

Aguilar v Reback

2022 NY Slip Op 34023(U)

November 23, 2022

Supreme Court, Kings County

Docket Number: Index No. 522131/2019

Judge: Francois A. Rivera

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At an IAS Term, Part 52 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 23rd day of November 2022

HONORABLE FRANCOIS A. RIVERA

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PAUL AGUILAR,

Plaintiff,

- against -

DECISION & ORDER

Index No. 522131/2019

SCOTT REBACK and TITAN MOTOR GROUP, LLC

Defendants.

-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the joint motion of defendants Scott Reback (hereinafter Reback) and Titan Motor Group, LLC (hereinafter Titan) (collectively the defendants), filed on April 12, 2022, under motion sequence twelve, for an order: (1) pursuant to CPLR 2221(e) granting leave to renew defendants' prior motion for summary judgment and for sanctions; (2) in the alternative, pursuant to CPLR 510, granting defendants' motion to transfer this case to Richmond County due to improper venue; (3) pursuant to CPLR 3116 striking most of the errata sheet that plaintiff Paul Aguilar (hereinafter plaintiff or Aguilar) submitted regarding his deposition testimony. This motion is opposed by the plaintiff.

- Notice of Motion
- Affirmation in Support
- Exhibits A-K
- Memorandum Of Law in Opposition
- Affirmation In Opposition
- Affidavit In Opposition by Plaintiff
- Affidavit In Opposition by Nonparty
- Exhibits A-L

BACKGROUND

On October 9, 2019, Aguilar commenced the instant action by filing a summons and complaint with the KCCO (hereinafter the commencement papers). The salient allegations of fact in the complaint were fully set forth in the Court's decision and order dated April 30, 2020, in the matter of *Aguilar v Reback* (67 Misc 3d 1213 [a] [Sup Ct. Kings County 2020]). The decision and order dismissed some causes of action asserted against the defendants but denied their motion to dismiss the entire complaint. The decision and order directed the defendants to answer the complaint no later than thirty days after service of notice of entry of the order.

By notice of motion filed on June 30, 2020, under motion sequence number two, the defendants sought to reargue the part of the order which did not dismiss the claims for tortious interference with business relations.

By decision and order dated September 17, 2020, the Court denied the defendants' request for re-argument. On October 15, 2020, the defendants filed their answer to the complaint.

By notice of cross motion filed on August 13, 2021, under motion sequence number six, and by order to show causes filed on the same date under motion sequence number seven, the defendants sought, inter alia, an order (1) granting summary judgment in their favor and dismissing the complaint pursuant to CPLR 3212; and (2) sanctioning the plaintiff and his counsel pursuant to 22 NYCRR 130-1.1 (a) for filing and maintaining a frivolous lawsuit; and (b) sanctions against Aguilar for attempted witness tampering with monetary incentive for perjury, falsifying a document and committing

perjury.

By decision and order dated October 28, 2021, the Court denied the defendants' motion for summary judgment due to the presence of disputed issues of material fact as derived from the conflicting affidavit of the defendants and the plaintiff, and also, because the defendants merely pointed to gaps in the plaintiff's proof. The Court denied the order to show cause seeking, inter alia, sanctions based on the defendants' failure to properly serve the order to show cause as directed, a jurisdictional defect.

LAW AND APPLICATION

By the instant motion, the defendants seek an order permitting renewal of: (1) their prior motion for summary judgment filed under motion sequence six and (2) their motion for sanctions against the plaintiff and plaintiff's counsel for filing and maintaining a frivolous lawsuit, and their motion for sanctions against the plaintiff is for attempted witness tampering with monetary incentive for perjury, falsifying a document and committing perjury.

In the alternative, the defendants seek an order transferring the action to Richmond County due to improper venue and an order striking the plaintiff's errata sheet regarding his deposition testimony pursuant to CPLR 3116.

Motion For Renewal

A motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221[e][2]) and shall contain reasonable justification for the failure to present such facts on the prior

motion" (CPLR 2221[e][3]; *see Wells Fargo Bank, N.A. v Mone*, 185 AD3d 626, 629 [2nd Dept 2020]).

As previously stated in the Court's decision and order dated October 28, 2021, the competing affidavits of the plaintiff and the defendants' witnesses merely presented credibility determinations and other issues of fact for the jury that could not be decided by the Court in the context of a summary judgment motion (*Buckshaw v Oliver*, 197 AD3d 681 [2nd Dept 2021]). The Court also pointed out that the defendants attempted to support their prior motion for summary judgment by pointing to gaps in the plaintiff's proof.

In the instant motion for renewal of the summary judgment, the additional information submitted by the defendants were text messages between the plaintiff and Rui Moreira, the General Manager of Porsche that they received after the prior motion was filed. The text messages, however, merely present additional disputed facts for the jury to consider in making such credibility and factual determinations. It is noted, that in the instant motion for renewal, the defendants also have continued to point to gaps in the plaintiff's proof in support of the relief sought.

Consequently, the defendants have failed to demonstrate that the purported new evidence provided a basis to change the court's determination (*see* CPLR 2221[e][3]). It is also noted that the instant motion did not provide a statement of material facts as required by New York State Uniform Court 202.8-g. The motion for renewal is therefore denied.

Sanctions Against Plaintiff and Plaintiff's Counsel

The defendants also seek sanctions against the plaintiff and plaintiff's counsel for allegedly engaging in frivolous conduct by the filing and continuation of the instant allegedly frivolous lawsuit. CPLR 8303-a grants the Court discretion to impose costs and sanctions upon a plaintiff for the filing and prosecution of a frivolous lawsuit. CPLR 8303-a (c) defines frivolous conduct as follows:

“In order to find the action, claim, counterclaim, defense or cross claim to be frivolous under subdivision (a) of this section, the court must find one or more of the following:

- (i) the action, claim, counterclaim, defense or cross claim was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another;
- (ii) the action, claim, counterclaim, defense or cross claim was commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law.”

Inasmuch as the Court has previously denied the defendants' prior motions to dismiss the complaint pursuant to CPLR 3211(a) and 3212, and the Court hereby denies the defendants' instant motion to renew the prior CPLR 3212 motion, the defendants have not demonstrated that the plaintiff or plaintiff's counsel filed and continued to prosecute a frivolous lawsuit.

Sanctions Against Plaintiff Alone

Although not stated in the defendants' notice of motion, the affirmation of their counsel in support also requests sanctions based on the plaintiff's production on December 17, 2021, of certain text messages between the plaintiff and Rui Moreira, the General Manager of Porsche. The defendants contend that the production was late, and

that the lateness was willful and sanctionable.

The court rule set forth in 22 NYCRR 130-1.1, which is intended to limit frivolous and harassing behavior, authorizes a court, in its discretion, to award a party in a civil action reasonable attorney's fees resulting from frivolous conduct (*Marrero v. N.Y. City Transit Auth.*, 150 AD3d 1097 [2nd Dept 2017], citing *Matter of Miller v Miller*, 96 AD3d 943, 944 [2nd Dept 2012]). Conduct is frivolous if, inter alia, it is completely without merit in law or asserts material factual statements that are false (*Marrero*, 150 AD3d at 1097, citing 22 NYCRR 130-1.1[c][1], [3]; *Matter of Ernestine R.*, 61 AD3d 874, 876 [2nd Dept 2009]). In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party (*Marrero*, 150 AD3d1097).

The late production of an item requested in discovery may serve as the basis for a request for a sanction pursuant to CPLR 3126. Pursuant to 22 NYCRR 202.7(a)(2), a motion relating to disclosure must be accompanied by an affirmation from moving counsel attesting that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion (*Kemp v 1000 Broadway, LLC*, 203 AD3d 1153, 1153 [2nd Dept 2022]). The affirmation shall indicate the time, place, and nature of the consultation and the issues discussed and any resolution, or it shall indicate good cause why no such conferral with counsel for opposing parties was held (*Winter v*

ESRT Empire State Bldg., LLC, 201 AD3d 842, 843–844 [2nd Dept 2022]). The good faith efforts may be explained in counsel's primary affirmation submitted in support of the motion or in a separate affirmation that serves specifically to discuss such efforts (*see Matter of Cheryl LaBella Hoppenstein 2005 Trust*, 186 AD3d 1230, 1233 [2nd Dept 2020]). Failure to provide an affirmation of good faith ... warrants denial of the motion (*Winter, LLC*, 201 AD3d at 844). Here, the defendants failed to attest that any good faith efforts had been made to secure the allegedly untimely provided text messages and to demonstrate how the allegedly untimeliness somehow prejudiced them. The alleged untimeliness, however, does not constitute frivolous conduct.

The defendants' notice of motion states that it seeks sanction against the plaintiff for attempted witness tampering with monetary incentive for perjury, for falsifying a document and for committing perjury. The claims of attempted witness tampering, falsifying a document and perjury are in part based on competing affidavits and determinations of issues of credibility. Issues of credibility are not properly resolved in the context of a summary judgment motion. Nor are they properly resolved by making them part of a motion for sanctions based on alleged dishonesty. In sum, the defendants urge the Court to make determinations of credibility, find the plaintiff to be not credible and impose sanctions based on the plaintiff's alleged deceit. However, issues of credibility are for the fact finder.

Change of Venue

CPLR 503(a) provides, in pertinent part, that except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it

was commenced; or the county in which a substantial part of the events or omissions giving rise to the claim occurred.

To prevail on a motion pursuant to CPLR 510(1) to change venue, a defendant must show that the plaintiff's choice of venue is improper, and that the defendant's choice of venue is proper (*see* CPLR 511[b]; *Green v Duga*, 200 AD3d 861, 862 [2nd Dept 2021]). Only if a defendant meets this burden is the plaintiff required to establish, in opposition, that the venue selected was proper (*id.*). If the defendant meets this burden, the plaintiff is required to establish, in opposition, via documentary evidence, that the venue selected was proper (*Faulkner v Best Trails & Travel Corp.*, 203 AD3d 890 [2nd Dept 2022]).

The defendants' motion for a change of venue was based on the plaintiff's deposition testimony in which he stated that he resided at 75 Leewood Loop, Staten Island, and that he had lived there for about 10 years and that he lived in Brooklyn prior to then, at 38 East 8th Street, Brooklyn. In opposition to this branch of the defendants' motion, the plaintiff submitted an affidavit explaining he owns property in Richmond County, but he does not reside there. Plaintiff averred that he has always lived at a Kings County address which he rents as his primary residence since at least the day he commenced the instant action.

An individual may have more than one residence. Inasmuch as the defendants' motion is based on the plaintiff's sworn deposition testimony and the plaintiff's opposition is based on the explanation provided in his sworn testimony from his affidavit, the issue should not be resolved by the motion papers. This branch of the defendants'

motion will be held in abeyance pending a threshold evidentiary hearing, in which the plaintiff and the defendants must appear. The plaintiff and the defendants will be given an opportunity to proffer further testimony and documentary evidence of the plaintiff's residence at the time the instant action was commenced. The hearing will be held on January 24, 2023, at 10:00 a.m.

Striking of the Errata Sheet

The defendants refer to twenty proposed changes contained in the plaintiff's errata sheet which sought to change certain answers in the plaintiff's deposition. The defendants have no objection to five of the changes but objected to the other fifteen. The defendants contend that the proposed changes were numerous, significant, substantive and without adequate justification. The reasons the plaintiff gave for the changes were that the plaintiff misspoke at the deposition or had additional recollection after the deposition.

CPLR 3116 (a) provides in pertinent part as follows:

“[t]he deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them.”

It also provides that no changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination (*id.*).

A witness has an explicit right to change deposition testimony provided that the witness does so in accordance with statutory requirements (*see Boyce v Vazquez*, 249 AD2d 724 [3rd Dept 1998]). Furthermore, a witness is permitted to make substantive

changes to his or her deposition testimony, provided the changes are accompanied by a statement of the reasons, therefore; so long as the statement of reasons is provided for the changes, the trial court is within its discretion to refuse to strike the deponent's errata sheet (*Lieblich v Saint Peter's Hosp. of City of Albany*, 112 AD3d 1202 [3rd Dept 2013]).

The Court did not find that any one of the objected to proposed changes were material or that the reason for the proposed change was insufficient (*cf. Torres v Board of Educ. of City of N.Y.*, 137 AD3d 1256, 1257 [2nd Dept 2016]; *Marzan v Persaud*, 29 A.D.3d 652, 653 [2nd Dept 2006]). Therefore, the motion to strike the plaintiff's errata sheet is denied.

CONCLUSION

The branch of the joint motion of defendants Scott Reback and Titan Motor Group, LLC for an order pursuant to CPLR 2221(e) granting leave to renew their prior motions for summary judgment and for sanctions is denied.

The branch of the joint motion of defendants Scott Reback and Titan Motor Group, LLC for an order pursuant to CPLR 510, granting defendants' motion to transfer this case to Richmond County due to improper venue is granted to the extent that the motion will be held in abeyance pending the outcome of an evidentiary hearing on the issue.

The parties are directed to appear before this Court at 360 Adam Street, Brooklyn New York, Room 556 on January 24, 2023, at 10:00 a.m. The parties will be given an opportunity to proffer further testimony and documentary evidence of the plaintiff's residence at the time the instant action was commenced.

The branch of the joint motion of defendants Scott Reback and Titan Motor Group, LLC for an order pursuant to CPLR 3116 striking the plaintiff's errata sheet is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:

Francois A. Rivera

J.S.C.

**HON. FRANCOIS A. RIVERA
J.S.C.**