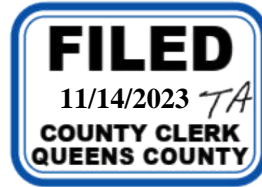


Sagy v Jet Auto Wreckers, Inc.
2023 NY Slip Op 35091(U)
November 8, 2023
Supreme Court, Queens County
Docket Number: Index No. 704755/2022
Judge: Leonard Livote
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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HONORABLE Leonard Livote IA Part 33
Justice

----- X

IGAL SAGY A/K/A YIGAL SAGY AND
S.Y. U.S.A. LINGERIE, INC.,

Index No.: 704755/2022

Motion Date January 31,
2023

Plaintiffs,
-against-

Motion Seq. No. 11

JET AUTO WRECKERS, INC., AND JOHN
DOE #1THROUGH JOHN DOE #25 THESE
NAMES BEING FICTITIOUS AND UNKNOWN
TO PLAINTIFF,

Defendants.

----- X

The following papers read on this motion by defendant Jet Auto
Wreckers, Inc. (Jet Auto) for leave to renew and reargue its
prior motion for summary judgment pursuant to CPLR 2221(d) and
(e), and upon renewal and reargument, granting summary judgment
dismissing plaintiff's complaint pursuant to CPLR 3212, or for
leave to amend its answer pursuant to CPLR 3025(b) to add the
affirmative defense of collateral estoppel; and for an order
dismissing the complaint of plaintiffs Igal Sagy a/k/a Yigal Sagy
(Sagy) and S.Y. U.S.A. Lingerie, Inc. pursuant to CPLR
3211(a)(3), (5) and (7); and awarding costs and expenses and
attorney's fees pursuant to 22 NYCRR 130-1.1.

Papers
Numbered

- Notice of Motion - Affidavits - Exhibits..... EF 20-50
Answering Affidavits - Exhibits..... EF 54-62
Reply Affidavits..... EF 65-66

Upon the foregoing papers it is ordered that this motion is
determined as follows:

In this action, plaintiffs allege that on March 6, 2012, Jet Auto, an independent contractor hired by the City of New York (the City) and the Department of Sanitation (DOS) to tow and dispose of abandoned vehicles, negligently and wrongfully towed his 1996 Ford Econoline van. The vehicle was registered to Samar Antar-Diad and was parked on private property between two houses, with the permission of the property owners, and with his license plates attached to the vehicle, which he used to store \$140,000 worth of merchandise and cash from his flea market business. By order dated February 23, 2018, the Honorable Kevin J. Kerrigan dismissed the complaint as against the City and DOS, holding that the actions of DOS personnel constituted discretionary acts for the City that were immune from liability for negligence in the performance of governmental functions.

Movant also previously moved for summary judgment, which was denied by the court's prior order dated August 21, 2017, and movant's subsequent motion to renew and reargue that order was likewise denied by order dated November 3, 2017 (collectively, the Prior Orders).

First, the branch of the instant motion seeking leave to reargue the Prior Orders is untimely insofar as Jet Auto made this motion long past thirty (30) days after it served a copy of the Prior Orders with written notice of its entry upon the plaintiffs' attorney on or about September 6, 2017, and February 19, 2018, respectively (CPLR 2221[d][3]; *Selletti v Liotti*, 45 AD3d 668, 669 [2d Dept 2007], *lv to appeal dismissed* 11 NY3d 773 [2008]). Timeliness notwithstanding, Jet Auto fails to demonstrate that it misapprehended any question of law or fact to warrant granting leave for reargument in any event (CPLR 2221[d]; *JPMorgan Chase Bank, N.A. v Novis*, 157 AD3d 776, 778 [2d Dept 2018]; *Salcedo v Demon Trucking, Inc.*, 146 AD3d 839, 840 [2d Dept 2017]).

With respect to renewal under CPLR 2221(e), a motion for leave to renew is the appropriate vehicle for seeking relief from a prior order based on a change in the law (CPLR 2221(e); *Sharan v Christiana Tr.*, 219 AD3d 1549 [2d Dept 2023]). The statute provides that a motion for leave to renew shall be based on new facts not offered on the original motion or "shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221(e); see *Wang v Lin*, 211 AD3d

1087, 1088 [2d Dept 2022]; *Deutsche Bank Natl. Tr. Co. v Elshiekh*, 179 AD3d 1017, 1020 [2d Dept 2020]).

However, absent circumstances set forth in CPLR 5015, after entry of a final judgment, a motion for leave to renew must be made before the time to appeal the final judgment has expired (see *Opalinski v City of New York*, 205 AD3d 917, 919 [2d Dept 2022], *lv to appeal dismissed*, 39 NY3d 935 [2022]). Here, it is undisputed that none of the circumstances set forth in CPLR 5015 apply to the facts in this case. Moreover, the time to appeal the Prior Orders has long since expired (CPLR 5513), and movant's instant motion for leave to renew is likewise untimely. In any event, contrary to movants' contentions, neither the police reports and other disclosure belatedly obtained (from a prior lawsuit in the Superior Court of New Jersey, Union County, captioned *Yigal Sagy and Sarit Shimshon v Lackland Self Storage, John Doe No. 1 d/b/a Lackland Self Storage and John Doe Nos. 2 to 99*, docket UNN-L-1913-11), nor this court's grant of summary judgment dismissing the instant action against the City and DOS due to governmental immunity for discretionary acts, would constitute new facts or law not available on the prior motion warranting renewal, particularly where conclusory alleged concealment of such disclosure was not reasonable justification for failure to present such facts on the original motion (see *Nunez v Yonkers Racing Corp.*, 218 AD3d 479, 480 [2d Dept 2023]; *Sperry Assoc. Fed. Credit Union v Lee*, 193 AD3d 1012 [2d Dept 2021]; *Mooklal v Clermont Farm Corp.*, 187 AD3d 740, 743 [2d Dept 2020]). As such, the determination made on summary judgment in the Prior Orders with respect to liability in this matter remains.

Turning to the branch of Jet Auto's motion seeking leave to amend the answer to include collateral estoppel as an affirmative defense, leave to amend a pleading should be freely given where the amendment is neither palpably insufficient nor patently devoid of merit, and the delay in seeking amendment does not prejudice or surprise the opposing party (CPLR 3025[b]; *Blanco Gomez v Principe*, 186 AD3d 466, 467 [2d Dept 2020]; *Lucido v Mancuso*, 49 AD3d 220, 227 [2d Dept 2008]). However, leave to amend is not warranted, as movant fails to sufficiently allege any previous judgment nor final determination on the merits in a prior action that would bar the instant matter (see *Siddiqui v Smith*, 207 AD3d 681, 683 [2d Dept 2022]; see also *Carter v Nouveau Indus., Inc.*, 187 AD3d 705, 707 [2d Dept 2020]; *Rudovic v*

Rudovic, 131 AD3d 1225, 1227 [2d Dept 2015]), and the allegations in the proposed answer are “palpably insufficient” to support an affirmative defense for collateral estoppel regardless (see *Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]).

The court has considered the parties’ remaining contentions regarding the relief sought in the notice of motion and finds them unavailing.

Accordingly, Jet Auto’s motion for leave to renew and reargue, and other relief, is denied.

Dated: November 8, 2023



J.S.C.
HON. LEONARD LIVOTE

