

Ballard v Sin City Entertainment Corp.

2019 NY Slip Op 32543(U)

July 26, 2019

Supreme Court, Bronx County

Docket Number: 20869/2012E

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK — BRONX COUNTY
PRESENT: GEORGE J. SILVER
Justice

ANDRE BALLARD, JAMES WILLIAMS, and
DARIUS HASTINGS,

Plaintiffs,

Index No. 20869/2012E
Motion Seq. No. 012

- v -

SIN CITY ENTERTAINMENT CORP., SCE GROUP,
INC., EMISSARY SECURITY GROUP INC.,
and "JOHN DOE" 1-25,

Defendants.

Cross-Motion: Yes No

Plaintiffs ANDRE BALLARD, JAMES WILLIAMS, and DARIUS HASTINGS (“plaintiffs”) move for an order, pursuant to CPLR § 2221, granting leave to reargue and/or renew this court’s decision dated December 17, 2018.¹ Plaintiffs also seek an order, upon reargument and/or renewal, to recall and withdraw the December 17, 2018 order, and to reinstate plaintiffs’ note of issue. Defendants SIN CITY ENTERTAINMENT CORP. (“Sin City”), SCE GROUP, INC. (“SCE Group”), EMISSARY SECURITY GROUP INC. (“Emissary Security”), and “JOHN DOE” 1-25 (collectively “defendants”) oppose plaintiffs’ motion. For the reasons discussed below, the court denies plaintiffs’ motion in its entirety.

BACKGROUND

In this action, plaintiffs allege that they sustained personal injuries as a result of an assault outside of defendants’ premises on August 23-24, 2011.

In the instant motion, plaintiffs argue that court’s December 17, 2018 decision vacating the note of issue was based upon erroneous proof that defendants improperly submitted for the first time in their reply papers. As a result, plaintiffs contend that they have been prejudiced by not

¹ In this decision, I vacated plaintiffs’ note of issue, upon determining that defendants had demonstrated unusual and unanticipated circumstances to move to vacate the note of issue more than 20 days after its filing, where substantial discovery remained outstanding, including depositions and physical examinations.

being afforded the opportunity to respond to this new evidence, which alleges that plaintiffs served a note of issue on the wrong defense counsel. However, plaintiffs argue that they properly served a note of issue upon Havkins Rosenfeld Ritzert & Varriale, LLP, counsel for Emissary Security, and upon Faust Goetz Schenker & Blee, LLP, (“Faust Goetz”) counsel for Sin City and SCE Group. According to plaintiffs, at the time of the filing of the note of issue on April 6, 2018, the above-mentioned firms were the attorneys of record for each defendant, and no notification, consent to change attorney, or substitution of counsel had been filed in court or served upon plaintiffs. As such, plaintiffs maintain that they were not aware of any other attorneys for defendants in this lawsuit. Plaintiffs also note that on August 10, 2018, Emissary Security served and e-filed a notice of substitution of counsel upon Faust Goetz, not Litchfield Cavo LLP, the present counsel for Sin City and SCE Group, which demonstrates that even co-defendant was not aware of any substitution of counsel for Sin City and SCE Group.

Plaintiffs further argue that while Sin City and SCE Group executed a consent to change attorney notice on March 13, 2018, Sin City and SCE Group do not offer any excuse as to why the consent to change attorney was not filed or served until September 11, 2018, more than five months after the note of issue was filed. In that regard, plaintiffs posit that the sole reason why Faust Goetz was served with the note of issue instead of Litchfield Cavo, LLP was due to its own inaction.

Additionally, plaintiffs assert that because the underlying decision and order vacating the note of issue was based upon a finding that unusual and unanticipated circumstances were present, namely plaintiffs’ filing of the note of issue upon the incorrect counsel for defendants, the court’s decision was founded upon a mistaken fact. However, plaintiffs maintain that because they have established that the note of issue was served upon the proper offices, the legal basis for vacating the note of issue never existed, and therefore, there is good cause to recall the court’s decision, and reinstate the note of issue. Finally, plaintiffs concede that they take no position with respect to the remainder of the court’s directives in the underlying decision and order.

In opposition, Sin City and SCE Group assert that the court granted their application to vacate the note of issue due to plaintiffs’ misrepresentations as to the status of discovery in the certificate of readiness and note of issue. Specifically, Sin City and SCE Group highlight that plaintiffs’ depositions as to damages and physical examinations were not conducted, and therefore plaintiffs’ representation that these items were “completed” were false.

Sin City and SCE Group also argue that while plaintiffs' application to renew and/or reargue is predicated on the issue of unusual and unanticipated circumstances raised in their reply affirmation, plaintiffs had an opportunity to be heard, and were in fact heard, on this issue at oral argument before the court on December 10, 2018. Sin City and SCE Group further reiterate that they did not timely move to vacate the note of issue because plaintiffs had served the note of issue on the incorrect attorneys. Ultimately, Sin City and SCE Group submit that vacatur of the note of issue was proper, and that they should not be prejudiced by plaintiffs' premature filing of the note of issue when there is significant discovery outstanding.

Similarly, co-defendant Emissary Security joins in, and incorporates by reference the arguments set forth in Sin City and SCE Group's opposition to plaintiff's motion. Emissary Security contends that granting plaintiffs' motion would waste judicial resources as plaintiffs' motion inappropriately rehashes the same arguments that were made during oral argument on December 10, 2018. Specifically, Emissary Security asserts that there are no new facts here that were not known by plaintiffs at the time of the oral argument, and that plaintiffs have not, and cannot raise any new facts or arguments that would defeat the court's finding of misrepresentations contained in plaintiffs' certificate of readiness and note of issue.

In reply, plaintiffs argue that defendants did not establish unusual or unanticipated circumstances upon which to move to vacate the note of issue beyond the 20-day period until they served their reply to the underlying motion. Plaintiffs reiterate that they were unaware that Sin City and SCE Group had changed counsel since defendants did not serve or file any notice until five months after the note of issue was filed. Accordingly, plaintiffs submit that because they did not serve the note of issue upon the wrong defense firm, there never existed, and does not exist, unusual or unanticipated circumstances to warrant vacating the note of issue.

Moreover, plaintiffs argue that contrary to defendants' argument, the court should not accept new evidence for the first time in reply. Plaintiffs also assert that there was no oral argument before the court of the underlying motion as it was conferenced with a court attorney, and was not recorded. Finally, plaintiffs argue that it was defendants' choice to not conduct discovery after the filing of the note of issue.

DISCUSSION

I. Leave to Reargue

CPLR § 2221(d) provides that 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.” “A motion for leave to reargue pursuant to CPLR [§] 2221 is addressed to the sound discretion of the court and may be granted only upon a showing ‘that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision’” (*William P. Pahl Equip. Corp.*, 182 A.D.2d at 27, *supra*). “Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided” (*Foley v. Roche*, 68 A.D.2d 558, 567 [1st Dept. 1979]).

Here, plaintiffs have failed to demonstrate that the court overlooked or misapprehended the facts or law in deciding defendants’ underlying motion to vacate plaintiffs’ note of issue (*300 W. Realty Co. v. City of New York*, 99 A.D.2d 708, 709 [1st Dept. 1984] [denying reargument where plaintiff made no showing or finding that the court overlooked or misapplied the statute]; *Spinale v. 10 W. 66th St. Corp.*, 193 A.D.2d 431, 432 [1st Dept. 1993] [denying leave to renew and reargue where there was “no showing that the court overlooked or misapprehended relevant facts or misapplied controlling law in the prior decision, nor did plaintiffs offer any evidence on that motion that was unavailable to them upon the court’s original consideration of the case”]).

Indeed, the only basis for plaintiffs’ argument is that the court improperly accepted defendants’ argument raised for the first time in their reply affirmation that they belatedly moved to vacate the note of issue because plaintiffs had served the note of issue on the incorrect attorneys for defendants. While plaintiffs aver that no oral argument was held on this issue as it was conferenced before a court attorney and was not on the record, these facts alone are insufficient to suggest that plaintiffs did not have an opportunity to address this issue. To be sure, plaintiffs do not allege that the court denied oral argument, or that they were not provided an opportunity to be heard and respond to defendants’ arguments raised in reply² (*see, Kennelly v. Mobius Realty Holdings LLC*, 33 A.D.3d 380, 382 [1st Dept. 2006] [A court, “in the exercise of its discretion,

² To further highlight, the court’s December 17, 2018 decision notes that plaintiffs concede during oral argument before the court on December 10, 2018 that “plaintiffs have not been deposed as to damages or had any physical examinations.”

may consider a claim or evidence offered for the first time in reply where the offering party's adversaries responded to the newly presented claim or evidence."]; *Fiore v. Oakwood Plaza Shopping Ctr., Inc.*, 164 A.D.2d 737, 739 [1st Dept. 1991]; *see also, Shaw X. v. Jingdong X.*, 51 Misc. 3d 1204(A) [N.Y. Sup. Ct. Kings County 2016] [considering argument raised for the first time in reply where the court gave plaintiff an opportunity to address the issue at oral argument]).

Moreover, a review of defendants' reply brief and the court's December 17, 2019 decision shows that the court did not overlook or misapprehend the fact that defendants moved to vacate the note of issue beyond the 20-day period due to plaintiffs' improper service of the note of issue. By contrast, the court considered this very argument, and found that defendants' explanation sufficiently constituted unusual and unanticipated circumstances to justify vacating the note of issue beyond the 20-day period.

Regardless, even if the court had rejected defendants' argument raised for the first time in reply, or even if plaintiffs' request for reargument is granted, plaintiffs' request to withdraw the court's decision and reinstate the note of issue would nonetheless be denied as the court may vacate the note of issue *sua sponte* based on the fact that plaintiffs' note of issue contains factual misrepresentations as to the status of discovery despite the litany of discovery that remains outstanding (*see, 22 NYCRR § 202.21(e); Simon v. City of Syracuse Police Dep't*, 13 A.D.3d 1228, 1229 [4th Dept. 2004]; *Covington v. Covington*, 249 A.D.2d 735, 736 [3d Dept. 1998]). Therefore, that branch of plaintiffs' motion for leave to reargue is denied.

II. Leave to Renew

Similarly, plaintiffs' application for leave to renew is denied. CPLR § 2221(e) provides that a motion for leave to renew "shall 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" and "shall contain reasonable justification for the failure to present such facts on the prior motion." "An application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court." (*Foley*, 68 A.D.2d at 568, *supra*; *see also Ulster Sav. Bank v. Goldman*, 183 Misc. 2d 893, 894—

95 [Sup. Ct. Rensselaer County 2000] [“A motion to renew must be based upon facts not offered on the prior motion that would change the prior determination.”]).

Here, plaintiffs do not allege or show the existence of any new facts which were not offered on defendants’ prior motion to vacate the note of issue. Fatally, plaintiffs concede that defendants’ reply brief in the prior motion advances the same facts and argument that plaintiffs now take issue with in their instant application. However, because the court has already considered and ruled upon the fact that defendants demonstrated unusual and unanticipated circumstances by which to move to vacate the note of issue beyond the 20-day time period in its December 17, 2018 decision, that branch of plaintiffs’ motion for leave to renew is denied (see *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 [1st Dept. 1992]; *Foley*, 68 A.D.2d at 568 [denying leave to renew where “no additional material facts are alleged” and where the “application [is not] supported by new facts or information which could not have been readily and with due diligence made part of the original motion”]).

Consequently, it is hereby

ORDERED that plaintiffs’ motion for leave to reargue and/or renew is DENIED in its entirety; and it is further

ORDERED that plaintiffs’ application to recall and withdraw the decision and order dated December 17, 2018, and reinstate plaintiffs’ note of issue is DENIED as moot; and it is further

ORDERED that the parties are directed to appear for a compliance conference on August 12, 2019 at 9:30 a.m. at 851 Grand Concourse (Room 709), Bronx, New York 10451, to ensure compliance with this court’s order and to further facilitate discovery.

This constitutes the decision and order of the court.

Dated: July 26, 2019

George J. Silver
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Check one: FINAL DISPOSITION NON-FINAL DISPOSITION