

Tese-Milner v ATCO Props. & Mgt., Inc.

2020 NY Slip Op 34102(U)

December 14, 2020

Supreme Court, New York County

Docket Number: 113902/2007

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. 113902/2007

ANGELA G. TESE-MILNER, AS CHAPTER 7 TRUSTEE
FOR NEREIDA VELASQUEZ,

MOTION SEQ. NO. 007

Plaintiff,

- v -

ATCO PROPERTIES & MANAGEMENT, INC. and
DESMOND BEGLIN,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 13, 14, 17, 18
were read on this motion to/for REARGUMENT/RECONSIDERATION.

In this action commenced by Nereida Velasquez ("Velasquez") to recover damages for sexual discrimination, sexual harassment, and retaliation, plaintiff Angela G. Tese-Milner, As Chapter 7 Bankruptcy Trustee for Velasquez, moves, pursuant to CPLR 2221(d), to reargue her post-trial motion (motion sequence 006), which sought reasonable attorneys' fees and costs against defendants ATCO Properties and Management, Inc. ("ATCO") and Desmond Beglin ("Beglin") (Docs. 14-16). Defendants oppose the motion (Doc. 18). After a review of the parties' contentions, as well as the relevant statutes and case law, the motion is **denied**.

FACTUAL AND PROCEDURAL BACKGROUND:

The underlying facts of this case are set forth in detail in the decision and order of this Court filed November 10, 2020 ("the 11/10/20 order"), which denied defendants' post-trial motion seeking, *inter alia*, to vacate the jury verdict rendered against them on July 29, 2019 (motion

sequence 005), as well as plaintiff's motion for reasonable attorneys' fees and costs on the ground that said determination should be referred to the United States Bankruptcy Court for the Southern District of New York ("the SDNY Bankruptcy Court") (Doc. 11). Any additional relevant facts are set forth below.

In denying plaintiff's motion, this Court noted that, in her application to the SDNY Bankruptcy Court seeking to hire counsel, plaintiff represented that counsel "'shall apply to said court 'for allowance of compensation and reimbursement of expenses in accordance with 'the Bankruptcy Code, the Bankruptcy Rules, [and] the Local Bankruptcy Rules and orders of the [SDNY Bankruptcy Court]"; that counsel would be paid on a contingency basis; and that plaintiff agreed that her attorney "shall apply to be compensated for any pre-petition work that it performed on the employment discrimination action" (Doc. 11 at 32). This Court also referenced several representations made by plaintiff's counsel before the SDNY Bankruptcy Court wherein he agreed that his attorneys' fees would be paid from the proceeds of any recovery in the captioned action and only upon approval of the SDNY Bankruptcy Court (Doc. 11 at 33). Further, in an order entered September 4, 2012, Judge Stuart M. Bernstein of the SDNY Bankruptcy Court directed, *inter alia*, that plaintiff would be compensated in accordance with "sections 330 and 331 of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, the Amended Guidelines for Fees and Disbursements for Professionals in the Southern District of New York, dated November 25, 2009, and the United States Trustee Fee Guidelines" (Doc. 11 at 33-34).

Plaintiff now argues that this Court erred in denying her motion by conflating, as evidenced by its heading entitled "B. Motion by Plaintiff's Counsel for Attorneys' Fees" on page 32 of the decision and order, its role with that of the Bankruptcy Court (Doc. 14 ¶ 2, 5). Specifically, plaintiff maintains that this Court is tasked with determining "how much [she] recovers in

attorneys' fees and costs from defendants," which is distinct from the SDNY Bankruptcy Court's role of determining "how much the plaintiff Chapter 7 trustee must pay to her counsel" (emphasis omitted) (Doc. 14 ¶ 7). Thus, plaintiff represents that "[t]he language correctly quoted by the Order from various filings in the [SDNY] Bankruptcy Court, requiring application to that court by plaintiff's counsel for fees and reimbursement of expenses, and determination of the contingent fee paid to counsel by that court (rather than fees awarded against defendants), does not affect the independent right of the plaintiff Chapter 7 trustee to recover her fees and expenses from defendants in this Court in addition to amounts awarded by the jury" (Doc. 14 ¶ 8).

In opposition, defendants urge this Court to summarily deny plaintiff's motion insofar as it did not overlook or misapply an issue of law or fact in deciding the underlying motion (Doc. 18 ¶ 4). Defendants contend that, assuming, *arguendo*, that this Court erred in titling the heading on page 32 of the 11/10/20 order "B. Motion by Plaintiff's Counsel for Attorney's Fees," this Court should nevertheless adhere to its prior determination (Doc. 18 ¶ 5). They claim that "[t]he focus on this reference ignores that, on page 18 [of the 11/10/20 order], th[is] Court correctly identifies 'Plaintiff's Motion for Attorneys' Fees' and, more importantly, sets forth in accurate detail the contents of the documents reflecting the proceedings of the [SDNY] Bankruptcy Court," thereby supporting its finding that "the [SDNY] Bankruptcy Court alone may determine the amount of the appropriate fee for [p]laintiff's counsel, as the discussion below the heading reveals" (Doc. 18 ¶ 5). Moreover, defendants argue that plaintiff offers no citation to a statute, rule or case supporting her proposition that the SDNY Bankruptcy Court cannot, in this instance, determine the reasonable attorneys' fees and costs (Doc. 18 ¶ 7). The Bankruptcy Code, claim defendants, regulates compensation for plaintiff's special counsel under Sections 327 through 331 and, thus, if the Trustee wanted to reserve the right to seek an award of attorneys' fees from this Court, she should

have included that reservation in her Section 327 application and obtained the SDNY Bankruptcy Court's approval (Doc. 18 ¶ 18).

Additionally, defendants argue, *inter alia*, that plaintiff's motion papers, claiming that "[a] prevailing plaintiff is *entitled* to recover attorney[s'] fees and costs from defendants in addition to whatever a jury awards at trial" ignores that an award of attorneys' fees lies within this Court's discretion and that she fails to establish any such abuse of discretion (Doc. 18 ¶ 9-10).

LEGAL CONCLUSIONS:

It is well-established that "[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. v Kassis*, 182 AD2d 22, 27 [1992] [internal quotation marks and citation omitted], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992]; *see* CPLR 2221 [d] [2]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided . . . or to present arguments different from those originally asserted" (*Matter of Setters v Al Props. & Devs. (USA) Corp.*, 139 AD3d 492, 492 [1st Dept 2016] [internal quotation marks and citation omitted]).

Plaintiff's motion is denied insofar as she has failed to demonstrate that this Court overlooked or misapprehended any matters of fact or law in determining the prior motion (*see* CPLR 2221[d]; *Oparaji v Yablon*, 159 AD3d 539, 540 [1st Dept 2018]). As articulated in detail in the 11/10/20 order, both plaintiff and plaintiff's counsel agreed that the SDNY Bankruptcy Court would determine the amount of the attorneys' fees, costs and disbursements to be paid to plaintiff's

counsel, and plaintiff has failed to proffer any legal authority to support her claim that said determination cannot be made by the SDNY Bankruptcy Court. Thus, this Court finds, in its discretion, that there is no basis upon which reargument should be granted.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by plaintiff Angela G. Tese-Milner, As Chapter 7 Trustee for Nereida Velasquez seeking, pursuant to CPLR 2221(d), reargument of its prior motion seeking attorneys' fees and costs is denied; and it is further

ORDERED that counsel for defendants shall, within 20 days after this decision and order is uploaded to NYSCEF, serve a copy of this decision and order, with notice of entry, upon plaintiff; and it is further

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

KATHRYN E. FREED, J.S.C.

12/14/2020
DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT REFERENCE