

Gaul v Manza

2020 NY Slip Op 33513(U)

September 8, 2020

Supreme Court, Schenectady County

Docket Number: 2015-2281

Judge: Michael R. Cuevas

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STATE OF NEW YORK
COUNTY OF SCHENECTADY

SUPREME COURT

PRESENT: HON. MICHAEL R. CUEVAS
JUSTICE OF THE SUPREME COURT

JEFFREY GAUL,
Plaintiff,

DECISION AND ORDER

-against-

Index No.: 2015-2281
RJI No.: 46-1-2015-1440

MARIA MANZA and MICHAEL MANZA,
Defendant.

NOTICE:

PURSUANT TO ARTICLE 55 OF THE CIVIL PRACTICE LAW AND RULES, AN APPEAL FROM THIS JUDGMENT MUST BE TAKEN WITHIN 30 DAYS AFTER SERVICE BY A PARTY UPON THE APPELLANT OF A COPY OF THE JUDGMENT WITH PROOF OF ENTRY EXCEPT THAT WHERE SERVICE OF THE JUDGMENT IS BY MAIL PURSUANT TO RULE 2103 (B)(2) OR 2103 (B)(6), THE ADDITIONAL DAYS PROVIDED SHALL APPLY, REGARDLESS OF WHICH PARTY SERVES THE JUDGMENT WITH NOTICE OF ENTRY.

APPEARANCES:

Jeffrey Gaul, *pro se* (Plaintiff)
Maria C. Corrao, Esq. (Attorney for Defendants)

MICHAEL R. CUEVAS, J.

INTRODUCTION

Plaintiff Jeffrey Gaul "Gaul" submitted a notice of motion and motion dated July 30, 2020, requesting the following relief:

- 1.) An Order staying this matter (*Nunc Pro Tunc* also requested) and all actions until such time as the Plaintiff's Appeal in the Third Department leads to a final Order from that Court;

- 2.) An Order directing that the Order of Judge Reilly "meant what it said: all costs waived for Plaintiff for all expenses concerning him pursuing the matter."
- 3.) For an Order directing the Defendants to properly complete, with Plaintiff, a stipulation or other court accepted means to agree to the actual outcome of the relative portions of the trial and/or for a stipulation of the record in the event that the free transcripts are not provided to Plaintiff by the court reporters as directed by Judge Reilly;
- 4.) For an Order directing that the Schenectady County Clerk or the appropriate party must cause the certified transcripts for all proceedings before Judge Joseph Sise to be transmitted to Plaintiff, henceforth, and at no cost to Plaintiff, or, in the alternative, at a 75% reduction of the typical costs;
- 5.) That the Court directs that some other alternative to any and all herein sought after relief, is required, in the interests of justice, all being consistent with the Reilly Order;
- 6.) That the Court directs that Plaintiff is allowed, henceforth, to utilize the Court's electronic filing system for all future filings;
- 7.) For an Order directing the Court Motion Clerk and/or the County Clerk to reimburse the \$45.00 motion fee [he] was forced to pay for this motion, if [applicable];
- 8.) For an Order directing the Court Motion Clerk and/or the County Clerk to reimburse and or not charge any undertaking fee;
- 9.) For an Order directing the Court Motion Clerk and/or the County Clerk to reimburse the previously paid Notice of Issue fee that the County Clerk's office insisted [he] must pay, contrary to the Reilly Order;

10.) For an Order directing that [he is] am entitled to costs and disbursements relating to this motion;

11.) For an Order directing the Schenectady County Clerk to reimburse any and all fees paid to it by Plaintiff to date concerning this matter.

Defendants Maria Manza and Michael Manza (“the Manzas”) did not file an opposition.

PROCEDURAL AND FACTUAL BACKGROUND

Judge Joseph Sise issued an Order and Decision in this matter. *Gaul Aff.* ¶2. Gaul asserts there were some errors included in the Order and Decision that are subject to an appeal. *Gaul Aff.* ¶¶2, 11-15. Gaul also asserts that he should have ultimately prevailed. *Gaul Aff.* ¶3.

Gaul is a Public Adjuster, licensed with the New York State Department of Financial Services. *Gaul Aff.* ¶5. A public adjuster manages property claims and is available for hire by the general public. *Gaul Aff.* ¶6. In the underlying matter, the Manzas had filed an insurance claim with their insurance company and the insurance carrier was not responding to the Manzas as anticipated. *Gaul Aff.* ¶7. The Manzas then hired Gaul as their public adjuster. *Gaul Aff.* ¶8. Gaul asserts that the Manzas made errors as a result of not following Gaul’s advice, and accordingly received less money on the insurance claim than they would have received, and were entitled to, under the insurance policy. *Gaul Aff.* ¶9. Gaul claims the Manzas underpaid him for his work. *Gaul Aff.* ¶10.

Gaul filed a notice of appeal to Judge Sise’s Order, and subsequently received an extension of time to perfect the appeal. *Gaul Aff.* ¶18. He had been granted poor person status *via* Order of Judge Vincent J. Reilly that specifically states:

it is hereby

ORDERED, that plaintiff’s motion to proceed as a poor person is granted and plaintiff is permitted to prosecute this action as a poor person against defendants, and it is further

ORDERED, that the Clerk of this Court is directed to make no charge for costs or fees in connection with the prosecution of this action.

Gaul Aff. ¶20, Ex. A. Because Gaul was granted poor person status, he believes, this entitles him to all of the transcripts from trial, after he received the final Decision & Order of Judge Sise. *Gaul Aff.* ¶21. He also asserts that the "law of the case doctrine" prevents any alternative finding. *Gaul Aff.* ¶22. Gaul requests a stay of the underlying matter based upon the pending appeal and alleged misrepresentations made to him by the Manzas' attorney. *Gaul Aff.* ¶¶23-24.

THE LAW AND DISCUSSION

A. TO OBTAIN TRANSCRIPTS PAID FOR BY THE COUNTY GAUL MUST PROPERLY APPLY FOR POOR PERSON STATUS WITH THE APPELLATE COURT.

CPLR Sections 1101 and 1102 provide that once an individual is granted a motion to appeal as a poor person they are entitled to two stenographic transcripts of the underlying trial, or hearing. *CPLR §§1101, 1102(b)*. Legislative history indicates that poor person status is intended to cover costs and fees imposed at the commencement of the action, and for service of papers. See, *1992 Report of the Advisory Committee on Civil Practice, reprinted in 2 McKinney's 1992 N.Y. Session Laws, p. 2987; see also, Memorandum of Assemblyman Lentol, 1992 N.Y. State Legis. Ann. 127-28*. Even if a party obtains poor person status at the trial court level, a separate motion is still required for the party to appeal as a poor person. See, *1992 Report of the Advisory Committee on Civil Practice, reprinted in 2 McKinney's 1992 N.Y. Session Laws, p. 2987; Memorandum of Assemblyman Lentol, 1992 N.Y. State Legis. Ann. 127-28; Alexander, 2012 Practice Commentaries, McKinney's Cons. Laws of NY, Bk. 7B, CPLR C1101:6, at 361-365*.

A trial court's original grant of poor person status for the purpose of prosecuting or defending the action does not automatically carry over to the appeal, if any, of an order or judgment of the trial court. *Alexander, 2012 Practice Commentaries, McKinney's Cons.*

Laws of NY, Bk. 7B, CPLR C1101:6, at 361-365; see also, Drysen v. D'Elia, 409 N.Y.S. 2d 495 (Sup. Ct. Nassau Co. 1978). In *Drysen*, the trial court clearly articulated that a “court order for poor person relief under CPLR 1101 (a) does not serve as an order under CPLR§1102 (b) entitling the poor person to a stenographic record at county expense.” *Drysen v. D'Elia, 409 N.Y.S. 2d 495 (Sup. Ct. Nassau Co. 1978).* The motion for leave to appeal as a poor person shall be brought in the court in which the appeal has been or will be taken, and on notice. *Memorandum of Senator Goodhue, 1987 N.Y. State Legis. Ann. 127; 22 N.Y.C.R.R. §1000.14 (a)(3); CPLR §1101 (c).* Without poor person status, granted by the Appellate Court, the litigant pursuing an appeal is not entitled to free transcripts of a trial or hearing, or a waiver of fees in the appellate court. See, *C1102:3 Appeals: Typewritten Briefs; see also, Smith v. Smith, 2 N.Y. 2d 120 (1956); Moriarity v. Butler Bin Co., 21 A.D. 2d 865 (1st Dept. 1964), aff'd 15 N.Y. 2d 901 (1965); Narcotic Addiction Control Com. v. Couloutacos, 29 A.D. 2d 199 (2d Dept. 1968); Garisto v. Garisto, 1967 N.Y. App. Div. LEXIS 4434 (2d Dept. 1967).*¹

CPLR Section 1102 (b) authorizes the court, in its discretion, to order that a transcript be provided, in proceedings other than an appeal. *Alexander, 2012 Practice Commentaries, McKinney's Cons. Laws of NY, Bk. 7B, CPLR C1102:2, at 383.* While there are very few cases construing this provision, it includes transcripts for summary judgment or 440 motions. *Id.*;² see also, *Panek v. McLaughlin, 110 Misc. 2d 1017 (Onondaga County Sup. Ct. 1980); Lester v. Lester, 69 Misc. 2d 528 (Sullivan Cty. Sup.*

¹ Notably, the Third Department has not spoken directly on this issue. The 4th Department has found that the trial court is the proper venue to request the trial transcripts be granted under *CPLR Section 1102*. See, *Jenks v. Murphy, 21 A.D. 2d 346 (4th Dept. 1964); Carter v. County of Erie, 255 A.D. 2d 984 (4th Dept. 1998); and Dowell v. Remmer, 24 A.D. 2d 543 (4th Dept. 1965).* Lower Court cases that also find that the Appellate Court is the proper venue to obtain trial transcripts under *CPLR Section 1102*, include: *People v. Chaneyfield, 2019 N.Y.L.J. LEXIS 195 (Sullivan County Ct. 2019); People v. Stroman, 16 Misc. 3d 749 (Kings Cty. Sup. Ct. 2007); Jenks v. Murphy, 42 Misc. 2d 1037 (Orleans Sup. Ct. 1964); People v. Forney, 9 Misc. 3d 1130 (A) (Kings Cty. Crim. Ct. 2005); Application of Whyte, 72 Misc. 2d 116 (City of N.Y. Civ. Ct. 1972); and Orman v. State, 59 Misc. 2d 709 (Ct. Claims 1969).*

² Notably, the 4th Department has held that payment for a deposition transcript is not within the statute's coverage. See, *Carter v. County of Erie, 255 A.D. 2d 984 (4th Dept. 1998).*

Ct. 1972) (granted for purposes of deposition transcripts); *People v. Toribio*, 2011 N.Y. Misc. LEXIS 6365 (Kings Ct. Sup. Ct. 2011); *People v. Draticir*, 2011 N.Y. Misc. LEXIS 3674 (Kings Cty. Sup. Ct., Crim. Term 2011) (detailing that a party can be granted transcripts, under poor person status, where that party demonstrates factual allegations (not mere conclusory ones), that there is a potentially meritorious claim); and *Gkanios v. Gkanios*, 88 A.D. 3d 644 (2d Dept. 2011) (where a transcript was granted for purposes of post-trial motions). What is clear, is that when the purpose of obtaining the transcripts is for an appeal, the individual requesting the transcripts must do so with a poor person application before the applicable appellate division.

Gaul argues that the Court must follow the letter of the Poor Person Order issued by Judge Reilly and provide him the trial transcripts. He asserts the receipt of these transcripts free from cost to him, is covered by the language of Judge Reilly's Order. And, that any opposing order improperly overturns this Order. New York law supports the law of the case doctrine,³ which finds that unless new evidence is discovered or there is a change in the law, an existing order may not be overturned except on appeal. However, what Gaul fails to understand is that the failure to provide him with free transcripts, is not in contradiction to Judge Reilly's Order. Judge Reilly's Order was the law of the case and was implemented properly until such time as the trial ended, and a final decision and

³ The law of the case doctrine is focused on the preclusive effect of judicial determinations made during the course of a litigation before final judgment. *Erickson v. Cross Ready Mix, Inc.*, 98 A.D.3d 717, 717 (2d Dept. 2012) ("The doctrine applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision"). The case doctrine is a judicially crafted policy that "expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). See also, *Clark v. Clark*, 117 A.D.3d 668, 669 (2014) ("The doctrine of the law of the case is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as judges and courts of co-ordinate jurisdiction are concerned") (internal quotation marks omitted), quoting *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975). As such, the law of the case doctrine "directs a court's discretion," but does not restrict its authority. See *Arizona v. California*, 460 U.S. 605, 618 (1983). The doctrine does not, however, apply upon "a showing of subsequent evidence or change of law." *J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey*, 45 A.D.3d 809, 809 (2d Dept. 2007) ("[T]he law of the case operates to foreclose re-examination of [the] question absent a showing of subsequent evidence or change of law") (internal quotations omitted), quoting *Matter of Yeampierre v. Gutman*, 57 A.D.2d 898, 899 (2d Dept. 1977).

order was entered. Simply put, Judge Reilly's Order is not being overturned by denying Gaul transcripts paid for by the County. As the trial court case is over, the jurisdiction now falls to the Appellate Court to issue a new poor person order, under a new motion made by Gaul, with proper notice. If Gaul is granted poor person status by the Appellate Court, he can then submit a request for the transcripts paid for by the County. Gaul indicated at oral argument that he believes that the Appellate Court only grants poor person status to criminal defendants. This is simply not true, and does not circumvent the procedural requirement that he apply for status through the Appellate Court, in order to obtain the transcripts.

Additionally, for these reasons, and the fact that Gaul admitted during the hearing that he was aware that the proper procedure was to apply for poor person relief in the Appellate Court, Gaul's request for an order directing reimbursement for all fees, costs, and disbursements associated with the present motion, is also denied.⁴ Additionally, Gaul's request for reimbursement of a note of issue fee, that he allegedly paid, is denied because he presented no admissible evidence that he paid the note of issue and that it was not reimbursed. As such, this request for reimbursement is not properly before this Court.

B. A STAY OF A DECISION AND ORDER IS AUTOMATIC, PENDING APPEAL.

A trial court's decision and order, or judgment, remains fully enforceable where it is being appealed, unless it is of the type specifically covered by *CPLR Section 5519* and receives an automatic stay; or a Court, in its discretion, orders a stay. *CPLR §5519*. To be automatically stayed, the judgment in this case would have had to be accompanied by

⁴ At hearing, Gaul intimated that the reason why he has not applied directly to the Appellate Court for poor person status is because he does not believe he will prevail. This Court takes judicial notice of correspondence submitted by Michael Dayian, Principal Court Attorney to the Hon. Felix J. Catena to Jeffrey Gaul on September 30, 2019, wherein Gaul was advised that in order to obtain the trial transcripts related to this matter, he should make his request directly to the Appellate Court for permission to prosecute the appeal as a poor person. Since Gaul was aware that this was not the proper venue for his motion requesting the transcripts, he will not be reimbursed costs for improperly filing his motion with the Schenectady County Clerk.

an undertaking pursuant to *CPLR Section 5519 (2)*. A stay granted in the Court's discretion under *CPLR Section 5519 (c)* requires a motion to either the trial or the Appellate Court, after the appeal has been undertaken. See, *Plowden v. Manganiello*, 143 Misc. 2d 446 (Bronx Sup. Ct. 1989), 22 *N.Y.C.R.R. 1250 (Joint Practice Rules of the Appellate Division)*. To succeed on a motion for a stay, the moving party must establish, with admissible evidence, that they meet following three requirements: (a) the likelihood of success on the merits; (b) irreparable injury in the absence of injunctive relief; and (c) the balancing of the equities between the parties. *Arnold v. Office of Prof. Discipline of NYS Education Dept.*, 100 A.D. 2d 665 (3d Dept. 1984); *Delaware County Bd. Of Supervisors v. N.Y.S. Dept. Health*, 81 A.D. 2d 968 (3d Dept. 1981); see also, *Seitzman v. Hudson Riv. Assoc.*, 126 A.D. 2d 211 (1st Dept. 1987); and *Alexandru v. Pappas*, 68 A.D. 3d 690 (2d Dept. 2009).

The Decision and Order of the Honorable Joseph M. Sise, entered on July 16, 2019, was not attached to the motion, but the Court takes judicial notice of its findings. Judge Sise denied parties all relief requested, with the exception of granting the Manzas \$1,000.00 as restitution for an overpayment by the insurance company directly to Gaul, in circumstances detailed in the Decision and Order. While Gaul does not specifically articulate in his motion that this is the part of the Decision and Order that he seeks to have stayed, this Court will presume that based upon a review of the Order. Because there was no undertaking, this case does not qualify for an automatic stay under *CPLR Section 5519*.

Gaul, fails to meet the requirements to obtain a discretionary stay because he did not submit a proper motion. Gaul did not adduce the Notice of Appeal, with the Decision and Order appealed, or the proof of filing. See, 22 *N.Y.C.R.R. 1250.4 (a)(3) (Practice Rules of the Appellate Division)*. While he did assert some facts to support his position in the underlying matter, he did not offer enough facts, evidence, or any law indicating why

the case was improperly decided, and why he will be successful on appeal. Moreover, Gaul does not make any showing of irreparable harm (the harm must be more than just money that can be reimbursed), or a balancing of the equities between the parties. Because Gaul does not meet any of these mandatory elements to obtain a discretionary grant of a stay of the money judgment, his request is denied.

C. STIPULATION TO THE RECORD

A stipulation is an agreement between parties, or their attorneys, relating to any matter in an action. *CPLR §2104*. Gaul requests this Court issue an Order directing the Manzas to enter into a stipulation agreeing to the “outcome of the relative portions of the trial” and/or a stipulation of the record. As stipulations are agreements between parties, and this Court simply cannot mandate a party must make an agreement.

D. E-FILING

Gaul requests that this Court direct that Plaintiff is allowed to file pursuant to the Court's electronic filing system. However, at this present time, Schenectady County is not an e-file Court. When the e-filing process is implemented, the parties will have to comply with the rules of the Court on proper filing procedures.

THE COURT'S RULING

Based upon the foregoing it is hereby:

ORDERED that Plaintiff Jeffrey Gaul's Motion is denied with respect to his request for an Order:

- Directing the Schenectady County Clerk provide transcripts without charge to Plaintiff, or at a 75% reduction of cost;
 - Directing that Plaintiff be reimbursed for the fees, costs, and disbursements paid to bring the present motion;
 - Directing that the underlying action be stayed pending appeal;
- and

- Directing the Defendants to enter into a Stipulation with Plaintiff regarding the outcome of portions of the trial, or to the record for appeal.

ORDERED that the Plaintiff Jeffrey Gaul's request for the following relief is hereby rendered moot, or was not properly put at issue before the Court:

- Request for a stay pending appeal;
- Request that Judge Reilly's Order be declared to "mean what it says";
- Request that Plaintiff Jeffrey Gaul be granted the right to e-file;
- Request that Plaintiff Jeffrey Gaul be reimbursed or not charged an undertaking fee;
- Request that Plaintiff Jeffrey Gaul be reimbursed for any Note of Issue fee that he allegedly paid.

ORDERED that this decision constitutes the Order of this Court.

Dated: September 8, 2020
at Schenectady, New York


HON. MICHAEL R. CUEVAS
Supreme Court Justice

Papers Considered:

Notice of Motion

Affidavit of Jeffrey Gaul in Support of Motion

Exhibit A: Poor Person Order

Emails dated July 27, 2020

Printout from NY Courts.GOV re Fee Waiver (Poor Persons Relief),
<https://www.nycourts.gov/Courthelp/GoingToCourt/feewaiver.shtml>

Judicial Transfer Notice to Hon. Michael R. Cuevas, August 12, 2020

Motion Endorsement Form

Decision and Order of Honorable Joseph M. Sise, entered July 16, 2019

Letter from Michael Dayian to Jeffrey Gaul dated September 30, 2019