

Delvalle v Ortega
2021 NY Slip Op 30454(U)
February 10, 2021
Supreme Court, Kings County
Docket Number: 517698/18
Judge: Lawrence S. Knipel
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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 Civic Center, Brooklyn, New York, on the 10th day of February, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X
LILLIAN DELVALLE,

Plaintiff,

- against -

Index No. 517698/18

MARCO ORTEGA, ALPHA I MARKETING CORP.,
and CHRISTINA MURILLO,

Defendants.

-----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

265-269

Opposing Affidavits (Affirmations)

270-275

Reply Affidavits (Affirmations)

301

Upon the foregoing papers in this personal injury action, plaintiff Lillian Delvalle (Delvalle) moves (in motion sequence [mot. seq.] 15) for an order, pursuant to CPLR 2221 (d), granting her leave to reargue her opposition to the motion by defendants Marco Ortega and Alpha I Marketing Corp. (Alpha defendants) “to compel [her] to provide corrected pharmacy authorizations with Rite Aid on 65th and 86th Streets in Brooklyn” and, upon reargument, denying the Alpha defendants’ motion to compel her to provide

“corrected” pharmacy authorizations.

On October 15, 2020, the Alpha defendants moved for an order (in mot. seq. 12) compelling Delvalle to provide corrected pharmacy authorizations for records from Rite Aid on 65th and 86th Streets in Brooklyn. The Alpha defendants asserted that the authorizations that Delvalle previously provided were not properly filled out and did not permit them to receive certain records. Specifically, the Alpha defendants rejected Delvalle’s authorizations provided for Rite Aid because Delvalle failed to fill out and initial Section 9A of the authorization forms for records relating to “Alcohol/Drug Treatment,” “Mental Health Information,” and/or “HIV-Related Information.”

By a November 5, 2020 order, this court granted that branch of the Alpha defendants’ motion to compel regarding the pharmacy authorizations for Rite Aid and ordered that “Plaintiff to provide corrected pharmacy authorizations with Rite Aid on 65th and 86th Streets in Brooklyn.”

Delvalle now seeks an order granting it leave to reargue the November 5, 2020 order compelling these “corrected” Rite Aid authorizations on the ground that “the Court overlooked Plaintiff’s arguments in opposition to the underlying motion” Specifically, Delvalle’s counsel argues that:

“Respectfully, the November 5, 2020 Order did not address Plaintiff’s arguments that: (i) Defendants are already in possession of proper and ‘correct’ authorizations for Rite Aid; and (ii) records relating to any Alcohol/Drug Treatment, Mental Health Information, and HIV-Related Information are not necessary in the defense of this litigation. Further, the

Court did not give its reasoning for determining what was supposedly incorrect with the Rite Aid authorizations previously provided by Plaintiff.”

Delvalle’s counsel also asserts that the Alpha defendants’ motion to compel production of corrected authorizations for Rite Aid should be denied based on the Second Department’s 2019 decision in *Nesbit v. Advanced Serv. Solutions* (173 AD3d 1056, 1057-1058 [2019]), which held that disclosure related to “Alcohol/Drug Treatment, Mental Health Information and HIV-Related Information” should not have been compelled because defendants failed to proffer any showing of an essential need for such disclosure. Delvalle’s counsel asserts that the holding in *Nesbit* is “perfectly on-point” and is “binding” authority.

The Alpha defendants, in opposition, assert that Delvalle’s motion for leave to reargue should be denied because Delvalle’s motion “is absent any showing that the Court overlooked or misapprehended facts which caused it to mistakenly arrive at its earlier decision . . .” Defense counsel further argues that Delvalle “is likewise unable to show that the Court overlooked or misapprehended law in reaching the November 5, 2020 Order as plaintiff did not cite a single case in opposition to the branch of the ALPHA Defendants’ motion to compel discovery . . . regarding pharmacy authorizations.”

Defense counsel asserts that Delvalle’s reliance on the Second Department’s 2019 holding in *Nesbit* cannot be considered on a motion to reargue, since Delvalle failed to cite any caselaw in opposition to the Alpha defendants’ underlying motion to compel.

Defense counsel asserts that Delvalle's instant motion is more akin to a motion to renew based on the *Nesbit* holding, however, renewal cannot be granted since "plaintiff made no showing as to why the *Nesbit* case was not cited in her underlying Affirmation in Opposition." Defense counsel further argues that the holding in *Nesbit* is factually distinguishable from this case, since Delvalle "affirmatively waived her ability to object to 'Mental Health Information' through her allegations of anxiety as placed in controversy through her Verified Bill of Particulars, dated April 24, 2019." In addition, defense counsel notes that Delvalle placed her mental health information into controversy when she testified at her deposition that she takes anxiety medication and is being treated for anxiety, which was exacerbated by the subject accident.

Delvalle, in reply, asserts that "CPLR 2221 (d) expressly prohibits the introduction of 'any matters of fact not offered on the prior motion,' but it critically does not state the same for matters of law not specifically offered on the prior motion." Delvalle's counsel asserts that "this Court must give due consideration to *Nesbit* upon a grant of Plaintiff's motion for leave to reargue." Delvalle's counsel further argues that "if the authorizations previously provided by Plaintiff were 'incorrect' in some way, the Court did not provide instructions for correcting them." Delvalle seeks, at the very least, "additional clarification as to how the previously provided authorizations were 'incorrect' and how the authorizations to be provided should be 'corrected.'"

"A motion for leave to reargue shall be based upon matters of fact or law allegedly

overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” (CPLR 2221[d] [2]).

Delvalle has failed to establish that this court overlooked or misapprehended any matters of fact or law when it issued the November 5, 2020 order compelling Delvalle to provide the Alpha defendants with corrected authorizations for Rite Aid records. The Alpha defendants demonstrated that Delvalle previously failed to fill out and initial Section 9A of the authorization forms for records relating to “Alcohol/Drug Treatment,” “Mental Health Information,” and/or “HIV-Related Information.” Here, unlike in *Nesbit*, the Alpha defendants have demonstrated that Delvalle’s mental health information is relevant and necessary since Delvalle testified at her deposition that she takes anxiety medication and is being treated for anxiety, which was exacerbated by the subject accident. Accordingly, it is

ORDERED that Delvalle’s motion (in mot. seq. 15) for leave to reargue is granted, and, upon reargument, the court adheres to its November 5, 2020 order compelling Delvalle to provide the Alpha defendants with corrected authorizations for Rite Aid on 65th and 86th Streets in Brooklyn. As further clarification, Delvalle shall provide the Alpha defendants with complete authorizations for Rite Aid on 65th and 86th Streets in Brooklyn, including Section 9A of the authorization forms for records relating

to “Alcohol/Drug Treatment,” “Mental Health Information,” and/or “HIV-Related Information.”

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE