

Sabiaga v Cape Church Assoc., LLC
2022 NY Slip Op 31144(U)
April 8, 2022
Supreme Court, New York County
Docket Number: Index No. 160747/2019
Judge: Frank Nervo
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.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANK NERVO PART 04

Justice

-----X

JOSE SABIAGA,

Plaintiff,

- v -

CAPE CHURCH ASSOCIATES, LLC, CONSIGLI &
ASSOCIATES, LLC,

Defendant.

-----X

INDEX NO. 160747/2019

MOTION DATE 03/10/2022

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY.

Defendants move to, inter alia, vacate plaintiff’s note of issue alleging that substantial discovery remains outstanding.¹ Plaintiff cross-moved to renew and/or reargue the Court’s prior decision on motion sequence 002 which denied plaintiff’s order to show cause to extend the note of issue deadline.

This matter has an extensive history of dilatory conduct and failure to comply with the Court’s decisions and rules, resulting in needless motion practice (see e.g. Decision and Order [NYSCEF Doc. No. 41]; Demand for Resumption of Prosecution [NYSCEF Doc. No. 49]; Order [NYSCEF Doc.

¹ Third-party AM Architectural Metal & Glass cross-moves for similar relief, and also seeks a discovery schedule to address outstanding discovery. Given that the motions seeks similar, if not identical relief, the Court addresses the relief sought as “defendants’ motion.”

No. 51]; Decision and Order – Mot. Seq. 003 [NYSCEF Doc. No. 65]).

Following the Court’s Decision and Order on motion sequence 003 – which denied an extension of the note of issue deadline due to plaintiff’s counsel’s failure to file proof of service and failure to provide any substantive basis to extend the note of issue – the parties filed a joint letter to judge “requesting that you vacate and/or modify your order of February 4, 2022 to allow discovery to proceed in this matter” (NYSCEF Doc. No. 68).² The Court is unaware of any provision in the CPLR which provides for reargument or renewal by letter. There can be no argument that the relief sought is available by motion to renew or reargue, as provided by CPLR §2221, consequently the Court has not considered the letter request.

First, addressing plaintiff’s cross-motion to renew and reargue the prior motion to extend the note of issue, same is denied. The purpose of reargument is to provide “a party an opportunity to establish that the court overlooked or misapprehended relevant facts or misapplied principles of law” (*Foley v. Roche*, 68 AD2d 558, 567 [1st Dept 1979]; see CPLR § 2221[d][2]). “Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very

² The Court notes that although the letter is purportedly filed on behalf of all parties, it is unsigned by defendants and third-party defendant.

questions previously decided” (*id.*). Nor is reargument a proper forum to present arguments different from those originally asserted (*William P. Pahl Equip. Corp. v. Kassis*, 182 AD2d 22 [1st Dept 1992] *lv. dismissed in part and denied in part* 80 NY2d 1005 [1992]). As to renewal, a motion to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination...” (CPLR § 2221[e][2]). Where a motion for renewal is not based upon new evidence unavailable at the time of the original motion, and the movant fails to offer a reasonable excuse for the failure to submit evidence upon the original motion, renewal is properly denied (*Schumann v. City of New York*, 242 AD2d 616 [2d Dept 1997]). A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation (*Elder v. Elder*, 21 AD3d 1005 [2d Dept 2005]).

Here, it is beyond cavil that the Court’s denial of motion sequence 003 was proper, both procedurally and substantively, plaintiff having failed to file requisite proof of service and filing entirely conclusory curt affidavits that failed to provide any basis to extend the note of issue deadline. Plaintiff concedes same (*see* NYSCEF Doc. No. 68). Consequently, reargument or renewal of the Court’s prior decision is inappropriate (*Elder, supra; Schumann, supra*).

Turning to defendants' motion to vacate the note of issue, same is granted. A note of issue should be vacated where "it is based upon a certificate of readiness that incorrectly states that all discovery has been completed" (*Nielsen v. New York State Dormitory Auth.*, 84 AD3d 519, 520 [1st Dept 2011]; *Matos v. City of New York*, 154 AD3d 532 [1st Dept 2017]). A party may not seek additional discovery after the NOI has been filed, absent "special, unusual or extraordinary circumstances" (*Goldsmith v. Howmedica, Inc.*, 158 AD2d 335, 336 [1st Dept 1990]; see also *Grant v Wainer*, 179 AD2d 364 [1st Dept 1992]). No such circumstances exist here. Furthermore, the Part Rules unequivocally prohibit post-note discovery (Part 4 Rules Supreme Court – New York County Dedicated Trial Division, Justice Frank P. Nervo "Note of Issue.>").

Here, the note of issue incorrectly states that the parties have complied with the prior orders of the Court. The addendum thereto states that the Court has not allowed sufficient time to complete all discovery. To be sure, it is not the Court's order which prohibited the completion of discovery in this matter but the parties' repeated contumacious noncompliance with the Court's orders which has left discovery incomplete. Notwithstanding any deficiencies in practice in this matter by counsel, and notwithstanding the demonstrated inability to timely comply with this Court's prior orders, there is a strong

preference for adjudicating matters on their merits. However, the Court's tolerance is not unlimited.

Accordingly, it is

ORDERED that the note of issue (NYSCEF Doc. No. 69) is vacated; and it is further

ORDERED that all parties shall serve courtesy copies of any outstanding demands within 30 days of this order, or same shall be deemed waived; and it is further

ORDERED that all parties shall serve responses to any courtesy copies, in accordance with the Uniform Rules, within 30 days of receipt of same. Failure to timely respond to same shall result in sanctions, in the Court's discretion, upon further application; and it is further

ORDERED that all party depositions shall be completed no later than December 30, 2022; and it is further

ORDERED that all non-party depositions shall be completed no later than June 30, 2023; and it is further

ORDERED that all depositions shall be noticed at least 30 days prior to deposition date; and it is further

ORDERED that all depositions shall occur either in-person or via electronic means; and it is further

ORDERED that post-deposition demands shall be served no later than 30 days following deposition giving rise to demand; responses thereto shall be served within 30 days of receipt of demand; and it is further

ORDERED that the failure to timely serve post-deposition demands shall constitute waiver of same; and it is further

ORDERED that failure to timely serve responses to timely served post-deposition demands shall result in sanctions, including but not limited to the striking of pleadings, in the Court's discretion upon further application; and it is further

ORDERED that defendants shall notice plaintiff's IME within 30 days of completion of his deposition; and it is further

ORDERED that plaintiff shall appear for an IME within 45 days of receipt of notice of same by defendants; and it is further

ORDERED that defendants shall serve a copy of the IME report within 60 days of plaintiff's exam; and it is further

ORDERED that failure to timely notice a deposition or IME shall constitute waiver of same; and it is further


ORDERED that the failure to appear for a timely noticed deposition or IME shall result in sanctions, including striking of pleadings, in the Court's discretion upon further application; and it is further

ORDERED that the end date for disclosure shall be December 1, 2023; and it is further

ORDERED that the note of issue deadline is extended to December 29, 2023; and it is further

ORDERED that there shall be no further extension of discovery deadlines, this order is **FINAL** absent a showing of extraordinary circumstances as found by the Court.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

<u>04/08/2022</u> DATE					 FRANK NERVO, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED			<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	REFERENCE
160747/2019 ESPINOZA,JOSE vs. CAPE CHURCH ASSOCIATES, LLC Motion No. 004					Page 8 of 8	