

Marks v Nail & Spa 72, Inc.

2023 NY Slip Op 30230(U)

January 23, 2023

Supreme Court, New York County

Docket Number: Index No. 153667/2021

Judge: David B. Cohen

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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. DAVID B. COHEN PART 58

Justice

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INDEX NO. 153667/2021

MICHELLE MARKS,

MOTION SEQ. NO. 003

Plaintiff,

- v -

NAIL & SPA 72, INC., 1012 LEXINGTON AVENUE CO. LLC,
and HUBB NYC PROPERTY MANAGEMENT LLC

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for REARGUMENT/RECONSIDERATION.

In this premises liability action, defendant Nail & Spa 72, Inc. ("Nail & Spa"), moves, pursuant to CPLR 2221(e), for leave to renew its motion to vacate a default judgment against it (Seq. 002); and, upon renewal, for an order granting the motion. Alternatively, Nail & Spa moves, pursuant to CPLR 2221(d), for leave to reargue its motion. Plaintiff opposes.

Factual and Procedural Background

This Court assumes familiarity with the facts and allegations in this case as set forth in the Court's order entered on September 30, 2022 (NYSCEF Doc No. 40). Briefly, plaintiff commenced this action against Nail & Spa in April 2021 alleging that she was injured when she slipped and fell inside Nail & Spa's place of business (Doc No. 1 at 10). After Nail & Spa failed to answer or otherwise appear in this action, plaintiff moved for a default judgment against it (Doc No. 12). By decision and order of January 27, 2022, this Court granted the motion and found Nail & Spa in default (Doc No. 21).

Nail & Spa then moved, pursuant to CPLR 317, 3012(d), and 5015(a), for an order vacating the default judgment and compelling plaintiff to accept a late answer (Doc Nos. 30-31, 38). By decision and order of September 30, 2022, Nail & Spa's motion was denied as it failed to set forth a reasonable excuse for its delay in appearing in the action, since it failed to provide sufficient details to support its assertion that the delay was caused by its insurance carrier's inaction (Doc No. 40).

Nail & Spa now moves for leave to renew and leave to reargue its original motion to vacate, and submits two supporting affidavits. In the first affidavit, an employee of its insurance carrier avers that plaintiff's counsel failed to respond to several of her good faith attempts to discuss the case, which delayed her ability to refer the case to Nail & Spa's counsel (Doc No. 49). In the second affidavit, Nail & Spa's employee states that she was working at Nail & Spa on the day of the incident, that the floors were mopped daily, and that she never saw any wet spot on the floor that day prior to plaintiff's fall or received complaints about such a condition (Doc No. 50).

Legal Analysis and Conclusions

Nail & Spa argues that granting leave to renew is appropriate because it serves the interest of justice. Although it concedes that its affidavits contain facts known, but not presented, at the time it filed the original motion, it asserts that this Court maintains the discretion to grant renewal despite those aspects to ensure substantial fairness. With respect to reargument, it asserts that this Court overlooked plaintiff's failure to sufficiently allege a cause of action sounding in negligence.

Plaintiff opposes, arguing that renewal should be denied because Nail & Spa has not provided a reason for why it failed to submit these affidavits with the original motion, regardless of whether they establish a reasonable excuse for the delay in responding to the complaint or a meritorious defense to her claims. Regarding reargument, she asserts that this Court neither

overlooked any facts nor misapprehended the law in deciding the original motion, and that Nail & Spa reiterates the same arguments it made previously.

Plaintiff's Request for Leave to Renew

“Although it is true that a motion to renew should generally be based upon newly-discovered facts, this rule is not inflexible, and the court has discretion to grant renewal in the interest of justice even upon facts that were known to the movant at the time the original motion was made” (*Kaszar v Cho*, 160 AD3d 501, 502 [1st Dept 2018] [citations omitted]; accord *Global Liberty Ins. Co. v Larurenceau*, 187 AD3d 570, 571 [1st Dept 2020]). However, the party seeking renewal must still supply a reasonable justification for why it failed to provide the information in support of the original motion (see *Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 484 [1st Dept 2015] [affirming denial of renewal motion because moving party “did not provide a reasonable justification for failing to submit the additional affidavit and documents in support of [its] original motion”]; *Leighton v Lowenberg*, 125 AD3d 427, 427-428 [1st Dept 2015] [similar]; cf. *Joseph v Board of Educ. of the City of N.Y.*, 91 AD3d 528, 529 [1st Dept 2012] [granting renewal after moving party demonstrated that law office failure caused omission of information previously known, but never submitted, when original motion filed]).

Here, as Nail & Spa fails to explain why the new affidavits were not submitted with its original motion, it is not entitled to renewal (see *Granite State Ins. Co.*, 132 AD3d at 484; *Leighton*, 125 AD3d at 427-428; *Onglingswan v Chase Home Fin., LLC*, 104 AD3d 543, 544 [1st Dept 2013] [denying renewal where moving party failed to offer “any justification for not submitting the purportedly new evidence on the initial motion”], *lv dismissed* 22 NY3d 1113 [2014]).

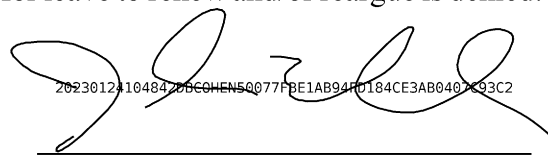
Plaintiff's Request for Leave to Reargue

“A motion for leave to reargue is addressed to the sound discretion of the court and is properly granted upon a showing that the facts . . . or law were overlooked or misapprehended by the court in determining the prior motion” (*Cascade Bldrs. Corp. v Rugar*, 154 AD3d 1152, 1154 [3d Dept 2017] [citation omitted]; see CPLR 2221 [d] [2]; *Mendez v Queens Plumbing Supply, Inc.*, 39 AD3d 260, 260 [1st Dept 2007]). However, “[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided” (*Matter of Setters v AI Props. & Devs. (USA) Corp.*, 139 AD3d 492, 492 [1st Dept 2016] [internal quotation marks and citations omitted]).

Nail & Spa’s contention that plaintiff failed to allege the elements necessary to state a cause of action sounding in negligence was previously raised in support of its original motion and was considered in deciding such motion. Thus, that issue has been “carefully considered and decided by [this Court]” (*Fosdick v Town of Hempstead*, 126 NY 651, 653 [1891]). Although this Court’s decision on the original motion did not directly reference this specific contention, “[i]t is a mistake for [a party] to assume that any particular portion of his [or her] argument, which has not been the subject of express reference in the opinion, has been overlooked” (*id.* at 652-653; see 4 NY Jur 2d, Appellate Review § 398 [“It cannot be assumed that any particular point has been overlooked because it was not discussed in the opinion”]). Therefore, as Nail & Spa fails to demonstrate how this Court overlooked facts or misapprehended the law, its request for leave to reargue is denied (see *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 28 [1st Dept 1992], *lv dismissed and denied* 80 NY2d 1005 [1992]).

Accordingly, it is hereby:

ORDERED that defendant Nail & Spas' motion for leave to renew and/or reargue is denied.



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1/23/2023

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE