church Street. Defendants admit that the City can accept service for its employee at the employee's place of business. However, defendants assert that 100 Church Street, the Office of the Corporation Counsel, is neither Carrion's actual place of business, nor his last known residence, and thus the City cannot accept service for Carrion at that location.

[* 5]

LEGAL CONSIDERATIONS:

A motion for leave to reargue, pursuant to CPLR 2221(d), "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." Such motion "is addressed to the sound discretion of the court." *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 (1st Dept 1992), *lv dismissed*, 80 NY2d 1005 (1992), *rearg denied*, 81 NY2d 782 (1993). Reargument is not designed or intended to afford the unsuccessful party successive opportunities to reargue issues previously decided (*see Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]), or to present arguments different from those originally asserted. *See William P. Pahl Equip. Corp.*, 182 AD2d at 27; *Foley v Roche*, 68 AD2d 558 (1st Dept 1979); *Amato v Lord & Taylor, Inc.*, 10 AD3d 374 (2d Dept 2004). On reargument, the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked. *See Macklowe v Browning School*, 80 AD2d 790 (1st Dept 1981). Professor David Siegel succinctly instructed that a motion to reargue "is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind." Siegel, NY Prac § 254, at 449 (5th ed 2011).

Initially, although defendants' failure to include a complete set of the underlying motion papers would typically warrant the denial of their application on procedural grounds (*see Biscone v JetBlue Airways Corp.*, 103 AD3d 158 [2d Dept 2012], *appeal dismissed* 20 NY3d 1084 [2013]), CPLR 2214(c) was subsequently amended. CPLR 2214(c) states that: "in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system." In accordance with this amendment, the First Department has held that although a party "failed to include the pleadings with its motion, the error was properly overlooked,

as the pleadings were filed electronically and thus were available to the parties and the court." *Studio A Showroom, LLC v Yoon*, 99 AD3d 632, 632 (1st Dept 2012). Further, "[w]here such papers are in the possession of an adverse party, they shall be produced by that party at the hearing on notice served with the motion papers." CPLR 2214(c). Since the captioned action is an electronically filed action and plaintiff and defendants annexed the missing papers to the instant motion papers, this is not a ground for denying defendants motion.

Upon addressing the merits, however, this Court sees no reason to grant reargument of plaintiff's prior motion to extend the time to perfect service upon Carrion, since defendants requested in their opposition papers to the underlying motion that the City be able to accept service for Carrion. The specific relief requested by defendants was granted in this Court's February 5, 2015 order. Thus, defendants' motion is not only devoid of merit but approaches frivolity.

Further, CPLR 308(2) is not the applicable provision governing service in the instant action. CPLR 308(2) pertains to service of process "to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served" and requires that a copy is mailed "to the person to be served at his or her last known residence or . . . actual place of business." This provision is not relevant because this Court's February 5, 2015 order directed the City, an entity and not a person of suitable age and discretion, to accept service for Carrion. As a result, the definition of "actual place of business" in CPLR 308(6) is unnecessary. Contrary to plaintiff's contention, CPLR 308(5) also does not apply in the instant action. CPLR 308(5) allows "[p]ersonal service upon a natural person [to] be made . . . in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section." Here, the motion was made on notice, so CPLR 308(5) does not apply.

However, where a court order directed service on a defendant police officer "by serving the Corporation Counsel of the City of New York," service was deemed sufficient. *In the Matter of A'Gard v Vance*, 2013 WL 6980463, 2013 NY Slip Op 33499(U), *3 (Sup Ct, NY County, Oct. 20, 2013, No. 402179/12) (Wooten, J.). This Court reasoned that: "In this matter the police respondents are all represented by the [Office of the] Corporation Counsel and thus service on that office is sufficient to satisfy the service directives in the [order] in effective service of process on the Police respondents." *Id.* Further, this Court has long held that the City is validly served by effecting service on the Office of the Corporation Counsel. *Avery v O'Dwyer*, 201 Misc 989, 991-992 (Sup Ct, NY County 1952) (Hofstadter, J.). CPLR 311(a)(2) specifies that service "upon the [C]ity of New York [shall be made] to the [Office of the] [C]orporation [C]ounsel." *Id.*; *Aymes v City of New York*, 27 AD3d 394, 396-397 (1st Dept 2006). When service is effected upon the Office of the Corporation Counsel, the correct address for service is 100 Church Street. *See Aymes*, 27 AD3d, *supra* at 395.

This Court further adheres to its initial decision that service on Carrion for plaintiff's federal claims may be perfected through service on the City at the Office of the Corporation Counsel located at 100 Church Street, New York, New York 10007.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that defendants' motion is denied in all respects; and it is further,

ORDERED that this constitutes the decision and order of this Court.

Dated: June 25, 2015

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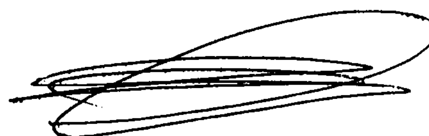

KATHRYN E. FREED, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT