

<b>Rivera v Puri</b>
2020 NY Slip Op 34084(U)
December 10, 2020
Supreme Court, Kings County
Docket Number: 502094/18
Judge: Lawrence S. Knipel
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10<sup>th</sup> day of December, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X  
DANIEL RIVERA,

Plaintiff,

- against -

Index No. 502094/18

DIPENDRA PURI,

Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_

38-49

Opposing Affidavits (Affirmations) \_\_\_\_\_

60

Upon the foregoing papers, plaintiff moves, in motion (mot.) sequence (seq.) three, for an order, pursuant to CPLR Section 2221, granting renewal and reargument of mot. seq. two, plaintiff's motion to strike defendant's answer, pursuant to CPLR 3126, for failure to produce a witness for deposition and to comply with this court's orders; or, alternatively, for an order precluding defendant from offering any proof at trial in the form of testimony or otherwise regarding the liability issue herein; allowing plaintiff to file his note of issue (NOI)

to comply with this court's January 8, 2020 order; and vacating this court's August 7, 2020 order, pursuant to CPLR 5015.

### *Background and Procedural History*

Plaintiff alleges that he sustained serious personal injury after being struck by defendant's vehicle in an automobile accident on September 3, 2017 and he thereafter commenced this action on February 1, 2018. Discovery ensued after defendant answered and plaintiff filed a verified bill of particulars, and, as most relevant herein, a January 8, 2020 order required defendant's deposition appearance on or before February 3, 2020 as well as for plaintiff to file a note of issue on or before February 19, 2020.

Plaintiff moved on February 19, 2020, in mot. seq. one, to strike defendant's answer for his failure to appear for a deposition, or to preclude defendant from presenting further evidence in support of any motion or at trial; and allowing plaintiff to file his note of issue despite outstanding discovery and purportedly in compliance with this court's aforementioned January 8, 2020 order.<sup>1</sup> The court's August 7, 2020 order resolved plaintiff's motion by denying plaintiff's motion to strike and preclude because plaintiff's NOI, filed February 19, 2020, stated that all discovery was complete on the same day he filed his motion to strike, and preclude and because plaintiff's good faith affirmation was wholly conclusory. Defendant now seeks leave to renew or reargue the court's August 7, 2020 order, pursuant to CPLR 2221.

---

<sup>1</sup> Plaintiff's filing of his NOI on February 19, 2020 together with the August 7, 2020 order resolving mot. seq. one has mooted plaintiff's request for NOI relief. Also, defendant thereafter, moved, in mot. seq. two, for summary judgment and that motion is presently pending in Part 83 before the Hon. Ingrid Joseph with December 17, 2020 scheduled as the next appearance date.

### *Plaintiff's Arguments*

Plaintiff argues that his motion to renew herein should be granted because the court allegedly overlooked or misapprehended certain matters of fact or law in its August 7, 2020 order. He recognizes that the January 8, 2020 order directed him to file his note of issue on or before February 19, 2020 and alleges that he complied with that order by filing mot.seq. one, a “stand-alone” motion with a sufficient good faith affirmation, to seek enforcement and clarification of the court’s January 8, 2020. Additionally, he argues that the case cited by the court in its January 8, 2020, order, *J. H. v. City of New York*, 170 AD 3d 816 [2d Dept 2019], is distinguishable from this case because plaintiff there filed its NOI and certificate of readiness before filing their cross motion for discovery sanctions. Here, plaintiff argues that his motion, mot. seq. one, and the NOI were filed concurrently with one another, but that mot. seq. one was filed at 1:42 PM on February 19, 2020; and plaintiff did not file his NOI until 3:20 PM on that day. Plaintiff reasons that if the court requires strict compliance with the CPLR, he technically did file his discovery motion before filing his NOI.

Next, plaintiff argues that the January 8, 2020, order should have been self-executing and the only issue in mot. seq. one was whether to strike defendant’s answer or to preclude defendant “as may be appropriate.” Plaintiff also states that unlike *J. H. v. City of New York*, there was no motion pending before this court and defendant, at the very least, was already precluded by the court’s January 8, 2020 order for having failed to appear for a deposition. Plaintiff summarizes that here he moved to strike, preclude and to file an NOI at the same time he filed his NOI and thus he views the facts in this case as drastically different from

those mentioned in the court's August 7, 2020 order that decided mot. seq. one. Plaintiff further argues that it is highly prejudicial him that he was required to both file the NOI regardless of the status of discovery and to penalize and preclude him from pursuing further discovery under the CPLR. He alleges that defendant has repeatedly engaged in willful, dilatory, and contumacious behavior, which is not punished and continually tolerated.

Plaintiff asserts that his initial good faith affirmation was not conclusory and that he provided therein at least four incidents where defendant failed and refused to appear for a deposition after having agreed to appear. Each time defendant's deposition was scheduled, plaintiff claims, calls were made, the defendant was urged to appear but defendant did not respond, ignored the calls and has not offered an excuse for disregarding the court's orders. Plaintiff claims he provided details of his good faith efforts to hold defendant's deposition and that defendant simply chose to ignore all scheduled dates. Plaintiff further claims that requiring plaintiff to list every interaction where defense counsel ignored plaintiff's call would be overly burdensome, and, regardless whether plaintiff's good faith affirmation complied with Uniform Rules for Trial Courts (22 NYCRR) § 202.7, an order precluding defendant's evidence or striking his answer would have been appropriate because plaintiff was only seeking enforcement and clarification of the court's January 8, 2020. Plaintiff stresses that as he was under order to file his NOI on or before February 19, 2020 and defendant had then made no summary judgment motion the court erred in issuing its August 7, 2020 decision. Plaintiff seeks to support his present motion by providing a second good faith affirmation with dates of alleged conversations with defense counsel, the name of the

attorney or staff member with whom plaintiff's counsel spoke and the time these conversations occurred.

Plaintiff also argues that he is entitled to an order to vacate because of defendant's misconduct and, pursuant to CPLR 5015, because of "newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404." Plaintiff summarily states that newly-discovered evidence, not previously available, has been produced, namely that defendant, in bad faith and in the midst of an ongoing global pandemic ignored the advice of Governor Andrew Cuomo, this court, and the Honorable Lawrence K. Marks, Chief Administrative Judge of the State of New York, and filed a nonessential summary judgment motion on March 19, 2020. Plaintiff submits that, based upon the newly presented evidence and upon defense counsel's alleged misconduct, he is entitled to the relief sought in his original moving papers in mot. seq. one and that the court's August 7, 2020 order should be vacated and/or modified.

#### *Defendant's Arguments*

Defendant, in opposition, argues that plaintiff's motion is frivolous because the second good faith affirmation, like the first, is also deficient. Defendant allege that the second good faith affirmation fails to indicate, as required by Uniform Rules for Trial Courts (NYCRR) § 202.7, the efforts taken to resolve the issues raised by the motion, the time, place and nature of the consultation, the issues discussed and any resolutions or indicate good cause why no such conferral with counsel for opposing parties was held. Defendant further alleges that

plaintiff's good faith affirmation also fails to indicate why the previous discovery motion was defective and that this motion, mot. seq. three, to reargue or renew is timely. Defendant argues that the prior decision is law of the case, should not be overturned and that plaintiff failed to annex the prior opposition in its entirety so that it can be seen that the same arguments in the prior opposition are incorporated herein.

### *Discussion*

Plaintiff has specifically characterized the present motion as one to reargue pursuant to CPLR 2221 (d) which requires that a reargument motion be identified specifically as such; be based upon factual or legal matters allegedly overlooked or misapprehended in determining the prior motion; not include any factual matters not offered on the prior motion; and be made within 30 days after service of a copy of the order determining the prior motion with written notice of its entry.

Plaintiff claims that the court overlooked or misapprehended certain matters of fact or law in its August 7, 2020 order, namely that he filed the NOI by the court-ordered deadline; that he filed a stand-alone motion, not a cross motion; and that there was no pending motion which defendant had filed. These factors, plaintiff submits, distinguishes this case from the one cited in the August 7, 2020 order. However, plaintiff concedes that the original motion, mot. seq. one, and NOI were concurrently filed with one another and, more specifically, that he filed his NOI an hour and thirty-eight minutes after filing his discovery motion.

The court under these circumstances neither misapprehended nor overlooked any factual or legal matters. Indeed, plaintiff was required to file an NOI by a specified deadline

and made such filing with the requisite certificate of readiness, which expressly stated that necessary discovery proceedings were completed. The fact that no other motion was pending when NOI filing occurred did not negate denying plaintiff's first motion, mot. seq. one. Rather, denying the motion was required. The Appellate Division Second Department explained in this regard in *Brown v Veterans Transp. Co.* (170 AD2d 638, 639 [1991]) that by "filing a note of issue and certificate of readiness, expressly affirming that discovery had been completed . . . the plaintiff[] waived any claim regarding noncompliance with pretrial disclosure and precalendar orders" (*see also Levy v Wexler*, 16 AD2d 688 [2d Dept 1962]). Likewise, *Siragusa v Teal's Express*, 96 AD2d 749, 750 [4th Dept 1983] recognized that "filing of a note of issue . . . is tantamount to asserting that all pretrial proceedings have been completed . . . Once the statement of readiness has been filed 'each party to the action is deemed to have assented to the statements contained therein and to have waived his right to pursue [discovery] proceedings'" (*Cerrone v S'Doia*, 11 AD2d 350, 352 [4th Dept 1960]). Professor Siegel's 2007 Supplementary Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3216:27 recognizes the remedy of first seeking to extend the time for filing the note of issue, not filing a false concomitant certificate of readiness, the situation that occurred herein which negates plaintiff's pursuit of a discovery sanction. Plaintiff thus misapplies CPLR 2221 warranting denial of this motion.

Also, the Uniform Rules for Trial Courts (22 NYCRR) § 202.7 states that:

[N]o motion shall be filed with the court unless there have been served and filed with the motion papers (1) a notice of motion, and (2) with respect to a motion relating to disclosure or to a bill

of particulars, an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion ... (c) The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held.

Contrary to plaintiff's argument, mot. seq. one, plaintiff's original motion in large part to strike defendant's answer and preclude evidence concerning lack of disclosure, required a good faith affirmation, as specified above in § 202.7. Plaintiff's reargument motion, mot. seq. three, also concerns lack of disclosure and equally requires a good faith affirmation.

Plaintiff, in mot. seq. three, has failed to demonstrate that facts were overlooked or misapprehended in the prior motion and is instead relying on a second good faith affirmation to modify or vacate the court's August 7, 2020, order. Plaintiff claims that the original good faith affirmation was sufficient but attaches a second good faith affirmation herein which thereby acknowledges that the original affirmation was insufficient. The original good faith affirmation failed to indicate the time, place and nature of the calls that were allegedly made, the issues discussed and any resolutions. In contrast, the second good faith affirmation provides the dates of the claimed conversations with defense counsel, the name of the attorney or staff member with whom plaintiff's counsel spoke and the time these conversations took place.

The second good faith affirmation, by containing new factual matters not offered on the prior motion thus contravenes CPLR 2221 (d) requirements, is prohibited and fatal to the

instant motion just as in *Park Assoc. v Crescent Park Assoc., Inc.*, 159 AD2d 460 [2d Dept 1990] presenting the converse situation where a motion, denominated as one for renewal and reargument, was dismissed as not based upon new facts unavailable at the time of the original motion and because a reargument motion is not appealable (*see, e.g., Huttner v McDaid*, 151 AD2d 547 [2d Dept 1989]).

Each of plaintiff's arguments fail and denying the initial motion as well as the instant motion was and is required for the several reasons discussed above. Consequently, plaintiff's motion for leave to reargue denial of his motion to strike defendant's answer for failure to produce a witness for deposition and to comply with this court's orders, or alternatively, for an order precluding defendant from offering any proof at trial, in the form of testimony or otherwise, regarding the liability issue and to permit plaintiff to file an NOI to comply with the court's January 8, 2020, order, is denied.

Concomitantly, plaintiff's motion to vacate the court's January 8, 2020, order pursuant to CPLR 5015 must be denied. CPLR 5015 provides in pertinent part that:

[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of: . . . 2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404; or 3. fraud, misrepresentation, or other misconduct of an adverse party.

Neither plaintiff's claim of purported newly discovered evidence or misconduct are grounded in fact.

Plaintiff claims it is entitled to relief an order to vacate, pursuant to CPLR 5015, because of newly discovered evidence and misconduct by defendant. He summarily states that newly discovered evidence has been produced that was not available previously. However, no newly discovered evidence is presented, and plaintiff wholly fails to demonstrate that the issue of newly discovered evidence is relevant to this case. as there has been no trial. CPLR 5015 requires that the newly discovered evidence must be of such character “which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404.” Plaintiff does not even demonstrate that the any evidence is new or that it would have probably produced a different result.

Similarly, plaintiff states that additional evidence of defendant’s misconduct has been presented that defendant, in bad faith and in the midst of an ongoing global pandemic, ignored the advice of Governor Cuomo, this court and Chief Administrative Judge Marks and filed a nonessential summary judgment motion on March 19, 2020. Plaintiff submits that the purported newly presented evidence and defense counsel’s alleged misconduct entitle him to the relief sought in his original moving papers and that the August 7, 2020 order herein should vacated and/or modified to reflect this situation. However, plaintiff presents no viable evidence of misconduct and errs in arguing that it was highly prejudicial to have required him to both file the NOI regardless of the status of discovery and to penalize and preclude him from bringing further CPLR discovery motions. The case was lawfully proceeding on an

appropriate schedule, and plaintiff made no motion to extend his NOI filing time. Hence, each of plaintiff's claims fail and the motion to vacate also merits being denied.

The court has considered the parties' remaining contentions and finds them unavailing. All relief not expressly granted herein is denied. Accordingly, it is

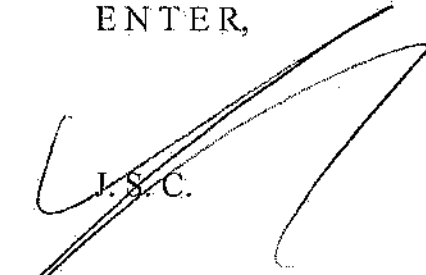
**ORDERED** that the branch of plaintiff's motion, mot. seq. three, to reargue his motion to strike defendant's answer for failing to produce a witness for a deposition and to comply with court orders, or, alternatively, for an order precluding defendant from offering any proof at trial, in the form of testimony or otherwise, regarding the liability issue is denied; and it is further

**ORDERED** that the branch of plaintiff's motion, mot. seq. three, allowing plaintiff to file his note of issue (NOI) to comply with this court's January 8, 2020 order is denied as moot; and it is further

**ORDERED** that the branch of plaintiff's motion, mot. seq. three, to vacate the court's August 7, 2020 order is denied

This constitutes the decision and order of the court.

ENTER,



J.S.C.  
Justice Lawrence Knipel