

Yarmish v Halstuk

2019 NY Slip Op 30092(U)

January 9, 2019

Supreme Court, Kings County

Docket Number: 509406/2016

Judge: Paul Wooten

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**SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY**

PRESENT: HON. PAUL WOOTEN
Justice

PART 97

EMMANUEL YARMISH,

Plaintiff,

- against -

INDEX NO. **509406/2016**

SEQ. NO. **2**

JANE NAOMI HALSTUK,

Defendant.

The following papers were read on this motion by plaintiff for leave to reargue.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1,2</u>
Answering Affidavits — Exhibits (Memo) _____	<u>3</u>
Replying Affidavits (Reply Memo) _____	<u>4</u>

This is an action commenced by Emmanuel Yarmish (plaintiff) on June 4, 2016 against defendant Jane Naomi Halstuk (defendant) to collect on promissory notes allegedly due and owing to plaintiff. Specifically, the complaint alleges that John Halstuk, defendant's former husband, defaulted in payment due plaintiff under Promissory Notes dated April 2, 1998, November 22, 1999, and March 16, 2000. Plaintiff is allegedly owed the sum of \$5,298,485.67, computed as of December 9th, 2015. Additionally, the complaint alleges that defendant was the Guarantor on the loans, the proceeds of which were used to purchase property in Israel, namely Apartments #1 and #4 at 4 Jabotinsky Street, Jerusalem Israel.

On February 2, 2017, defendant moved to dismiss the complaint, *inter alia*, pursuant to CPLR 3211 on the grounds that plaintiff failed to properly serve defendant, who lives in Israel, with both the Summons and Complaint and Amended Complaint thus this Court lacked in personam jurisdiction over defendant. Moreover, defendant sought dismissal on the basis that

the statute of limitations had run on the Promissory Note claims. Plaintiff submitted opposition to defendant's motion. Oral arguments were heard on the record on October 18, 2017. In a Decision and Order dated December 4, 2017 (Prior Decision), the Court granted defendant's motion to dismiss finding that the defendant was not properly served with process.

Before the Court is a motion by plaintiff for an Order (1) pursuant to CPLR 2221(d) for leave to reargue the Prior Decision; and, (2) pursuant to CPLR 2201, for a stay of this action pending effectuating service of process. Specifically, upon reargument, plaintiff seeks an Order denying defendant's motion to dismiss. Additionally, plaintiff requests that should the Court adhere to its finding in the Prior Decision regarding service via the Hague Convention, the Court should stay this action to permit plaintiff to effectuate service of the Amended Complaint upon defendant through the Hague Convention.

In support of his motion, plaintiff contends that this Court overlooked the evidence in the record that defendant waived the process service requirements of the Hague Convention.

Plaintiff relies upon paragraph 13 of the Promissory Notes, which provides:

Borrower irrevocably appoints each and every member of his household, as its attorney upon whom may be served, by certified mail at the address set forth above, any notice, process or pleading in any action or proceeding against it arising out of or in connection with this Note; and Borrower hereby consents that any action or proceeding against it be commenced and maintained in any court within the State of New York or in the United States District Court for the Southern District of New York by service of process on any such member; and Borrower agrees that the courts of the State of New York and the United States District Court for the Southern District of New York shall have jurisdiction with respect to the subject matter hereof and the person of the Borrower.

Plaintiff contends, *inter alia*, that at the time when the Promissory Notes were executed, defendant was appointed and had consented to be served with process in this action by certified mail as Borrower's attorney in fact, with defendant's knowledge of same. Plaintiff maintains that defendant consented to be amenable to service in suit on the Promissory Notes in any capacity. Thus, plaintiff asserts that this Court overlooked and/or misapprehended that defendant had expressly agreed to the method of service of process and jurisdiction of the

Court as agreed upon in the Promissory Notes, and that there is a basis in law for this Court to rule that defendant is bound by the method of service agreed upon by the parties in Paragraph 13 of the Promissory Notes. Additionally, plaintiff asserts that he should be granted a stay of this action in order to effectuate service on defendant via the Hague Convention, rather than dismissal of the action.

In opposition, defendant asserts that plaintiff's motion should be denied because this Court did not overlook or misapprehend any matters of fact or law in making its prior determination, rather in the Prior Decision, the Court clearly and thoroughly addressed the issue of service of process having considered the pleadings, attachments, briefs, and oral argument. It is defendant's contention that plaintiff merely brings forth the same arguments as he did in opposition to defendant's motion to dismiss and that plaintiff is improperly seeking a second bite of the apple. Moreover, defendant states that plaintiff's request for a stay should be denied as an improper remedy in a proceeding that has already been dismissed. Defendant further asserts that plaintiff needs to re-file his Complaint and observe the applicable rules concerning service of process.

DISCUSSION

In the Prior Decision, this Court granted defendant's motion dismissing the action, pursuant to CPLR 3211(a)(8), on the grounds that the defendant was not properly served with process. Specifically, this Court noted that service of process of a Kings County lawsuit on an individual living in Israel must take place via the Directorate of Court in Israel under The Hague Convention, and that plaintiff did not provide evidence demonstrating his compliance with the dictates of the Hague Convention (see Notice of Motion, exhibit A [Prior Decision], p. 2). The Court, in holding that the Complaint must be dismissed pursuant to CPLR 3211(a)(8), did not reach the merits of the remaining arguments, including whether or not the statute of limitations had run (see *id.*, p. 2- 3).

“A motion for leave to reargue 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” (*Salcedo v Demon Trucking, Inc.*, 146 AD3d 839, 840 [2d Dept 2017], quoting *Ahmed v Pannone*, 116 AD3d 802, 805 [2d Dept 2014] [internal quotation marks omitted]; see CPLR 2221[d][2]; *Grimm v Bailey*, 105 AD3d 703, 704 [2d Dept 2013]). “Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision” (*id.*, quoting *Mudgett v Long Is. R.R.*, 81 AD3d 614, 614 [2d Dept 2011]). However, “a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented” (*Ahmed*, 116 AD3d at 805 [internal quotation marks omitted]; see *Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819 [2d Dept 2011]; *Rodriguez v Gutierrez*, 138 AD3d 964 [2d Dept 2016]; *Pryor v Commonwealth Land Tit. Ins. Co.*, 17 AD3d 434 [2d Dept 2005]).

After giving due consideration of the foregoing papers, the Court finds that it did not overlook, nor did it misapprehend, any matters of fact or law, which could have changed this Court’s Prior Decision (see CPLR 2221[d][2]). Notwithstanding plaintiff’s contentions to the contrary, the Court considered whether defendant waived the service requirements pursuant to the Hague Convention and consented to accept service via certified mail as set forth Paragraph 13 or by alternate means of service as set forth in the Promissory Notes. This issue was raised by the parties in their papers in support of and in opposition to defendant’s motion to dismiss, as well as was argued before the Court on October 18, 2017 (see Notice of Motion, exhibit A [Court transcript], pp. 14; 16-17). In its Prior Decision, the Court considered the papers and

arguments and found that “[a]lthough plaintiff claims that defendant waived the service of process requirements, the Court finds no support of this argument in the record” (see Prior Decision at 2). In support of this motion to reargue, plaintiff improperly advances the same argument about waiver of service that he raised in opposition to defendant’s motion to dismiss, which were already considered and rejected by this Court. A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided (see *Ahmed*, 116 AD3d at 805). Accordingly, the branch of plaintiff’s motion to reargue is denied.

Moreover, the branch of plaintiff’s motion seeking a stay of this action, pursuant to CPLR 2201, in order to afford plaintiff the opportunity to effectuate service via the Hague Convention is denied. As defendant correctly points out, the Court cannot grant a stay in this matter as it has already been dismissed and marked disposed.

CONCLUSION

Accordingly it is,

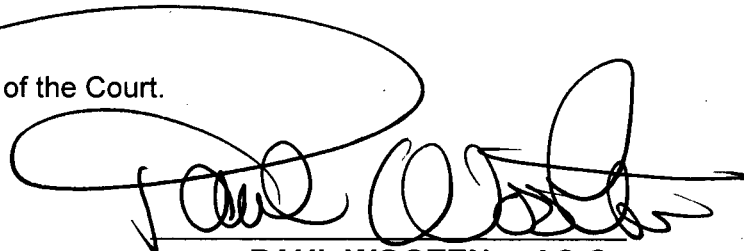
ORDERED that the branch of plaintiff’s motion, pursuant to CPLR 2221(d), for leave to reargue the Decision and Order of this Court dated December 4, 2017 is denied; and it is further,

ORDERED that the branch of plaintiff’s motion, pursuant to CPLR 2201, for a stay in the herein action, is denied; and it is further,

ORDERED that counsel for defendant is directed to serve a copy of this Order with Notice of Entry upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: 1/4/19


PAUL WOOTEN J.S.C.

2019 JAN -9 AM 8:06
KINGS COUNTY CLERK
FILED

