

Wolf v Walgreens Boots Alliance, Inc.

2019 NY Slip Op 32737(U)

September 9, 2019

Supreme Court, New York County

Docket Number: 156071/2015

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 156071/2015

NAOMI WOLF,

Plaintiff,

MOTION SEQ. NO. 004

- v -

WALGREENS BOOTS ALLIANCE, INC., RETAIL PHARMACY USA, INC., DUANE READE, INC., WALGREEN CO., PETER MALKIN MANAGEMENT, INC., ESRT 250 WEST 57TH STREET ASSOCIATES, LLC, C/O EMPIRE STATE REALTY TRUST, INC., 250 WEST 57TH STREET ASSOCIATES, LLC, C/O MALKIN HOLDINGS, LLC, and AVP TERMITE AND PEST CONTROL OF NEW YORK, INC.,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149

were read on this motion to/for RENEWAL

In this personal injury action, plaintiff Naomi Wolf moves, pursuant to CPLR 2221 (c), to renew the motion (motion sequence 003) by third-party defendant AVP Termite & Pest Control of New York, Inc. ("AVP") seeking to dismiss the second verified complaint and, upon renewal, seeks to vacate the order of this Court dated March 18, 2019 and entered March 21, 2019 ("the 3/21/19 order") which, inter alia, granted AVP's motion to dismiss the second amended verified complaint. AVP opposes the motion. After oral argument, and after a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The facts of this case are set forth in detail in the 3/21/19 order. Doc. 127. Additional relevant facts are set forth below.

In September 2018, after AVP's motion to dismiss was fully submitted, Gerald Mazur of AVP appeared for a deposition in this matter. Doc. 139. Mazur testified, inter alia, that approximately five years before, he came by the store for a service visit and was told by the manager to close the kick plates because a woman had fallen over one, that the woman had gotten up, said she was fine, and left the store, and that he (Mazur) never heard about the woman again. Doc. 139 at 26-30.

In the 3/21/19 order, this Court granted AVP's motion to dismiss the complaint as against it on the ground that the claims against AVP were barred by the statute of limitations and that the "relation back doctrine does not apply in this matter." Doc. 127 at 6. In so holding, this Court reasoned, inter alia, that "plaintiff has not shown that AVP 'knew or should have known' that she intended to sue AVP but for her mistake in identifying all the proper parties." Id. at 6. This Court also dismissed the cross claims asserted against AVP by defendant Duane Reade. Id. at 7.

Plaintiff now moves for reargument of AVP's motion to dismiss the second amended complaint against it. In support of the motion, plaintiff asserts that, in opposition to AVP's motion to dismiss, it "did not submit detailed evidence regarding the due diligence [she] exercised to obtain discovery of the identity of the individual in the surveillance tape because AVP was already fully aware of [her] prior motion to compel against Walgreens, for discovery of the identity of the individual on the tape." Doc. 130 at 6. Plaintiff further asserts that, "[i]n deciding [p]laintiff's motion to compel, this Court ordered that Walgreens disclose the identity of the individual on the surveillance tape, and Walgreens disclosed that it was an AVP employee named Gerald Mazur",

which was the sole reason AVP was named in this litigation. Doc. 130 at 7. Plaintiff maintains that Mazur's testimony "affirms that AVP knew or should have known it would have been sued by the plaintiff but for her mistake in identifying the proper parties", that "AVP could not have concluded that [p]laintiff had no intent to sue", and that it knew in 2013 "that it was one of the parties responsible for [p]laintiff's fall." Doc. 130 at 6, 9.

In opposition to the motion, AVP argues, inter alia, that, despite her contention that AVP was aware of plaintiff's motion to compel against Walgreens for the identity of the individual on the tape, plaintiff presents no evidence that AVP knew about this action prior to the time it wasimpleaded after the expiration of the statute of limitations. AVP stresses that, although Mazur admittedly learned that a woman had fallen at the store, he was told that she said that she was fine and that she left the store. Additionally, asserts AVP, because Mazur could not recall precisely when he was told about the woman falling in the store, he could not be certain that it was the plaintiff and thus could not have been on notice of a potential lawsuit by the plaintiff but for plaintiff's mistake regarding AVP's identity. AVP further maintains that, even if Mazur's testimony established that AVP initially believed that it might be sued, his testimony does not alter the fact that "AVP could have rightfully concluded that [plaintiff's] failure to sue...meant that there was no intent to sue." Doc. 127 at 6. Additionally, AVP stresses that, since plaintiff had possession of the videotape since September 11, 2015 (Doc. 130 at par. 11), it could have named the individual in the video, and/or his employer, as a John Doe defendant.

AVP further maintains that plaintiff presents no evidence which would warrant the granting of its renewal motion. It further asserts that plaintiff has set forth no excuse for failing to include evidence of her due diligence in attempting to obtain the name of the individual in the video in opposition to AVP's motion to dismiss and that, even if she had, it would not have changed the

result of that motion. Although AVP concedes that Mazur's deposition testimony constitutes new evidence which could not have been submitted in opposition to AVP's motion to dismiss, such testimony would not have changed the result of that motion. Additionally, AVP maintains that plaintiff has identified no change in the law which would affect the 3/21/19 order.

In reply, plaintiff argues that it was impossible to have learned about the existence of AVP prior to the expiration of the statute of limitations because between September 11, 2015, the day on which the video was exchanged, and August 15, 2017, "Duane Reade obstructed discovery of the AVP employee on the surveillance tape who created the trap." Doc. 144 at 2. Thus, urges plaintiff, she had a reasonable justification for not presenting such facts in opposing AVP's motion to dismiss. Plaintiff further asserts that the new facts concerning its due diligence, as well as Mazur's deposition testimony "would likely have changed the court's determination." Doc. 144 at 3. Plaintiff also maintains that AVP was put on notice that it was one of the parties responsible for the accident in 2013 and therefore knew, or should have known, that it would be sued but for plaintiff's mistake. Doc. 144 at 7.

LEGAL CONCLUSIONS:

CPLR 2221(e) (2) 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." CPLR 2221(e) (3) provides that a motion for leave to renew "shall contain reasonable justification for the failure to present such facts on the prior motion."

It is undisputed that, in opposition to AVP's motion to dismiss, plaintiff did not submit evidence regarding its due diligence in attempting to obtain the name of the individuals on the

surveillance tape. Additionally, plaintiff could not have submitted Mazur's deposition testimony in opposition to the AVP's motion to dismiss since that motion was submitted before the deposition was conducted. Thus, plaintiff has a reasonable explanation for failing to submit Mazur's testimony in opposition to AVP's motion to dismiss. However, although plaintiff contends that AVP was already fully aware of plaintiff's prior motion to compel Walgreens to provide the identity of the individual on the surveillance tape, plaintiff submits no substantiation for this excuse for failing to submit evidence of its due diligence in opposition to AVP's motion to dismiss. In any event, since plaintiff concedes that the new facts concerning its due diligence, as well as Mazur's deposition testimony "would *likely* have changed the court's determination" (Doc. 144 at 3 [emphasis added]), and not that it "would [have] change[d] the prior determination" (CPLR 2221[e] [2]), these facts are insufficient to support a motion for renewal.¹

Plaintiff also maintains that AVP was put on notice that it was one of the parties responsible for the accident in 2013 and therefore knew, or should have known, that it would be sued but for a mistake by plaintiff in identifying the proper parties. Doc. 144 at 7. However, plaintiff fails to identify any specific mistake which she made in failing to identify AVP as a party to be sued. Indeed, since plaintiff devotes a substantial portion of her argument to the fact that she did not learn of AVP's identity because Walgreens provided deficient discovery responses, it is evident that plaintiff cannot satisfy the third prong of the relation back test since it did not make a mistake "in failing to sue [AVP] within the applicable [statute of] limitations." *Ramirez v Elias-Tejada*, 168 AD3d 401, 403-404 (1st Dept 2019), citing *Buran v Coupal*, 87 NY2d 173, 175, 179 (1995).

¹ Although plaintiff asserts elsewhere in her papers that the new evidence would have changed the prior determination, this Court, in its discretion (*see Central Amusement Intl. LLC v Lexington Ins. Co.*, 162 AD3d 453, 453 [1st Dept 2018]), refuses to grant renewal given her equivocation. Further, even if this Court were to consider Mazur's testimony as new evidence, such would not change this result given that the testimony clearly establishes that plaintiff walked away unhurt after she fell and that AVP thus had no reason to expect to be sued.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff is denied in all respects; and it is further

ORDERED that the parties are to appear for a previously scheduled status conference on October 29, 2019 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

9/9/2019

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

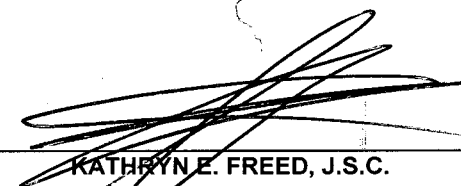
SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE


KATHRYN E. FREED, J.S.C.