490-92 Amsterdam v O'Neal
2016 NY Slip Op 30776(U)
April 21, 2016
Supreme Court, New York County
Docket Number: 151661/2012
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. Justice

PART 35

490-92 Amsterdam

-v-

O'Neal, Hector

INDEX NO. 156161/12

MOTION DATE 4/19/16

MOTION SEQ. NO. 003

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Plaintiff moves to reargue and renew defendant's prior motion for judgment on his counterclaim and dismissal of plaintiff's complaint. By order dated February 22, 2016 the Court dismissed the Complaint and granted judgment on defendant's counterclaim on the issue of liability.

Plaintiff's motion is resolved as follows:

Reargument

A motion to reargue simply states that the Court overlooked or misapprehended the facts or the law. A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992] *lv denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]).

Defendant's prior motion sought relief under the following: (1) CPLR 3011, which provides "An answer may include a counterclaim against a plaintiff . . . . There shall be a reply to a counterclaim denominated as such"; (2) CPLR 3012,[1] which governs the time within which a

[1] CPLR 3012 (a), which provides that "Service of an answer or reply shall be made within twenty days after service of the pleading to which it responds; (c) provides, that "service of an answer shall be made within thirty days after service is complete" where the pleading is not personally delivered to the person.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: _____ _____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
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responsive pleading must be served; and CPLR 3211(8), for dismissal of the complaint for want of prosecution in failing to timely respond to defendant's January 29, 2014 CPLR 3216 90-day notice demanding service and the filing of the note of issue.

CPLR 3216 provides in relevant part:

(a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof . . . , or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

(b) No dismissal shall be directed . . . unless the following conditions precedent have been complied with:

(1) Issue must have been joined in the action;

(2) One year must have elapsed since the joinder of issue or six months must have elapsed since the issuance of the preliminary court conference order where such an order has been issued, whichever is later;

(3) The . . . party seeking such relief, . . . shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him or her for unreasonably neglecting to proceed. . . .

As indicated in the prior Order, defendant previously established that the above conditions for dismissal were satisfied, and therefore, dismissal under CPLR 3216 was warranted.

Inasmuch as plaintiff argues that Court "overlooked the law requiring defendant's counterclaim be dismissed" (Affirmation, ¶3), reargument is granted. However, upon reargument, the Court rejects plaintiff's new argument that CPLR 3215(c) governs defendants' counterclaim and that defendant's failure to seek default within one year of warranted dismissal of the counterclaim. In plaintiff's previous opposition papers, plaintiff argued, *inter alia*, that it only learned in June 2013 (when it recovered control of plaintiff) that its then-president neglected this action, and that its delay in prosecution was caused by defendant's "decades-long dictatorship," which ended, according to the submissions, on December *2010*. Plaintiff did not argue, as it does now, that CPLR 3215(c) requires the Court to dismiss a counterclaim if no proceeding for default judgment on the counterclaim has been made within one year, and that defendant waited over three years to move for default judgment, without excuse. Reargument is not designed to afford the unsuccessful party opportunities to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588 [1st Dept 1979]; *Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27, 588 N.Y.S.2d 8 [1st Dept 1992]). 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, 437 NYS2d 11 [1st Dept 1981]), and it cannot be said that the Court overlooked CPLR 3215(c), which plaintiff did

not previously raise. To the degree plaintiff argues that the requirements of CPLR 3215 were not satisfied by defendant, the Court notes that contrary to plaintiff's contention, defendant did not seek, and the Court did not grant, dismissal of the complaint or a default judgment under CPLR 3215.

And, plaintiff did not previously argue that the 90-day notice was improperly served or is a nullity because it was not e-filed.

Renewal

A motion to renew, when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v. Wolf*, 194 Misc.2d at 133, 751 N.Y.S.2d 707; D. Siegel New York Practice § 254 [3rd ed.1999]). A motion to renew, "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*Beiny v. Wynyard*, 132 A.D.2d 190, 522 N.Y.S.2d 511, *lv. dismissed* 71 N.Y.2d 994, 529 N.Y.S.2d 277, 524 N.E.2d 879).

The Court finds that the "new facts," explaining the unsuccessful attempts that were made by plaintiff's "Secretary" to obtain the legal file from plaintiff's previously discharged attorney sufficiently explain the reasons for plaintiff's delay in prosecuting the case from June 2013 through January 27, 2014. (See letters dated June 13, 2013, July 5, 2013 and January 27, 2014). All of these attempts occurred prior to defendant's service of the 90-day notice. The record indicates that plaintiff was unable to obtain cooperation from plaintiff's former counsel, and therefore, explains the lack of plaintiff's knowledge of defendant's 90-day notice and plaintiff's failure to respond to same.

Although these facts were available at the time of the prior motion, plaintiff explains that the President was unaware of the Secretary's efforts until after the Court's order was issued and brought to the attention of the board. That the President was aware (in June 2013) that this case was being neglected by its former counsel does not undermine the showing that plaintiff's several attempts to obtain the file of this case thereafter were frustrated by said counsel. Nor does it undermine the claim that plaintiff was unaware of the 90-day notice.

The Court is mindful that a motion to renew should not be granted based upon facts known to the moving party at the time of the prior motion, unless the moving party offers a reasonable excuse for not having submitted such facts on the prior motion (*Poag v Atkins*, 3 Misc 3d 1109 [Supreme Court New York County 2004]). However, this rule was not inflexible, and courts retained broad discretion to grant renewal, in the interest of justice, upon facts known to the moving party at the time of the prior motion (*Id.*)

Under the circumstances in this case, and in the interest of justice, this court will exercise that discretion, and grant the plaintiff's motion for leave to renew.

Upon renewal, the Court denies defendant's motion to dismiss the complaint, and denies judgment on the issue of liability on defendant's counterclaim.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branches of plaintiff's motion pursuant to CPLR 3215(c) is denied; and it is further

ORDERED that Plaintiff's motion to reargue and renew defendant's prior motion is granted; and it is further

ORDERED that solely upon renewal, defendant's prior motion pursuant to CPLR 3211(a)(8) and 3216(a) to dismiss the complaint for failure to prosecute and for judgment on liability on its claims is denied; and it is further

ORDERED that the pending reference is vacated, the complaint is reinstated, and plaintiff shall serve its answer to the counterclaims within 30 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference on June 28, 2016, 2:15 p.m. and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 4/21/16

J.S.C.

HON. CAROL R. EDMEAD

1. CHECK ONE :
2. CHECK AS APPROPRIATE :
3. CHECK IF APPROPRIATE :

☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

MOTION IS: ☒ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

☐ SETTLE ORDER ☐ SUBMIT ORDER

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