

Golovashchenko v Telentos Constr. Corp.
2018 NY Slip Op 30437(U)
March 14, 2018
Supreme Court, New York County
Docket Number: 116388/10
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
LEONID GOLOVASHCHENKO and OLENA
GOLOVASHCHENKO,

Plaintiffs,

-against-

DECISION/ORDER

Index No.: 116388/10

Mot. Seq. 006

TELENTOS CONSTRUCTION CORPORATION and
DORMITORY AUTHORITY OF THE STATE OF NEW
YORK and THE CITY OF NEW YORK,

Defendants.

-----X
TELENTOS CONSTRUCTION CORPORATION and
DORMITORY AUTHORITY OF THE STATE OF NEW
YORK,

Third-party Plaintiffs,

-against-

A.S.A.R. INTERNATIONAL CORP.,

Third-party Defendant.

-----X
A.S.A.R. INTERNATIONAL CORP.,

Second third-party plaintiff,

-against-

DYNA CONTRACTING, INC.,

Second third-party defendant.
-----X

-----X

A.S.A.R. INTERNATIONAL CORP.,

Third third-party plaintiff,

-against-

LIRO GROUP, a subsidiary of LIRO CONSLUTING
ENGINEERS,

Third third-party defendants.

-----X

HON. CAROL R. EDMEAD, J.S.C.:

In a Labor Law Action, plaintiffs Leonid and Olena Golovashchenko (plaintiffs, or the Golovashchenkos) move, pursuant to CPLR 2221, for renewal and reargument, of the court’s memorandum decision dated August 11, 2017 (August 2017 decision). Specifically, plaintiffs seek a modification of the August 2017 decision that reinstates Olena Golovashchenko’s derivative claim for loss of her husband’s consortium and services. Alternatively, plaintiffs move, pursuant to 5015 (a) (1), to vacate plaintiffs’ default on their derivative claim. Defendants Telentos Construction Corporation (Telentos), Dormitory Authority of the State of New York (Dormitory Authority), and the City of New York (the City) cross-move for reargument. Specifically, cross-moving defendants seek an order, upon reargument, dismissing Leonid Golovashchenko’s Labor Law §§ 200 and 240 (1) claims, and granting Telentos summary judgment on its claim for contractual indemnification against A.S.A.R. International Corp. (ASAR).

BACKGROUND

Plaintiff was injured when he was struck on the head by a piece of plywood while he was removing asbestos from a building.¹ The August 2017 decision resolved a motion by Telentos, the Dormitory Authority, and the City – which sought summary judgment dismissing the complaint, and summary judgment on their contractual indemnification claims against ASAR -- as well as plaintiffs' cross motion for summary judgment as to liability on the Labor Law § 241 (6) claims against Telentos, the Dormitory Authority, and the City, and on the common-law negligence and Labor Law § 200 claim against Telentos.

The August 2017 decision granted plaintiffs summary judgment on the 241 (6) claim, as predicated on an alleged violation of Industrial Code 12 NYCRR 23-1.28 (a). The remainder of plaintiffs' cross motion was denied. As to defendants' motion, the court dismissed the following as abandoned: the Labor Law § 240 (1) claim; allegedly violated provisions of the Industrial Code that plaintiff did not defend in their opposition to defendants' motion; the common-law negligence and Labor Law § 200 claims against the Dormitory Authority and the City; and, most importantly for the purposes of the present motion, Olena Golovoshchenko's claim for loss of her husband's services. Moreover, the court granted the branch of defendants' motion that sought summary judgment on the Dormitory Authority and the City's claims for contractual indemnification against ASAR. The remainder of defendants' motion was denied.

DISCUSSION

I. Plaintiff's Motion

Plaintiff seeks to reinstate Olena Golovashchenko's derivative claim for loss of consortium and services. In the underlying motion practice, defendants moved to dismiss these

¹ For further factual background, see the August 2017 decision.

claims and plaintiffs failed to respond in their opposition. Accordingly, the court dismissed the derivative claim as abandoned. Here, plaintiffs seek to avail themselves of three possible avenues to reinstatement of the derivative claim: renewal, reargument or vacatur of their default.

Renew and Reargue

Plaintiffs seek to both to renew, under CPLR 2221 (e), and to reargue, pursuant to CPLR 2221 (d). A motion for leave to renew is sparingly granted and is not a second opportunity given freely to a party who has not acted diligently in making the initial motion (*Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010]). Under CPLR 2221 (e) (2) a motion to renew must “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.” Renewal should ordinarily be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application (*see Trust v 114 Tenth Ave. Assoc., Inc.*, 44 AD3d 576, 577 [1st Dept 2007]). Here, there has been no change in law, and plaintiff offers no new facts. Simply, plaintiff failed to specifically oppose the branch of defendants’ motion that sought dismissal of her derivative claim. Plaintiff’s claim that they believed the derivative claim would automatically be saved since parts of the related Labor Law claims survived. As this is not the proper basis for a motion to renew, this branch of plaintiffs’ motion must be denied.

A motion for leave to reargue, on the other hand, serves to offer a party the chance to demonstrate that the court overlooked or misunderstood the pertinent facts or failed to properly apply the relevant legal principles (CPLR 2221 [d] [2]). “Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted” (*William P. Pahl Equip. Corp. v Kassis*, 182

AD2d 22, 27 [1st Dept 1992]). Moreover, a motion to reargue cannot be based on factual matters not raised on the original application (CPLR 2221 (d) (2); *Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 (2d Dept 2011)).

Here, the court has not overlooked or misunderstood plaintiffs' argument, or misapplied the law. This is a circumstance where plaintiffs have not made any argument as to the derivative claim. Although plaintiffs argue, here, that they implicitly argued, on the underlying motion, that the derivative claim was valid by defending the related Labor Law claims, the court made the reasonable inference that plaintiffs were abandoning the derivative claim (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014] [failure to address claims indicates an intention to abandon them as bases of liability]). Thus, as plaintiffs cannot demonstrate a mistake of fact or law by the court, the court must deny the branch of plaintiffs' motion that seeks reargument of the August 2017 decision.

Default

Plaintiffs failure to address the derivative claim was essentially a default. CPLR 5015 (a) provides that a default is excusable and may be vacated if the motion to vacate is "made within one year" from receipt of notice of service of entry (CPLR 5015 [a] [1]).

Courts have long held that, in order to vacate a default under CPLR 5015 (a), a party seeking to vacate must offer "a reasonable excuse for [the] default and facts indicating a meritorious" cause of action or defense (*Rugieri v Bannister*, 7 NY3d 742, 744 [2006]; *see also Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). The standard of CPLR 5015 (a) is relatively forgiving, as defaults "are not favored, since the law prefers issues be disposed of upon their merits, in the absence of a showing of prejudice" (*Ballard v Billings & Spencer Co.* 36 AD2d 71, 76 [4th Dept 1971]).

Here, plaintiffs default is reasonable in that they believed that the derivative claim was implicitly opposed through their opposition to defendants' motion to dismiss the related Labor Law claims. While it was not good practice to totally ignore the derivative claim in their papers, plaintiffs' belief was reasonable, as defendants' argument against the derivative claim was that it could not stand where the related claims are defective. As plaintiffs successfully defended some of the underlying claims, it was reasonable, although not advisable, to think that they had implicitly defended the derivative claim. Moreover, defendants fail to show that any prejudice to them would arise from vacating the default. Finally, plaintiffs make a showing of a meritorious derivative claim by submitting Olena Golovashchenko's deposition testimony, in which she details changes in her marriage following her husband's accident. As plaintiffs make the requisite showing to vacate under CPLR 5015 (a), the court must grant the branch of their motion seeking to vacate their default on the derivative claim.

II. Defendants' Application for Leave to Reargue

As defendants simply rehash arguments made and rejected in the underlying motion, their motion to reargue is denied.

CONCLUSION

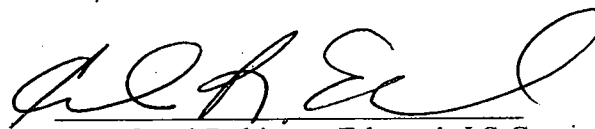
Accordingly, it is

ORDERED plaintiffs' motion is granted only to the extent that plaintiffs' default on Olena Golovashchenko's derivative claim is vacated pursuant to CPLR 5015, and the claim is reinstated; and it is further

ORDERED that defendants' cross motion for leave to reargue is denied; and it is further

ORDERED that counsel for plaintiff is to serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: March 14, 2018



Hon. Carol Robinson Edmead, J.S.C

HON. CAROL R. EDMED
J.S.C.