SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 521192/2022
Motion Date: 2-6-23
Mot. Seq. No.: 2

----------X

RITE AID OF NEW YORK, INC.,

Plaintiff,

-against-

DECISION/ORDER

SMITH STREET REALTY, LLC, successor in interest to J&M Realty, LLC,

Defendant.

----------X

Upon the following e-filed documents, listed by NYSCEF as item numbers 29-45, the motion is decided as follows:

The plaintiff, RITE AID OF NEW YORK, INC., moves by order to show cause for an order granting reargument its prior Order to Show Cause for a *Yellowstone* Injunction, which was denied by Order dated November 14, 2022, on the grounds that plaintiff did not effect service on the defendant in accordance with the Order to Show cause. The plaintiff also seeks a myriad of other relief.

When plaintiff submitted the initial Order to Show Cause for a *Yellowstone* injunction to the Part 72 judge for signature, plaintiff's counsel requested permission to serve the defendant "by NYSCEF electronic filing and electronic mail on Jayson Blau, Esq., Jayson Blau & Associates, j@jblaulaw.com." The papers submitted in support of the Order to Show Cause included the "Notice of Default and Thirty (30) Day Notice to Cure" that the plaintiff served in this matter which contains the following language:

> PLEASE TAKE FURTHER NOTICE that any response or inquiry to this notice must be made in writing and directed to SMITH STREET REALTY LLC c/o Jayson Blau & Associates, 5600A Broadway, 2nd Floor, The Bronx, NY 10463.

(see NYSCEF # 3, p. 55). The Part 72 judge denied the request and but directed that service be made on the defendant by "personal service and electronic mail on Jayson Blau, Esq., Jayson Blau & Associates… on or before July 29th, 2022." While plaintiff submitted proof that the Order to show cause was timely emailed to Jayson Blau, Esq., no proof was submitted indicating that it was personally served on him on or before July 29, 2022. In a reply affirmation dated

August 15, 2022, plaintiff's counsel stated that: "As of the writing of this Affirmation, we continue to attempt to affect [sic] personal service on Mr. Blau at his offices." Although the plaintiff admittedly did not effect service of the Order to Show Cause in accordance with its directives, plaintiff submitted an affidavit of service indicating that the Order to Show Cause was served on the defendant on July 28, 2022, when it was served on "Verita Alsenal, a receptionist employed by Smith Street Realty, who was allegedly authorized to accept service on the defendant's behalf.

The Court denied the motion on the ground that the plaintiff failed to serve the order in accordance with its directives holding that "[t]he method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with (*Stern v. Garfinkle*, 22 A.D.3d 694, 694, 805 N.Y.S.2d 395, 395, citing *Matter of McGreevy v. Simon,* 220 A.D.2d 713, 633 N.Y.S.2d 177; *Matter of Bruno v. Ackerson,* 39 N.Y.2d 718, 384 N.Y.S.2d 765, 349 N.E.2d 865).

The plaintiff maintains that the Part 72 judge Court erred in directing that service of the Order to Show Cause be made on the defendant by personal and electronic mail on Jayson Blau, Esq., and Jayson Blau & Associates. Plaintiff argues that since there was no action pending against the defendant at the time the Order to Show Cause was submitted for signature, the Part 72 Judge should have directed personal service on the defendant and that it was error to direct expedient service pursuant to CPLR 308(5) on defendant's attorney. In support of this argument, the plaintiff cites *Happy Age Shops, Inc. v. Matyas*, 128 A.D.2d 754, 513 N.Y.S.2d 714. There, as here, at the time the plaintiff moved by Order to Show cause for a preliminary injunction, there was no action pending against the defendant. In holding that the lower court erred in directing expedient service on defendant's purported attorney, the Appellate Division stated:

> It is axiomatic that a preliminary injunction is only available in a pending action *(see*, CPLR 6301; *Town of W. Seneca v. Smith*, 115 AD2d 1013). The plaintiff's assertion of jurisdiction over these defendants, based upon service of a copy of the summons and complaint upon the law firm which represented the defendants in the underlying lease dispute, is misplaced. The provision in the order to show cause for service upon these attorneys of the order and accompanying papers, including the summons and complaint, in support of the motion for the preliminary injunction, was based upon CPLR 2103 (b), which presupposes the existence of an

> already pending action in which an attorney has appeared. That provision is not a vehicle for affecting service of process. Moreover, there is no basis for the plaintiff's claim that this service provision in the order to show cause was intended by the court to authorize expedient service of the summons pursuant to CPLR 308 (5). Nothing in the papers submitted in support of the order to show cause indicated that such relief was either necessary on the ground of impracticality **or that it was being requested** *(see, Saulo v. Noumi*, 119 AD2d 657).

(*Happy Age Shops, Inc.*, 128 A.D.2d at 754–55, 513 N.Y.S.2d 710). The Appellate Division in *Happy Age Shops, Inc.* reversed the lower Court, which had granted plaintiffs motion for a preliminary injunction, and denied the motion.

Here, unlike in *Happy Age Shops, Inc.*, and *Saulo v. Noumi*, the plaintiff requested expedient service on defendant pursuant to CPLR 308(5). Although the Part 72 judge did not grant plaintiff's request to serve the defendant in the exact manner that the plaintiff requested, there there's no question that the plaintiff requested expedient service and that its request was granted. This Court must assume that the Part 72 judge concluded that the "Notice of Default and Thirty (30) Day Notice to Cure" justified expedient service. It is not for this court to decide whether this constituted error. It is well settled that a Justice should not modify or overrule an order of a fellow Justice of coordinate jurisdiction (*see,* 1 Carmody-Wait 2d, NY Prac, §§ 2:64–2:67; CPLR 2221; *Grossman v. Composto–Longhi,* 96 AD3d 1000, 1002; *Doscher v. Doscher,* 54 AD3d 890, 891).

In sum, motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision" (*Grimm v. Bailey,* 105 AD3d 703,704; *see also* CPLR 2221(d)). A motion to reargue is not designed as a vehicle to afford the unsuccessful party an opportunity to argue once again the very questions previously decided (*Gellert & Rodner v. Gem Community Mgt., Inc.*, 20 AD3d 388). Here, the plaintiff did not demonstrate that the court overlooked or misapprehend the facts or law or for some reason mistakenly arrived at its earlier decision and is attempting to reargue the same questions this Court previously decided.

Accordingly, it is hereby

ORDRED that the motion is in all respects **DENIED**.

This constitutes the decision and order of the Court.

Dated: June 1, 2023

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020