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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice of the Supreme Court

TRIAL/IAS, PART 23
NASSAU COUNTY

VICKIE WILLIAMS,

Plaintiff(s),

Index No.: 9847/15

-against-

Motion Seq. No.: 003
Motion Submitted: 3/19/18

DAVITA HEALTHCARE PARTNERS, INC., and DVA RENAL HEALTHCARE, INC. d/b/a FREEPORT KIDNEY CENTER,

Defendant(s).

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Plaintiff, Vickie Williams, (Williams), moves this court for an Order pursuant to CPLR § 2221(a), granting her leave to renew and reargue the decision of this court dated January 11, 2018, which dismissed her complaint for failure to comply with discovery. Defendants, Davita Healthcare Partners, INC., and DVA Renal Healthcare, INC. d/b/a Freeport Kidney Center oppose the motion.

The January 11, 2018 order found that Williams had not complied with discovery and therefore her complaint was dismissed. This was not the first court order to take issue with Williams' consistent failure to comply with discovery and this court's directives. The court issued an order dated October 25, 2017 that denied Defendants' motion for discovery-related sanction solely because Defendants failed to include an affirmation of good faith. In that decision, the court implored Williams to comply with discovery and noted she was getting the second or third chance she most likely did not deserve. Despite the court's warning, Williams once again failed to comply with discovery and Defendants brought another motion for sanctions, this time with a proper affirmation of good faith. In the interim, the court, during a conference with the parties, had issued an order directing Williams to supply certain, specific items of discovery within a particular time frame. She failed to do so. When Defendants brought the prior motion, Williams, as if wanting to put an exclamation point in all her prior dilatory behavior, served her opposition to the motion late. It was the second motion in a row she served her opposition late. Based upon the failure to timely serve opposition, the court submitted the motion as unopposed and then granted the motion. Williams now seeks leave to renew and reargue that order, arguing that granting the motion was in error.

A motion for leave to renew or reargue is addressed to the sound discretion of the

Supreme Court (see *Matter of Swingearn*, 59 AD3d 556 [2d Dept. 2009]). A motion for renewal "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR § 2221[e] [2]). A motion for reargument must 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" (CPLR § 2221[d][2]). It is not designed, however, to provide an unsuccessful party with successive opportunities to re-litigate the issues previously decided (*see Foley v. Roche*, 68 AD2d 558, 567 [1st Dept. 1979]), or to present arguments different from those originally tendered (*see Giovanniello v. Carolina Wholesale Off. Mach. Co., Inc.*, 29 AD3d 737, 738 [2d Dept. 2006]).

Pursuant to CPLR § 2221(d)(3) a motion for reargument "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry". There is no statutory limit to the time within which a litigant can file a motion to renew based upon facts not offered on the prior motion that would change the prior determination pursuant to CPLR § 2221[e]. While Williams' motion was timely filed, the Supreme Court has jurisdiction to reconsider its prior order "regardless of statutory time limits concerning motions to reargue" (*Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]; *see Aridas v Caserta*, 41 NY2d 1059 [1977]; *cf. Matter of Huie [Furman]*, 20 NY2d 568 [1967]; *Johnson v Incorporated Vil. of Freeport*, 303 AD2d 640 [2d Dept.

2003]).

To prevail upon a motion to renew, a party must proffer both "new facts not offered on the prior motion that would change the prior determination . . . and . . . reasonable justification for the failure to present such facts on the prior motion" (CPLR § 2221 [e] [2], [3]; *see New York Cent. Mut. Fire Ins. Co. v Caddigan*, 15 AD3d 581 [2d Dept. 2005], *JP Morgan Chase Bank, N.A. v Malarkey*, 65 AD3d 718, 719-720 [3d Dept. 2009]; *Johnson v Title N., Inc.*, 31 AD3d 1071, 1071-1072 [3d Dept. 2006]).

The prior motion was submitted as unopposed. The return date of the motion was January 10, 2018, and Plaintiff served opposition to the motion, by regular mail, on January 8, 2018. In the current motion, Plaintiff tries to refashion that series of events as the court not receiving the papers in time and therefore considering the motion unopposed. Though it was made clear in the prior order, it is worth repeating that even if the opposition papers had arrived by January 10, 2018, they still would have been late. CPLR sec 2214(b) requires opposition to motions that were made 16 days or more before the return date to be served at least seven days before the return. Herein, the motion was made 23 days before the return date, yet Williams still offers no excuse, and no basis, for serving opposition papers by mail two days before the return date.

The court agrees with Defendants that the current motion is procedurally defective for various reasons. However, the court has considered the motion on its merits and finds

that the prior order will remain unchanged. The court has not overlooked or misapprehended any law or facts in finding Williams' repeated refusal to comply with discovery to be willful and contumacious. The history of this matter, as detailed in the prior order, speaks for itself. Further, there are no new facts that would change the court's decision. The court did review Williams' opposition to the prior motion, and has reviewed it again for this motion, and finds nothing in there would have resulted in a different decision. On November 15, 2017, this court issued an order directing Williams to provide a very specific list of items by December 15, 2017. The order clearly stated that failure to comply would result in dismissal of her complaint. Despite her counsel's carefully worded affirmation suggesting Williams complied, that order was not fully complied with, and therefore dismissal of her complaint was proper.

Accordingly, it is hereby;

ORDERED, that the Williams' motion to renew and reargue is DENIED in its entirety.

This constitutes the Decision and Order of the Court.

Dated: April 30, 2018
Mineola, N.Y.

Hon. James P. McCormack, J. S. C.