Scully v Town of Mamaroneck
2016 NY Slip Op 33095(U)
September 8, 2016
Supreme Court, Westchester County
Docket Number: 51106/15
Judge: David F. Everett

To commence the 30-day statutory time period for appeals as of right under CPLR 5513 (a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JANET VAGT SCULLY,

Plaintiff,

-against-

Index No. 51106/15
Motion Seq. Nos. 002/003

THE TOWN OF MAMARONECK, ROBERT ASHLEY, individually and in his role as police officer employed by Town of Mamaroneck and JOHN DOE, an unknown police officer employed by the Town of Mamaroneck,

Defendants.

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EVERETT, J.

The following papers were read on the motions:

002 Notice of Motion/Aff in Supp/Exhibits A-I
Aff in Opp/Exhibits 1-3
Reply Aff

003 Notice of Motion/Counsel Aff in Supp/Scully Affidavit in Supp/Counsel Aff in Supp/Exhibits A-Q
Aff in Opp/Exhibits A-B
Reply Aff

Upon the forgoing papers, the motions are granted in part and denied in part.

The following facts are taken from the pleadings, motion papers, affidavits and documentary evidence and the record, and are undisputed unless otherwise indicated.

Under motion sequence number 003, defendants The Town of Mamaroneck (Town), Christine Battalia (Battalia), as Town Clerk of the Town of Mamaroneck, Robert Ashley (Ashley), individually and in his role as police officer employed by Town of Mamaroneck and

JOHN DOE, an unknown police officer employed by the Town of Mamaroneck, jointly move for an order, pursuant to CPLR 3211 (a) (4) and 3025 (b), dismissing plaintiff's supplemental summons and amended complaint, or in the alterative, for an order pursuant to CPLR 3211 (f), extending the time to answer the amended complaint.[1] Under motion sequence number 003, plaintiff Janet Vagt Scully (Scully) moves for an order, pursuant to CPLR 2221, granting leave to reargue and renew this Court's decision and order dated March 18, 2016 (Prior Order), and upon granting leave, granting her motion to amend her notice of claim dated April 6, 2015, to add allegations of negligent hiring and supervision of Mamaroneck police officers. Scully also requests that this Court issue an order of recusal, pursuant to Judiciary Law § 14. The motions, under motion sequence numbers 002 and 003, are consolidated for disposition.

Addressing first the issue of recusal, Judiciary Law § 14 provides, in relevant part:

> "[a] judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree."

According to the Court of Appeals, in the leading case of *People v Alomar* (93 NY2d 230, 246 [1999] [internal citations omitted]), "[r]ecusal, as a matter of due process, is required only where there exists a direct, personal, substantial or pecuniary interest in reaching a particular conclusion or where a clash in judicial roles is seen to exist." Plaintiff has not made this showing.

Here, other than speculation and conjecture about my having an interest in this matter,

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[1] Defendants withdrew those aspects of the motion, under motion sequence No. 002, that sought a dismissal of the complaint or for preclusion of evidence, or to compel compliance with discovery pursuant to CPLR 3124 and 3126 (2) and (3) (*see* compliance conference order dated May 3, 2016).

based on little more than a shared zip code, my support for a local little league team unaffiliated with any of the parties, and an undated contribution to a nonparty local official's campaign, while I was still in private practice, and of which I have little recollection, Scully provides no reason for me to recuse myself from this case. Upon careful review of the record, I can discern no reason for me to conclude that I cannot be fair and impartial to all of the parties and their counsel, as I have no personal interest or connection with any persons or places mentioned connection with this dispute over a parking permit and parking ticket. I therefore, decline to recuse myself from this matter.

Addressing next, Scully's motion to reargue and renew the Prior Order, the motion is denied.

CPLR 2221 (d) provides, in relevant part, that a motion to reargue must be identified as such, must be "made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry," and "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." A reargument motion is based solely on the papers submitted in connection with the prior motion. It is not a means by which an unsuccessful party can obtain a second opportunity to argue one or more issues previously decided, nor is it an opportunity to submit new or additional facts not previously submitted as part of the motion (*McGill v Goldman*, 261 AD2d 593, 594 [2nd Dept 1999]; *15 E.63 St. Co. v Cook*, 120 AD2d 442, 443 [1st Dept 1986]; *Foley v Roche*, 68 AD2d 558, 567 - 568 [1st Dept 1979]).

Likewise, CPLR 2221 (e) provides, in relevant part, that a motion to renew must be identified as such. A renewal motion "shall be based upon new facts not offered on the prior

motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination . . . [and a] reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2] and [3]). For a motion court to consider the new facts, it must find that the party seeking renewal did not know of the facts at the time of the original motion or had a reasonable excuse for failing to present the new facts in its original motion (*Yarde v New York City Tr. Auth.*, 4 AD3d 352, 353 [2nd Dept 2004]; *Foley v Roche*, 68 AD2d at 568]). It is not an opportunity for an unsuccessful party to advance facts which were known or could have been known and presented to the motion court but for deficiencies in the prior papers (*Matter of Weinberg*, 132 AD2d 190, 210 [1st Dept 1987], *appeal dismissed Matter of Beiny,* 71 NY2d 994 [1988]).

Movants may, pursuant to CPLR 2221 (f), combine their request for reargument and renewal in one notice of motion provided that they "identify separately and support separately each item of relief sought," so that the motion court can "decide each part of the motion as if it were separately made." It is apparent from the Court's review of the motion papers that plaintiff made no attempt to comply with CPLR 2221 (f), warranting a summary dismissal of the motion on that basis alone.

The Court notes that, also absent from plaintiff's motion papers are new facts, not offered on her prior motion, that would have changed the Prior Order had such facts been known, together with a reasonable excuse for failing to present such facts in her prior motion. Nor does she identify a change in the law that would change the Court's prior determination (CPLR 2221 [e] [2] and [3]). As a result, plaintiff offers no basis on which it would be appropriate to grant leave to renew the Prior Order.

There is also no basis to grant leave to reargue the Prior Order. Plaintiff's assertion notwithstanding, the motion is untimely, and her attempt to deflect defendants' timeliness argument, by pointing out a minor error in the cover sheet accompanying a copy of the entered Prior Order, is unavailing.

The Prior Order was entered in the Office of the Westchester County Clerk on April 7, 2016, at which time the parties, who had consented to e-filing (22 NYCRR § 202.5-b), automatically received notice, via NYSCEF, that the Prior Order had been entered by the County Clerk. Defendants, nevertheless, served a copy of the entered Prior Order, consistent with CPLR 2220, by mailing a true copy of the entered Prior Order to plaintiff on or about April 7, 2016. Although defense counsel's cover sheet accompanying the Prior Order contains the correct caption and index number, it incorrectly identifies the name of the judge and the date of entry, stating: "annexed hereto is a true copy of a Decision and Order of the Honorable Julieanne T. Capetola, dated March 18, 2016, entered in the Office of the County Clerk of Westchester County on the 4th day of April, 2016." Thereafter, on or about April 22, 2016, defendants again served plaintiff with a copy of the entered Prior Order (which they refiled the same day with the County Clerk). The second service effort contained a cover sheet that correctly identifies the Prior Order in all respects.

Using the April 22, 2016 service date to start the 30-day clock, plaintiff contends that service of her motion less than 30 days later, on May 16, 2016, is timely, and insists that the mistake in the first cover sheet rendered the April 7, 2016 service attempt a nullity. However, it is clear from the record that, not only did plaintiff receive, via NYSCEF, a copy of the entered Prior Order on the date of entry, April 7, 2016, but service was also effected on her by mail on or

about the same date. Plaintiff's objections notwithstanding, the initial cover sheet adequately apprises her of the identify of the action, in that it contains both the correct caption and the correct index number. The fact that it also contains the ministerial mistakes of identifying the wrong judge and the wrong date of entry, does not render service of a true copy of the Prior Order entered on April 7, 2016, a nullity. Plaintiff's time to serve her motion to reargue started to run on April 7, 2016, and her failure to serve the motion prior to May 16, 2016, precludes court review.

However, even if this Court were to consider the motion to reargue the denial of plaintiff's motion to amend her notice of claim, she offers substantially the same arguments presented and rejected on the prior motion. As stated above, a motion to reargue is not a means by which plaintiff can obtain a second opportunity to argue the issues previously decided, nor is it an opportunity for her to present new or differently worded arguments relating to the same, previously decided issues. Rather, it is an opportunity to show the court that it overlooked relevant facts or misapprehended applicable law, which plaintiff has not done (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]; *Foley v Roche*, 68 AD2d at 567). Plaintiff has not made this showing as she has failed to demonstrate how the Court misapprehended either law or fact by finding that her proposed amendment contains allegations of negligent hiring and supervision, which would impermissibly alter the theory of liability for which the municipal defendant were placed on notice, well outside the 90-day period (General Municipal Law § 50-e [1] and [2]).

Given that plaintiff's motion for renewal is not based on new facts which were unavailable at the time of the Prior Motion, nor does it state a ground for reargument based on a

misapprehension of law or fact, her motion for leave to renew and reargue the Prior Order is denied.

Finally, defendants' chief argument in support of dismissal of plaintiff's amended complaint is that it sets forth additional details of facts already alleged, rather than adding new parties or new causes of action. Upon examination of the amended complaint e-filed on April 20, 2016, defendants' motion for an order dismissing plaintiff's amended complaint is denied, and their motion, in the alternative, for an order granting an extension of time to answer the amended complaint is granted.

CPLR 3025 (b) provides, in relevant part, that: "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just." Leave to amend a pleading should also be freely granted "where, as here, the proposed amendment is not palpably insufficient or patently devoid of merit, and will not prejudice or surprise the opposing party" (*Bolanowski v Trustees of Columbia Univ. in City of N.Y.*, 21 AD3d 340, 341 [2d Dept 2005]).

Here, plaintiff's procedural error in failing to move for leave of court, or to obtain a stipulation from opposing counsel, does not warrant a dismissal of the amended complaint. Given that the amended complaint was served and filed after this Court issued the Prior Order consolidating the related action commenced under Westchester County Index No. 50014/16, with the action already pending under Westchester County Index No. 51106/14, it was not unreasonable for plaintiff to serve an amended complaint combining and supplementing, under

the single index number, the allegations previously stated in separate complaints, under separate index numbers.

Accordingly, it is

ORDERED that plaintiff's motion for leave to renew and reargue the Prior Order is denied; and it is further

ORDERED that plaintiff's request for this Court to issue a recusal order is denied; and it is further

ORDERED that defendants' motion to dismiss the supplemental summons and amended complaint is denied; and it is further

ORDERED that defendants' motion for an extension of time to answer the amended complaint is granted to the extent that the supplemented summons and amended complaint in the form filed with the Court on April 20, 2016, shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that the parties appear for a compliance conference in room 800, at 9:30 a.m., on September 16, 2016.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
September 8, 2016

ENTER:

HON. DAVID F. EVERETT, A.J.S.C.