

Ferreira v Century 21 Dept. Stores, LLC
2017 NY Slip Op 31475(U)
July 12, 2017
Supreme Court, New York County
Docket Number: 156517/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED, J.S.C.
Justice

PART 2

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VANDERLEI NUNES FERREIRA,
Plaintiff,

INDEX NO. 156517/2016

MOTION DATE _____

- v -

MOTION SEQ. NO. 003

CENTURY 21 DEPARTMENT STORES, LLC, ITS AGENTS,
SERVANTS AND EMPLOYEES, JOHN DOES 1-5 (FICTITIOUS
NAMES), ABC COMPANIES 1-5 (FICTITIOUS NAMES),
JOINTLY, SEVERALLY AND IN THE ALTERNATIVE,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this application to/for Renewal/Reargument

Upon the foregoing documents, it is
ordered that the motion is denied.

In this personal injury action, plaintiff Vanderlei Nunes Ferreira moves: 1) pursuant to CPLR 5015, to vacate an order of this Court dated April 12, 2017 which dismissed the complaint; and 2) pursuant to CPLR 2221, to renew and/or reargue an order to show cause, seeking to vacate the April 12, 2017 order, which this Court declined to sign on April 25, 2017.

By order dated March 1, 2017 and entered the following day, this Court granted an unopposed motion by defendant Century 21 Department Stores LLC to dismiss the complaint. NYSCEF Doc. 16. The order granted a conditional dismissal of the complaint based on plaintiff's

“fail[ure] to comply with a demand for a bill of particulars, notice for discovery and inspection and witness demand, and demand pursuant to Medicare and Medicaid and SCHIP Extension Act of 2007.” Id. Specifically, this Court held that defendant’s motion to dismiss “is granted and the complaint is dismissed unless, within 30 days from service of a copy of this order with notice of entry, plaintiff responds” to the outstanding discovery demands. Id. This Court further directed the parties to appear for a preliminary conference on May 9, 2017. Id.

On April 12, 2017, defendant’s attorney submitted to this Court an affirmation attesting to the fact that plaintiff had failed to comply with the March 1, 2017 order. NYSCEF Doc. 18. The same day, this Court issued an order dismissing the complaint based on plaintiff’s failure, “without cause”, to comply with the March 1, 2017 order. NYSCEF Doc. 19.

By order to show cause filed April 21, 2017, plaintiff moved, pursuant to CPLR 5015 (a) (1), to vacate the April 12, 2017 order. NYSCEF Doc. 21. In support of the motion, plaintiff’s attorney argued, inter alia, that delays in providing discovery were caused by issues regarding his health and the inability of plaintiff, a full-time resident of Brazil, to speak English. By order entered April 25, 2017 (NYSCEF Doc. 29), this Court declined to sign the order to show cause on the ground that plaintiff failed to comply with CPLR 5015 (a) (1) by establishing a reasonable excuse for the default and a meritorious claim. Id. In so holding, this Court noted that “although plaintiff blames his inability to speak English as a reason for failing to provide discovery, he signed an English “certification” of his bill of particulars unaccompanied by a translation.” Id. Additionally, this Court reasoned that plaintiff did not submit “a personally verified complaint establishing the merits of his claim.” Id.

On May 12, 2017, plaintiff filed the instant motion 1) pursuant to CPLR 5015, to vacate the order of this Court dated April 12, 2017 dismissing the complaint; and 2) pursuant to CPLR

2221, seeking renewal and/or reargument of the order to show cause which this Court declined to sign on April 25, 2017.

Initially, that branch of plaintiff's motion to vacate the order of April 12, 2017 is denied since this Court's denial of the identical relief on April 25, 2017 is law of the case.

Additionally, that branch of the motion seeking reargument is denied since this Court did not misapprehend or overlook any issue of fact or law in declining to sign plaintiff's order to show cause on April 25, 2017. See CPLR 2221. Further, despite plaintiff's argument that renewal and reargument should be granted because plaintiff has now provided bills of particular in Portuguese and English, this argument does not address the other discovery, such as duly executed authorizations, which were to have been exchanged. Thus, the motion is denied in all respects.¹

In light of the foregoing, it is hereby:

ORDERED that the motion is denied in all respects; and it is further,

¹ In denying the motion, this Court notes that plaintiff commenced a separate, identical action against defendant under Index Number 153731/17 on April 21, 2017 (NYSCEF Doc. 1) and defendant filed an answer to the complaint in that matter on June 6, 2017. NYSCEF Doc. 2. "Since plaintiff's noncompliance [in the captioned action] did not 'result in a dismissal with prejudice, or an order of preclusion or summary judgment,' plaintiff was not barred from commencing a second action." *Downtown Acupuncture, P.C. v State Farm Mut. Auto. Ins. Co.*, 20 Misc3d 137 (A) (App Term 2d Dept 2008), citing *Maitland v Trojan Elec. & Mach. Co.*, 65 NY2d 614, 615-616 (1985); *Daluise v Sottile*, 40 AD3d 801, 802-803 (2d Dept 2007).

ORDERED that this constitutes the decision and order of the court.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT



HON. KATHRYN E. FREED, J.S.C.

7/12/2017

DATE

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE