Gitman v Martinez
2015 NY Slip Op 32944(U)
June 5, 2015
Supreme Court, Ulster County
Docket Number: 13-4087
Judge: Michael H. Melkonian
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER

CATHY GITMAN,

Plaintiff,

-against-

DECISION AND ORDER

RUBEN MARTINEZ, CRETE CARRIER CORP., HERBERT BENNER and ZOOK TRUCKING, LLC,

Defendants.

(Supreme Court, Ulster County, Motion Term, February 27, 2015)
Index No. 13-4087
(RJI No. 55-14-00344)

(Acting Justice Michael H. Melkonian, Presiding)

APPEARANCES: Buttafucco & Associates, PLLC
Attorneys for Plaintiff
(James S. McCarthy, Esq., of Counsel)
144 Woodbury Road
Woodbury, New York 11797

Law Office of Theresa J. Puleo
Attorneys for Defendants Herbert Benner and Zook Trucking, LLC
(John F. Pfeiffer, Esq., of Counsel)
The Galleries of Syracuse
441 South Salina Street
Box 364
Syracuse, New York 13202

Carter, Conboy, Case, Black more, Maloney & Laird, P.C.
Attorneys for Defendants Ruben Martinez and Crete Carrier Corp.
(Brian D. Carr, Esq., of Counsel)

Rondout Legal

20 Corporate Woods Boulevard
Albany, New York 12211-2362

MELKONIAN, J.:

This is an action for damages for personal injuries arising out of a three-car chain-reaction accident which took place on September 19, 2013, between the vehicle operated by plaintiff Cathy Gitman ("plaintiff"), the vehicle owned by defendant Zook Trucking, LLC ("Zook") and operated by defendant Herbert Benner ("Benner") (collectively referred to herein as the "Zook defendants") and the vehicle owned defendant Crete Carrier Corp. ("Crete") and operated by defendant Ruben Martinez ("Martinez") (collectively referred to herein as the "Crete defendants"). Plaintiff's vehicle was the first in the chain. The accident occurred on Interstate 87 in the Town of Rosendale.

Plaintiff moved for partial summary judgment on liability on the ground that Benner's tractor-trailer was rear-ended by Martinez's tractor-trailer, which caused Benner's tractor-trailer to be propelled into the plaintiff's vehicle rear-end plaintiff's vehicle. The motion was served on or about July 25, 2014 and was returnable on September 22, 2014. By Decision and Order dated December 3, 2014, this Court granted plaintiff's motion for partial summary judgment on liability and upon searching the record (CPLR § 3212[b], [e]), granted summary judgment to the Zook defendants dismissing the complaint and all cross-claims insofar as asserted against them.

The Crete defendants now move pursuant to CPLR § 2221 for leave to renew and reargue and renewal and reargument to vacate the Court's decision of December 3, 3014.

A motion for leave to renew must be based on new or additional facts "not offered on the prior motion that would change the prior determination" and "shall contain a reasonable justification for the failure to present such facts on the prior motion" (CPLR § 2221 [e] [2], [3]).

In moving to renew, the Crete defendants argue that they have uncovered "new facts" that they claim were unavailable to them at the time of the original motion. The "new facts" that the Crete defendants rely upon consist of a September 19, 2013 ambulance report from Kingston Hospital which contains a notation that states plaintiff "reports that she was rear-ended by a tractor trailer and then the tractor trailer that hit her was then hit by another tractor trailer causing her to spin off the roadway."

An application for renewal "shall be based upon new facts not offered on the prior motion that would change the prior determination..." and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR § 2221 [e][2], [3]). "Renewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit additional facts on the original application." Matter of Beiny v Wynyard, 132 AD2d 190 (1st Dept. 1987). Renewal is not available as a second chance for parties who have not exercised due diligence in making their first factual presentation (Carota v Wu, 284 AD2d 614, 617 [3rd Dept. 2001] [internal quotation marks and citation omitted]).

Here, counsel argues that "the unusual timing of the summary judgment motion was entirely unanticipated, and as a result of a full accounting and analysis of all medical

discovery had not yet taken place." Counsel admits that the "Kingston Hospital records had not been reviewed" and also admits that "[t]hose records had not been developed and marshaled into an organized form, and not yet analyzed at the time that the motion was made." Counsel further argues that the "the procedural posture of the case at the time of the motion resulted in [counsel] not having had the opportunity to complete discovery, gather and organize evidence into an organized form, and analyze each and every page of the voluminous medical records." He argues that "the procedural posture of the case at the time of the summary judgment motion presents a reasonable justification for [counsel's] lack of knowledge and possession of the facts at issue."

While a court may, in its discretion, and in the interest of justice and fairness, grant a motion to renew on the basis of facts known to the moving party at the time of the prior motion, a court may also decline to exercise its discretion to do so where, as is the case here, the moving party failed to exercise due diligence in making their first factual presentation and where the moving party also failed to provide a reasonable explanation for not submitting those same facts in the original motion (see, CPLR § 2221 [e] [3]). Counsel's excuse – in short that he didn't expect the plaintiff to make a motion for summary judgment and therefore didn't thoroughly review the record – is unacceptable. The Crete defendants had authorizations to obtain plaintiff's medical records since at least March 5, 2014 – more than four months before they were served with the motion for summary judgment. Moreover, even if counsel found (or received) the document in October 2014, counsel fails

to proffer any excuse for neglecting to call it to the Court's attention.

Accordingly, the motion to renew is denied.

A motion for leave to reargue is addressed to the sound discretion of the Court and may be granted only upon a showing that the Court overlooked, misapplied or misapprehended the facts or the law, or for some reason mistakenly arrived at its earlier decision (CPLR § 2221 [d] [2]; Spa Realty Associates v Springs Associates, 213 AD2d 781, 783 [3rd Dept. 1995]; Matter of Mayer v National Arts Club, 192 AD2d 863, 865 [3rd Dept. 1993]).

In moving to reargue, the Crete defendants argue that the Court overlooked matters of fact and/or law by granting plaintiff's motion for partial summary judgment on liability and *sua sponte* dismissing the complaint against the Zook defendants on the ground that summary judgment was premature because substantial discovery remains outstanding.

Upon review and consideration of the motion to reargue, the Court finds that the moving papers fail to establish that the Court overlooked, misapprehended either the facts or law or otherwise mistakenly arrived at its determination.

The Court finds that under the circumstances of this case, as stated in the prior decision of December 3, 2014, Martinez failed to submit evidence as to any negligence on the part of Benner or plaintiff or to provide a non-negligent explanation for the accident sufficient to raise a triable question of fact. Although Martinez maintained that the accident was the result of Benner or plaintiff braking or suddenly decelerating while proceeding on

the interstate, this does not explain his failure to maintain a safe distance from the vehicle in front of him or to safely stop prior to rear-ending the Benner vehicle (see, Tripp v Gelco Corp., 260 AD2d 925, 925-926 [3rd Dept. 1999]; Riley v County of Broome, 256 AD2d 899 [3rd Dept. 1998]; Jones v Egan, 252 AD2d 909, 911[3rd Dept. 1998]; Riley v County of Broome, 256 AD2d 899 [3rd Dept. 1998]; *see*, De Vito v Silvernail, 239 AD2d 824, 825 [3rd Dept. 1997]; Mohamed v Town of Niskayuna, 267 AD2d 909 [3rd Dept. 1999]). The Crete defendants' contention that summary judgment is premature because discovery is not complete reflects but a "mere hope," which is ineffectual in forestalling summary disposition (Moran v Regency Sav. Bank, F.S.B., 20 AD3d 305 [1st Dept. 2005]).

Accordingly, it is hereby, ORDERED that the Crete defendants' motion for an order pursuant to CPLR § 2221 granting leave to reargue or renew is denied.

This Memorandum constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for the plaintiff. All other papers are delivered to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of CPLR Rule 2220 respecting filing, entry and Notice of Entry.

SO ORDERED.
ENTER.

Dated: Troy, New York
June 5, 2015

MICHAEL H. MELKONIAN
Acting Supreme Court Justice

Papers Considered:

(1) Notice of Motion dated January 30, 2015;
(2) Affirmation of Brian D. Carr, Esq., dated January 30, 2015, with exhibits annexed;
(3) Memorandum of Law;
(4) Affirmation of James S. McCarthy, Esq., dated March 13, 2015, with exhibits annexed;
(5) Affirmation of John F. Pfeiffer, Esq., dated February 16, 2015, with exhibits annexed;
(6) Memorandum of Law;
(7) Affirmation of Brian D. Carr, Esq., dated March 26, 2015.