Fermas v Ampco Sys. Parking
2016 NY Slip Op 32096(U)
September 29, 2016
Supreme Court, Queens County
Docket Number: 22618/2012
Judge: David Elliot

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

WISSAM FERMAS,
Plaintiff,

- against -

AMPCO SYSTEM PARKING, et al.,
Defendants.

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No. 22618 2012

Motion
Date September 2, 2016

Motion
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Seq. No. 16

The following papers numbered 1 to 16 read on this motion by defendants Ampco System Parking, ABM Industries Incorporated, Wheels LT., and Royston S. Powell (collectively moving defendants) for an order: (1) pursuant to CPLR § 2201 staying all proceedings in this action, including the trial scheduled to begin on June 22, 2016, pending this court's determination of the instant motion; (2) pursuant to CPLR 3025 (b) granting them leave to amend their answer to assert an affirmative defense for plaintiff's failure to utilize a seat belt; and/or in the alternative (3) pursuant to CPLR 5015 (a) (1) and 3025 (b) relieving moving defendants from this court's February 16, 2016 order to the extent that it denied their prior application which sought leave to amend their answer to add the aforementioned affirmative defense; and on this cross motion by plaintiff for an order pursuant to 22 NYCRR 130-1.1 (c) granting costs and sanctions against moving defendants.

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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

By order dated February 16, 2016, this court denied that branch of moving defendants' prior motion for an order granting them leave to amend their answer to include an affirmative defense for plaintiff's lack of use of a seat belt on the ground that moving defendants failed to submit the proposed amended pleading and highlight the difference between the original and proposed amended pleading, in accordance with CPLR 3025 (b).

By this motion, moving defendants seek an order, inter alia, staying all proceedings pending a determination herein; same is denied as moot, inasmuch as the trial date of this action has been adjourned to October 27, 2016.

Moving defendants next seek an order, pursuant to CPLR 3025 (b), granting them leave to file an amended answer adding and asserting the seat belt defense and/or, in the alternative, for an order, pursuant to CPLR 5015 (a) (1) and 3025 (b), relieving them from this court's February 16, 2016 order to the extent that it denied their prior motion which sought the same relief. Moving defendants annex a proposed verified amended answer which includes and highlights said defense. However, it appears that the proposed answer is one involving a different case. According to moving defendants' June 22, 2016 correspondence submitted to the court, counsel explains that the firm discovered the error and, as such, it prepared a copy of the order to show cause motion papers that contained the corrected copy of the proposed amended answer, which had been served upon all parties as required by the order, and that it would be providing to the clerk, on the return date of the order to show cause, with the corrected copy of the motion. The court is in possession of same. Further, enclosed with the June 22, 2016 correspondence was, inter alia, the corrected copy of the proposed amended answer.

In support of the motion, moving defendants argue that plaintiff can neither establish prejudice nor surprise if the amendment were permitted since: (1) plaintiff admitted she was not wearing a seat belt at the time of the accident; (2) codefendants asserted the identical defense in their answer dated January 2, 2013; (3) the issue was raised at party depositions and within summary judgment motion papers; and (4) the issue was the subject the expert witness disclosure of moving defendants, dated August 30, 2015. Plaintiff has been defending herself against this affirmative defense and, as such, cannot claim that she would be unprepared to address the matter at trial. Conversely, moving defendants aver that the failure to grant their motion would result in an inequitable and inconsistent result since codefendants, and not them, would be able to avail themselves of the seat belt defense at trial. They argue further that the delay cannot be said to be so egregious such that denial is warranted, particularly given the absence of prejudice. Moving defendants also point out that the standards and goals deadline is November 27, 2016. Finally, they urge that the issue should be decided on the merits rather than deny the relief based upon a "default."

In opposition to the motion and in support of her cross motion, plaintiff states that moving defendants' reliance on CPLR 5015(a) (1) is without legal basis, inasmuch as the February 16, 2016 order was not issued upon their default; rather, all papers were considered, including those of moving defendants (indeed, it was moving defendants' prior motion which was denied) and thus, there is no default to be vacated herein.

Further, plaintiff contends that, since moving defendants had previously made the same motion for like relief, that the instant motion amounts to a renewal/reargument motion though it was not made as such and, to that end, moving defendants have failed to satisfy the standards for renewal/reargument of their prior motion. Plaintiff further argues that moving defendants, both on their prior motion and in support of this one, have failed to offer any excuse as to their delay in seeking the requested relief.

Substantively, plaintiff claims prejudice, citing the trial date, and further citing the fact that plaintiff would be unable to retain an expert and provide an expert exchange to address the seat belt issue in a timely manner such that would not place her at a disadvantage. In any event, plaintiff states that the defense is not viable, given the fact that plaintiff was under no obligation to wear a seat belt (VTL § 1229-c). Plaintiff also states that, while codefendants alleged a seat belt defense in their answer, the two parties have stipulated that codefendants withdraw that defense.[1]

In support of her cross motion for sanctions, plaintiff cites moving defendants' aforementioned conduct.

In opposition to the cross motion and in reply, moving defendants state that the application is meritorious and supported. Moving defendants state that a reasonable excuse for the delay is irrelevant as a matter of law since plaintiff must establish delay coupled with prejudice, and no prejudice can be shown here given the fact that plaintiff was on notice of this theory of defense as early as 2013 (*i.e.*, the stipulation with codefendants, or plaintiff's lack of preparation, is irrelevant). Moving defendants further state that there is no bar to resubmitting a motion pursuant to CPLR 3025 (b) to cure a procedural defect, which was the basis for the first denial.

Finally, plaintiff in reply urges that CPLR 3025 (b) "does not grant a litigant the ability to seek leave to amend pleadings ad infinitum." Plaintiff again highlights moving defendants' failure to offer any excuse for the delay in failing to timely amend; plaintiff also states that there "has been no additional discovery regarding plaintiff's use of her seat belt

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1. Though the stipulation annexed to plaintiff's opposition is signed only by her counsel, plaintiff offers the fully executed stipulation in reply.

since [party depositions in 2013 and 2014].” Counsel states that plaintiff has not prepared at all for the defense, and states that the agreement that codefendants withdraw their seat belt defense “was reached well before defendant’s latest motion and was memorialized via stipulation in July 2016.”

As correctly pointed out by plaintiff, inasmuch as moving defendants are seeking, by this motion, the same relief which was denied by prior order of this court – albeit on procedural grounds – the motion would, indeed, in effect, be a motion for renewal (CPLR 2221 [e]).[2] Notwithstanding, whether or not the court gives this motion renewal treatment, under the circumstances presented, the motion should be granted.

Whereas, here, when the application is made long after the action has been certified for trial, judicial discretion in allowing the amendment should be “discrete, circumspect, prudent, and cautious” and, furthermore, whereas, here, when leave is sought on the eve of trial,[3] judicial discretion is to be exercised “sparingly” (*Yong Soon Oh v Hua Jin*, 124 AD3d 639 [2015]; *American Cleaners, Inc. v American Intl. Specialty Lines Ins. Co.*, 68 AD3d 792 [2009]; *Comsewogue Union Free School Dist. v Allied-Trent Roofing Sys., Inc.*, 15 AD3d 523 [2005]). Part of the court’s analysis in determining whether the court should exercise its discretion includes a consideration of these factors: (1) how long moving defendants were aware of the facts upon which the motion was predicated; (2) whether a reasonable excuse for their delay was offered; and (3) whether prejudice resulted therefrom (*American Cleaners, Inc.*, 68 AD3d at 794).

With respect to the first factor, moving defendants were aware of the facts upon which the motion was predicated by July 29, 2013, the date of plaintiff’s deposition. As to the second factor, while it is true that moving defendants continue to fail to offer a reasonable excuse for having brought the motion on the eve of trial, their first motion was made on

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2. Moving defendants argue that there is an apparent difference between CPLR 3025 (a), which expressly limits a party’s ability to amend without leave, and CPLR 3025 (b), since the latter Rule “does not limit a party’s ability to move to amend with leave, noting that it may do so ‘at any time’ and that ‘leave shall be freely given.’ ” However, as noted in the Practice Commentaries to the CPLR 3025 (b), “[u]nlike the amendment of right option in CPLR 3025(a), of which only one is allowed per party, there is no arbitrary limit on the *number of times a pleading may be amended* by leave of court” (Patrick M. Connors, McKinney’s Cons Laws of NY, Book 7B,CPLR 3025, C3025:5) (emphasis added). Here, moving defendants are not moving for leave to grant them an additional amendment to their pleading; rather, they are simply renewing a motion for leave to grant them a first amendment, which was previously denied by this court.

3. The motion was filed on June 20, 2016, and the trial was scheduled for June 22, 2016. The adjourned trial date is October 27, 2016.

September 24, 2015, less than one month after the second note of issue was filed. That motion was denied due to an inadvertent procedural defect and, on this motion, moving defendants have corrected said defect (*see generally Darwick v Paternoster*, 56 AD3d 714 [2008]; *DeLeonardis v Brown*, 15 AD3d 525 [2005]). Despite the admitted lack of an excuse, same does not per se bar an amendment absent prejudice, even when the motion is made on the eve of trial (*see Holchendler v We Transp.*, 292 AD2d 568 [2002]; *see also Hothan v Mercy Med. Ctr.*, 105 AD3d 905 [2015] [motion to amend was made after jury selection but before the court declared a mistrial, and the Appellate Division did not discuss the issue of an excuse for the delay]). It should further be generally noted that the court has the power in any event – in the absence of prejudice – to, sua sponte, amend pleadings to conform to the evidence, even if it is after judgment (CPLR 3025 [c]).

To that end, plaintiff can claim neither surprise nor prejudice. Plaintiff was aware of the existence of this defense as early as it was interposed by codefendants in January 2013. Moreover, moving defendants' expert witness disclosure clearly indicated that the expert was to be "expected to testify that plaintiff failed to mitigate all injuries she did or would have suffered by failing to make use of the seatbelts available to her in the vehicle in which she was traveling." It is of particular significance that plaintiff made no objection in response to this CPLR 3101 (d) exchange (*see e.g. Rivera v Montefiore Med. Ctr.*, 123 AD3d 424 [2014]).

The prejudice cited by plaintiff appears to be self-imposed, *i.e.*, (1) plaintiff chose not to retain her own expert despite knowledge that her failure to use a seat belt was an issue in this case (by virtue of, notably, codefendants' affirmative defense, said codefendants having apparently also "served expert disclosure joining [moving defendants'] on the matter"); and (2) plaintiff chose to negotiate the withdrawal of codefendants' defense.

Nor is the proposed amendment patently devoid of merit as suggested by plaintiff. Plaintiff's reliance upon VTL § 1229-c is misplaced, since that section, inter alia, carves out an exception to the imposition of liability *upon the operator* of a motor vehicle for a rear-seated passenger who is over the age of sixteen who fails to utilize a seat belt. Thus, it appears irrelevant with respect to whether moving defendants would be entitled to a reduction of damages based upon plaintiff's failure to use her seat belt.

In short, and in light of the above analysis, the equities weigh in favor of moving defendants.

Turning to the cross motion for sanctions, 22 NYCRR 130-1.1 (a) permits sanctions for frivolous conduct (*see Glenn v Annunziata*, 53 AD3d 565 [2008]; *Breslaw v Breslaw*, 209 AD2d 662 [1994]), which is defined as conduct that is "completely without merit in law,"

undertaken "primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another," or which "asserts material factual statements that are false" (22 NYCRR 130-1.1 [c] [1], [2], [3]). In determining if conduct is frivolous "the court shall consider . . . whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party" (22 NYCRR 130-1.1 [c] [3]). Given the court's determination on moving defendants' motion, the cross motion is denied.

Accordingly, the cross motion is denied. The motion is granted to the extent that their answer is hereby deemed amended to assert the affirmative defense of plaintiff's failure to utilize a seat belt. In the event plaintiff needs time to provide an expert exchange, she, if she be so advised, may make such appropriate application for that relief.

A copy of this order is being mailed to counsel for all parties on this date.

Dated: September 29, 2016

J.S.C.