**D'Angelo v City of New York**

2023 NY Slip Op 30832(U)

March 16, 2023

Supreme Court, New York County

Docket Number: Index No. 150011/2018

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH** **PART 52**

***Justice***

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MARY D'ANGELO,

Plaintiff,

- v -

CITY OF NEW YORK, FIRE DEPARTMENT OF HE CITY OF NEW YORK, JAMES P. BOOTH, ROBERT COLON

Defendant.

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**INDEX NO.** 150011/2018

**MOTION DATE** 12/07/2022

**MOTION SEQ. NO.** 004

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120

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

Plaintiff Mary D'Angelo (plaintiff) moves to renew and reargue this Court's June 23, 2022 decision and order (prior decision) scheduling the examinations before trial (EBT) of plaintiff and defendant the Fire Department of the City of New York (FDNY), extending the note of issue filing deadline to December 14, 2022, and ordering a status conference to be held in the DCM part following the parties' depositions. Defendants the City of New York, FDNY, James Booth, and Robert Colon (collectively, the City) oppose the instant motion.

The Court based its prior decision on the representations of counsel following extensive oral argument and ensuing discussion on June 1, 2022. At oral argument, counsel "consented to resolve the motions by scheduling plaintiff's deposition, to be followed by a deposition of defendant the Fire Department of the City of New York." *See* prior decision, NYSCEF doc. no. 106. Following oral argument and before issuing the prior decision, the Court contacted counsel numerous times by e-mail attempting to obtain mutually convenient EBT dates, which were not forthcoming. Therefore, the prior decision set forth deadlines for the EBTs rather than ordering dates certain. The Court also instructed counsel to contact

the DCM part to schedule a conference following the completion of the EBTs if additional discovery issues remained.

Plaintiff now moves to reargue on the basis that the Court misapprehended that counsel for plaintiff consented and agreed to the resolution of both her motion and defendants' cross-motion in the manner set forth in the prior decision. In opposition, the City argues that the Court did not misapprehend the facts and that the Court properly decided plaintiff's underlying motion.

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. A motion for leave to reargue is addressed to the sound discretion of the Court and may be granted upon a showing that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. *See Oparaji v Yablon*, 159 AD3d 539 (1st Dept 2018).

The Court does not find that it overlooked or misapprehended the relevant facts or misapplied the law in rendering its prior decision. Plaintiff contends that the Court misapprehended the fact that Plaintiff did not consent to the resolution of her motion. However, the Court spent a considerable amount of time speaking to both sides at oral argument. Following discussion with the Court, both sides agreed to schedule EBTs as outlined in the prior decision. As plaintiff has failed to show that the Court has misapprehended the facts or law, that portion of plaintiff's motion seeking reargument is denied.

Moreover, even if the Court's order was not issued on consent, it is nevertheless the order of the Court with which plaintiff has not complied. Plaintiff does not contest that depositions should take place, but, rather, takes issue with the order of the depositions. The crux of plaintiff's argument is that, since she served a notice of deposition first, defendants should be deposed first.

Generally, a defendant is entitled to examine the plaintiff first, unless defendants serves a notice of deposition on plaintiff after the time to serve a responsive pleading has expired. *See* CPLR 3016 (a); *Klevens Const. Co., Inc. v State*, 87 Misc 2d 108, 109 (Ct Cl NY County 1976). Such exception does not apply here. Although plaintiff did serve a notice of deposition first, and after the City had already answered, the notice of deposition was served *after* the Court had already issued a preliminary conference order which established that plaintiff's EBT was to be held before that of the City. Both counsel for plaintiff and the City appeared at the preliminary conference and no objection was made to the EBT schedule. Plaintiff's counsel seemingly attempted to circumvent the Court order by serving a notice of deposition after the preliminary conference was held and the order which directed the priority of the EBTs was entered. No special circumstances exist here that would require that the Court deviate from the generally accepted rule that plaintiff is deposed first. *See Goldberg v Freedman*, 33 AD2d 754, 754 (1st Dept 1969).[1] This Court's prior decision therefore stands.

Further, as per the Court's instructions following oral argument and the prior decision, counsel are to confer following the scheduled depositions regarding remaining outstanding discovery, including regarding the City's responses to plaintiff's first set of interrogatories and document requests. To the extent not explicitly stated in the Court's prior order, the portion of plaintiff's underlying motion seeking to compel responses to plaintiff's first set of interrogatories and document requests is denied as moot. The City provided full responses to the interrogatories, 311 pages of documents, and verifications regarding same. *See* NYSCEF doc. nos. 97, 99. Notably, plaintiff has not clearly identified what documents she

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[1] In its decision in *Goldberg* (33 AD2d 754), the First Department decried similar arguments over priority of depositions where no special circumstances exist:

> Again, we deprecate the consummate waste of time occasioned by attorneys' picayune and pettifogging contentiousness over the manner of conducting an examination of this character. This matter has now occupied the time of four Justices at Special Term and this appellate court. It is conduct of this character that mystifies the public and brings the profession into ill-repute.

seeks. Accordingly, the Court directed counsel to conduct the parties' depositions to permit plaintiff's counsel to inquire as to the City's relevant policies and alleged incidents to collect further information.

Plaintiff also moves to renew on the basis that plaintiff was unable to appear for her deposition as ordered by the Court in the prior decision. Plaintiff maintains that her counsel was unaware of the dates on which plaintiff was available for depositions. In opposition, the City argues that plaintiff's counsel should have been aware of her client's availability when appearing for a motion to compel the deposition itself.

A motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR 2221 (e) (2), (3). Renewal "generally applies where facts available at the time of the prior motion were, for valid reasons, unknown to the movant, but may sometimes encompass new matter that was not available prior to the court's decision." *Haenel v November & November*, 144 AD2d 298, 299 (1st Dept 1988) (citations omitted). 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." *Coccia v Liotti*, 70 AD3d 747 (2d Dept 2010) (quotations and citations omitted).

The Court was fully aware at the time it issued the prior decision that plaintiff's counsel did not come prepared with specific dates on which to schedule depositions at oral argument. That is precisely why the Court provided deadlines by which to conduct EBTs, rather than dates certain. In fact, the Court attempted to assist in scheduling numerous times with counsel by e-mail, summarizing the oral argument and requesting agreed-to dates for the parties' EBTs. Renewal is not a proper remedy where, as here, the motion is not based on any facts not offered on the prior motion.

As plaintiff has failed to show that the Court has misapprehended the facts or law, and no new facts have been offered that would change the Court's prior determination, plaintiff's motion to renew and reargue is denied.

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion to renew and reargue is denied; and it is further

ORDERED that plaintiff first submit to an EBT on May 4, 2023 at 10:00 a.m.; and it is further

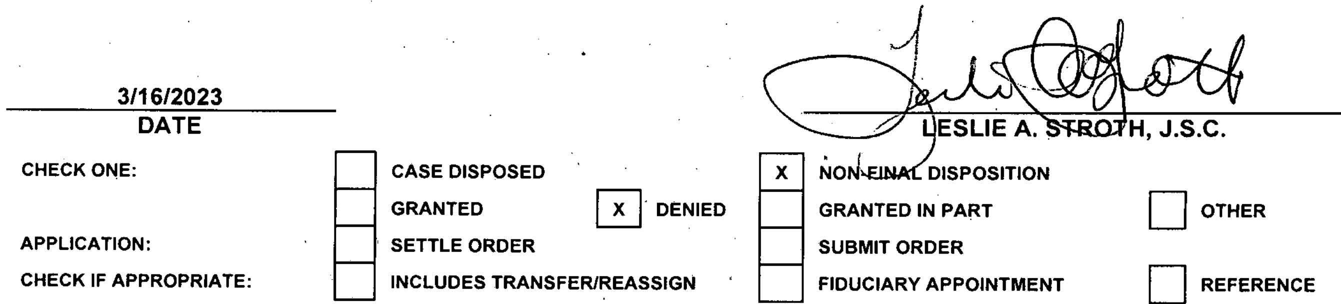
ORDERED that, upon the completion of plaintiff's examination, the City shall submit to EBT(s)[2] on May 11, 2023 at 10:00 a.m.; and it is further

ORDERED that the deadline to complete discovery is extended, and the note of issue must be filed in this matter on or before October 4, 2023; and it is further

**ORDERED that failure to comply with these directives may result in the imposition of costs and/or sanctions, including dismissal or the entry of a default judgment. The deadlines set forth may not be extended or adjourned without express approval of the Court; and it is further**

ORDERED that the Clerk of the Court is directed to set this matter down for a status conference in the DCM Part on the next available date after June 5, 2023.

The foregoing constitutes the decision and order of the Court.



3/16/2023
DATE

LESLIE A. STROTH, J.S.C.

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| 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 | |

[2] Regarding plaintiff's notices of deposition and the witnesses produced by the City for same, counsel are directed to the Uniform Rules for Trial Cts (22 NYCRR) § 202.20-d for instruction.