Curcio v Princess Cut Indus., Inc.
2017 NY Slip Op 33201(U)
December 11, 2017
Supreme Court, Nassau County
Docket Number: 602549-17
Judge: Jerome C. Murphy
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SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

GERARDO CURCIO,

Plaintiff,

- against -

PRINCESS CUT INDUSTRIES, INC. and CHRISTINE QUADRINO,

Defendants.

TRIAL/IAS PART 18
Index No.: 602549-17
Motion Date: 9/28/17
Sequence No.: 002
MD
DECISION AND ORDER

The following papers have been read on this motion:

Notice of Motion, Affirmation and Exhibits.....1
Correspondence dated November 1, 2017 from Anthony DiPaolo, P.C.....2

PRELIMINARY STATEMENT

Plaintiff brings this application for an Order, pursuant to CPLR § 2221, for leave to reargue the Court's Decision and Order dated May 26, 2017; upon reargument, granting plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR § 3213, together with such other and further relief and this Court deems just and proper. No opposition has been submitted by defendants.

DISCUSSION

As best as can be determined from the papers submitted herein, this action arises out of defendants', Princess Cut Industries, Inc. and Christine Quadrino's alleged failure to pay the sums due under an $110,000.00 Promissory Note. Plaintiff commenced this action pursuant to CPLR §

3213 against the defendants for summary judgment. By prior Decision and Order dated May 26, 2017 (entered June 1, 2017), this Court denied the plaintiff's prior unopposed motion for summary judgment in lieu of complaint in its entirety. Specifically, this Court found that the plaintiff's failure to include and serve a summons with his motion for summary judgment was fatal to his application.

Upon the instant motion, plaintiff moves for leave to reargue this Court's prior Decision and Order on the grounds that this Court should have looked for the affidavits of service in the Clerk's ECF file (Docs. 1, 12 and 13) which plaintiff argues demonstrates that his prior motion did in fact include a summons.

Notably, a conference was held in this matter on October 31, 2017 where this Court also noted that the summons which is the subject of this motion to reargue did not contain an index number. Counsel for the plaintiff subsequently informed the Court and the defendant, Christine Quadrino, by letter dated November 1, 2017 that "since this case was electronically filed, the index number is electronically stamped on the upper hand corner of the summons." A further review of those papers for reargument showed that the index number was at the top of the summons page and was completely covered by the stapled area.

Addressing first the issue of the Index Number, this Court notes that pursuant to CPLR 305 entitled "Summons; supplemental summons, amendment":

> (a) Summons; supplemental summons. A summons shall specify the basis of the venue designated and if based upon the residence of the plaintiff it shall specify the plaintiff's address, and also shall bear the index number assigned and the date of filing with the clerk of the court.***

However, the failure to include the index number on a summons with notice does not require dismissal of the action unless and until there is a showing of prejudice to the defendant (*Cruz v. New*

York City Hous. Auth., 269 AD2d 108 [1st Dept. 2000]). Thus, even if the plaintiff had failed to include an index number and the date of filing on the summons with notice, a failure to comply with the technical requirements of CPLR 305(a) would not warrant dismissal unless there was a showing of prejudice caused by such defect (*Bevona v. Malek*, 224 AD2d 317 [1st Dept. 1996] *lv. denied* 88 NY2d 807 [1996]). Clearly, the defendant herein – who has failed to oppose the plaintiff's instant motion for leave to reargue – has also failed to show any prejudice whatsoever (*Cruz v. New York City Housing Authority*, *supra*).

As to its instant motion to reargue, the Court notes that, pursuant to CPLR 2221 entitled "Motion affecting prior order":

> ***
> (d) A motion for leave to reargue:
> 1. shall be identified specifically as such;
>
> 2. 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
>
> 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.
> ***

The law is clear. A motion to reargue is addressed to the discretion of the court and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law (CPLR 2221[d][2]). It is not designed as a vehicle to afford the unsuccessful party an opportunity to argue once again the very questions previously decided (*Gellert & Rodner v. Gem Community Mgt., Inc.*, 20 AD3d 388 [2nd Dept. 2005]). Nor is it designed to provide an opportunity for a party to advance arguments different from

those originally tendered (*Amato v. Lord & Taylor, Inc.*, 10 AD3d 374, 375 [2nd Dept. 2004]) or argue a new theory of law or raise new questions not previously advanced (*Levi v. Utica First Ins. Co.*, 12 AD3d 256, 258 [1st Dept. 2004]; *Frisenda v. X Large Enterprises, Inc.*, 280 AD2d 514, 515 [2nd Dept. 2001]). Instead, the movant must demonstrate, based solely upon the papers submitted in connection with the prior motion, that the matters of fact or law that he or she believes the court has misapprehended or overlooked (*Hoffmann v. Debello-Teheny*, 27 AD3d 743 [2nd Dept. 2006]; *James v. Nestor*, 120 AD2d 442 [1st Dept. 1986]; *Philips v. Village of Oriskany*, 57 AD2d 110 [4th Dept. 1997]). Absent a showing of misapprehension or the overlooking of a fact, the court must deny the motion (*Barrett v. Jeannot*, 18 AD3d 679 [2nd Dept. 2005]).

Here, it is plain that the plaintiff's argument that this Court overlooked the affidavits of services and the court's electronic court file is meritless. First, there is no obligation on this Court to perform a check of the county clerk's electronic court file. To the contrary, the movant remains obligated to ensure that its application is complete as it is presented to the Court for consideration. Next, while it is true that the affidavits of service offered as an Exhibit to the plaintiff's prior motion documented that a Summons was (also) served on the named defendants, the absence of a copy of the summons itself on his prior application rendered the prior motion defective. This is particularly true in this case where, as stated above, the Index Number being documented on the summons also presented an issue for this Court.

Therefore, in the absence of any demonstration by the plaintiff on this motion that this Court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law, the instant application by plaintiff for leave to reargue is denied.

Indeed, the motion to reargue is also denied because the plaintiff also fails to append a copy

of the affidavit of service of the within motion (CPLR 306[a], [d]). "A motion that is not properly served must be denied" (*Mitelman & Son Meat Processing, Inc. v. Meat Packers & Butchers Supply Co., Inc.*, 272 AD2d 531 [2nd Dept. 2000]; *see also, Mayer v. Vilar*, 2014 NY Slip Op. 31305[U] [Sup. Ct. New York 2014]; *Mathur v. Diblasio*, 2010 WL 9583662 [Sup. Ct. New York 2010]).

Moreover, even if this Court were to overlook the infirmities of the instant application and grant the plaintiff leave to reargue, upon reargument, this Court would nevertheless deny the plaintiff's underlying motion for summary judgment in lieu of complaint pursuant to CPLR 3213. CPLR 3213 provides a speedy and effective means for resolving claims where the action is "based upon the instrument for money only" (*Banco Popular N. Am. v. Victory Taxi Mgt.*, 1 NY3d 381 [2004]; *Sun Convenient, Inc. v. Sarasamir Corp.*, 123 AD3d 906 [2nd Dept. 2014]). However, on the papers before this Court on this motion, it is plain that the defendant has laid bare her defenses to the plaintiff's action which sufficiently support a bona fide defense and defeat the plaintiff's motion for summary judgment in lieu of complaint (*cf. Oquendo v. City of New York*, 238 AD2d 391 [2nd Dept. 1997]). It is the decision of this Court that the case should continue and be decided on the merits. The defendant, Princess Cut Industries, Inc., must be represented by an attorney in this case, but Christine Quadrino may remain self-represented if she so elects.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
December 11, 2017

ENTERED
DEC 20 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:
Jerome C Murphy
JEROME C. MURPHY
J.S.C.