

Stewart v Hub Billiard Club, Inc.
2016 NY Slip Op 32812(U)
June 2, 2016
Supreme Court, Nassau County
Docket Number: 600750/2014
Judge: Karen V. Murphy
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

ROCCO STEWART,

Plaintiff,

Index No. 600750/2014

-against-

Motion Submitted: 04/05/16

Motion Sequence: 002

THE HUB BILLIARD CLUB, INC.,

Defendant.

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Plaintiff moves this Court for an Order granting leave to reargue the defendant's prior motion for summary judgment resulting in the Short Form Order issued January 5, 2016 dismissing the complaint. Plaintiff also seeks leave to renew its opposition, on the ground that certain facts were not known to the Court at the time of defendant's prior motion. Defendant opposes the requested relief.

Plaintiff contends that the Court's refusal to consider the affidavit of Tom Gaynor, plaintiff's friend/acquaintance, upon the prior motion was error. Plaintiff maintains that renewal is also warranted because "justifiable reasons have been presented as to why the facts about Gaynor's disclosure as a nonparty witness were not presented earlier."

CPLR § 2221 (d) provides in pertinent part that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not

offered on the prior motion. . .” and “shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.” In this case, plaintiff’s motion is timely made.

It is settled that “[m]otions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision” (*Carrillo v. PM Realty Group*, 16 AD3d 611 [2d Dept 2005]; see also *CPLR § 2221[d][2]*; *Barnett v. Smith*, 64 AD3d 669 [2d Dept 2009]; *Frisenda v. X-Large Enterprises*, 280 AD2d 514 [2d Dept 2001]; *William P. Pahl Corp. v. Kassis*, 182 AD2d 22 [1st Dept 1992]; *Foley v. Roche*, 68 AD2d 558 [1st Dept 1979]).

Plaintiff argues that Gaynor’s name and address were disclosed to defendant on three prior occasions in 2014 and 2015, and that “defendant’s counsel badly misled the court in presenting the legal argument that the Gaynor affidavit should be disregarded because he was never disclosed as a witness.”

The Court notes that Gaynor’s affidavit was submitted for the first time in opposition to the prior motion; therefore, defendant properly addressed Gaynor’s affidavit in its reply papers. Defendant did not argue in its previous reply papers that Gaynor’s affidavit should be rejected because Gaynor was not previously disclosed as a witness; instead, defendant argued that the affidavit should be rejected because Gaynor “failed to respond to the defendant’s non-party subpoena to take his deposition.”

In fact, the Court determined that Gaynor’s affidavit would not be considered because “he did not respond to the defendant’s non-party deposition subpoena.”

In this case, the Court issued a trial Certification Order on February 9, 2015, and plaintiff filed his Note of Issue on May 4, 2015. It is undisputed that defendant had Tom Gaynor’s name and address prior to plaintiff filing his Note of Issue, as evidenced by defense counsel’s March 18, 2015 letter to plaintiff’s counsel acknowledging receipt of the supplemental disclosure dated December 25, 2014, and requesting to advise if it was possible for plaintiff’s counsel to arrange for the depositions of the individuals listed, including Tom Gaynor. This request was apparently made because “these individual are all friends and/or relatives of [plaintiff].” It is further undisputed that plaintiff’s counsel did not arrange for those non-party depositions, nor did defendant subpoena Gaynor until on or about August 1, 2015, despite having been provided with his identity and address by the end of 2014.

Plaintiff's contention that reargument should be granted because the Court rejected Gaynor's affidavit on the basis of non-disclosure is based upon plaintiff's incorrect reading of the Decision and Order, in addition to an incorrect reading of defendant's reply papers. Plaintiff also argues, however, that the Gaynor subpoena was improperly issued, having been served months after plaintiff filed the Note of Issue (Affirmation of Plaintiff's Counsel, paragraphs 15-16).

In reviewing its prior Decision and Order, the Court determines that granting reargument would be a provident exercise of its discretion based on the finding that this Court overlooked or misapprehended matters of fact or law related to the issue of the Gaynor affidavit (*see Matter of Bastien v. Motor Veh. Acc. Indem. Corp.*, 62 AD3d 791 [2d Dept 2009]; *Barrett v. Jeannot*, 18 AD3d 679 [2d Dept 2005]). Defendant's subpoena for Tom Gaynor's deposition, issued in August 2015, after the Note of Issue had been filed, was improper. "Prior to serving the subpoena[] upon the nonparty witness[], the defendant did not move pursuant to 22 NYCRR 202.21 (e) to vacate the note of issue within 20 days of its service on the ground that the case was not ready for trial. Moreover, the defendant did not move pursuant to 22 NYCRR 201.21 (d) for permission to conduct post-note of issue discovery on the ground that 'unusual or unanticipated circumstances' had developed after the filing of the note of issue (22 NYCRR 202.21 [d]). These are the only two methods available to a party who seeks to obtain disclosure after the filing of the note of issue" (*Singh v. Finneran*, 100 AD3d 735, 736 [2d Dept 2012]).

Moreover, counsel for the parties stipulated on February 9, 2015, concurrent with the Court's issuance of the trial Certification Order, that any and all outstanding discovery and deposition would take place within 90 days thereof. Apparently, defendant did not pursue the subpoena of Tom Gaynor when it became clear in March and/or April 2015 that plaintiff would not voluntarily arrange for the requested non-party depositions.

Based upon the foregoing, the subpoena served upon Tom Gaynor on August 1, 2015 was improper, thereby rendering his failure to appear for deposition an inappropriate basis upon which to have rejected his affidavit tendered in opposition to defendant's summary judgment motion.

Upon reargument, the Court notes that it previously determined that Gaynor's affidavit attesting to seeing the handrail loose a few days before the plaintiff fell "ordinarily would give rise to the existence of a material issue of fact as to constructive notice." On that basis, the Court now determines that plaintiff has raised a triable issue of fact as to notice of the alleged dangerous condition. While issues of credibility are raised by Gaynor's affidavit, the credibility of the witnesses, including the credibility of Gaynor,

plaintiff, and the defense witnesses are appropriately determined by the trier of fact (see *Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:6*, at 14; *Donato v. ELRAC, Inc.*, 18 AD3d 696 [2d Dept 2005]; *Frame v. Markowitz*, 125 AD2d 442 [2d Dept 1986]).

Accordingly, the Court hereby vacates those portions of its prior Order determining that plaintiff has failed to establish the existence of a material issue of fact, and granting defendant's summary judgment motion dismissing the complaint.

Upon reargument, defendant's prior summary judgment motion is denied, and the complaint is hereby reinstated.

That branch of plaintiff's motion seeking renewal is denied as academic.

The foregoing constitutes the Order of this Court.

Dated: June 2, 2016
Mineola, N.Y.


J. S. C.

ENTERED

JUN 06 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE