White v Cuomo
2019 NY Slip Op 32597(U)
March 5, 2019
Supreme Court, Albany County
Docket Number: 5861-16
Judge: Gerald William Connolly

[* 1]

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

COPY

JENNIFER WHITE, KATHERINE WEST, CHARLOTTE WELLINS and ANNE REMINGTON,

Plaintiffs,

-against-

HON. ANDREW CUOMO, as Governor of the State of New York, and the NEW YORK STATE GAMING COMMISSION,

Defendants.

DECISION AND ORDER
Index No.: 5861-16

(Supreme Court, Albany County, All Purpose Term)

APPEARANCES: O'Connell and Aronowitz
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Hon. Letitia James
New York State Attorney General
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Attorneys for Defendants
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Connolly, J.:

Plaintiffs in this action challenging the constitutionality of Chapter 237 of the Laws of 2016 have brought the instant motion for reargument with respect to this Court's Decision, Order and Judgment of October 26, 2018, granting Plaintiff's motion for summary judgment declaring those portions of Chapter 237 authorizing and regulating interactive fantasy sports ("IFS") in violation of Article I, §9 of the State Constitution and Defendants' cross-motion for summary judgment dismissing plaintiff's complaint insofar as Chapter 237 purported to exclude IFS from the Penal Law

definition of "gambling".

On a motion for reargument, which is addressed to the discretion of the Court, the moving party must show that this Court "overlooked or misapprehended a relevant fact or misapplied [some] controlling principle of law" (*Matter of Llana v Town of Pittstown*, 245 AD2d 968, 970 [3d Dept 1997]; *see also Matter of Smith v Town of Plattekill*, 274 AD2d 900 [3d Dept 2000]; *Peak v Northway Travel Trailers*, 260 AD2d 840 [3rd Dept 1999]) "or for some reason mistakenly arrived at its earlier decision" (*Mayer v. Nat'l Arts Club*, 192 AD2d 863, 865 [3d Dept 1993]). The application "shall not include any matters of fact not offered on the prior motion" (CPLR §2221[d][2]), and it is not intended to offer the unsuccessful party successive opportunities to argue the very questions previously decided by the court or to raise arguments not previously advanced on the original motion (*see Foley v. Roche*, 68 AD2d 558, 567 [1st Dept 1979]; *see also Wasson v Bond*, 134 AD3d 1224, 1225 [3rd Dept 2015]; *Pryor v. Commonwealth Land Title Ins. Co.*, 17 AD3d 434, 436 [2d Dept 2005]).

Plaintiffs argue that the Legislature could only constitutionally "decriminalize" IFS if it had simultaneously included in Chapter 237 a substitute provision which would have prevented gambling. Plaintiffs argue that by holding that IFS was not gambling within the meaning of Penal Law Article 225, the Legislature sought to "permit" such activity in violation of the Constitutional prohibition ("no gambling...shall be authorized *or allowed* within the State..."). Plaintiffs allege that, as a result of the Court's decision, IFS operators operate in the State despite the Court's finding that the authorization in Chapter 237 was unconstitutional, and that "...the State is left powerless to do anything about it, as there is no longer any criminal or civil statute to prevent FanDuel and

DraftKings from engaging in IFS ..." (Pl. Memo of Law, pgs. 3-4)[1].

Based upon the above, Plaintiffs now argue that Chapter 237 must be struck down in its entirety; they argue that the Legislature excluded IFS from the Penal Law definition of "gambling" for the sole reason of enabling IFS to occur so that the State could regulate and tax it. Plaintiffs argue that the purpose of the decriminalization was to effect the (specifically constitutionally prohibited) authorization of IFS within the state, thereby rendering such decriminalization unconstitutional.

Further, the Plaintiffs argue that such decriminalization cannot be severed from those provisions of Chapter 237 found unconstitutional by the Court, that the Legislature never intended for there to be unregulated or unlicensed IFS, and that the Court should accordingly modify its prior Decision, Order and Judgment to delete the declaration that the provision of Chapter 237 excluding IFS from the Penal law definition of "gambling" is constitutional.

Plaintiffs have not appended copies of their prior submissions in this matter to the within motion; nor have plaintiffs asserted on the within application that such arguments were previously raised in the submissions on the underlying cross-motions for summary judgment.

Defendants oppose the application, citing to, *inter alia*, *Estate of Urbach*, 252 AD2d 318, 320 (3d Dept 1999) for the proposition that a motion to reargue is not the proper procedural vehicle to address a final judgment, which must be addressed instead either by an appeal or by motion brought pursuant to CPLR §5015. Section 5015 provides for relief from judgment on grounds of:

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[1] Though Plaintiffs next reference the Legislature's actions with regard to its affirmative duty to pass laws to prevent gambling, they do not provide a substantive basis for the statement regarding the powerlessness of the State, through the Legislature and Executive, to address any concerns regarding unauthorized operation of IFS within the State.

excusable default; newly-discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party; lack of jurisdiction to render the judgment or order or reversal, modification or vacatur of a prior judgment or order upon which it is based. Defendants aver that plaintiffs have not, on the instant motion, asserted any of such grounds.

Defendants further argue that plaintiffs arguments herein are without merit as the Legislature is not required to criminalize activity, citing to, *inter alia*, *People ex rel Sturgis v Fallon*, 152 NY 1 (1897).

Finally, defendants argue that plaintiffs instant application for an order prohibiting defendants from taking any further action to implement Chapter 237 is improper as not originally requested in the Complaint herein and given the current procedural posture of this matter, that is, where defendants have appealed the underlying Decision, Judgment and Order and such Decision, Judgment and Order has been automatically stayed by operation of law (CPLR §5519(a)(1)).

Plaintiffs application for reargument is denied. As argued by the defendants, a motion to reargue does not lie upon a final judgment (*see Maddux v. Schur*, 53 AD3d 738, 739 [3d Dept 2008]) and, even were the Court to treat the within application as one for relief pursuant to CPLR §5015, plaintiffs have not demonstrated (or asserted) any entitlement to such relief on any of the identified statutory grounds. Even assuming *arguendo* that an application to reargue pursuant to CPLR §2221 did lie herein, plaintiff has failed to demonstrate that the Court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law (*Matter of Oswald*, 138 AD3d 1343, 1344 [3d Dept 2016]) which was asserted in argument before the Court on the underlying cross-motions.

Otherwise, the Court has reviewed the remaining arguments and finds them either

unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, it is hereby

ORDERED that plaintiff's application is denied in its entirety.

This constitutes the decision and order of the Court. The original decision and order is being returned to the attorney for the defendants. A copy of this decision and order and all other papers are being delivered to the Albany County Clerk. The signing of this decision and order and delivery of a copy of the decision and order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry with respect to the decision and order.

SO ORDERED.
ENTER.

Dated: March 5, 2019
Albany, New York

Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. Order to Show Cause dated November 27, 2018, Affirmation of Cornelius D. Murray, Esq., dated November 27, 2018 with Exhibits A-D annexed thereto and Memorandum of Law in Support of Plaintiff's Motion for Reargument dated November 27, 2018;
2. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Reargue dated December 19, 2018; and
3. Plaintiffs' Reply Memorandum of Law dated December 28, 2018.