

J.K. v Viscardi Ctr. Inc.

2024 NY Slip Op 30707(U)

March 5, 2024

Supreme Court, Kings County

Docket Number: Index No. 506594/2020

Judge: Sabrina Kraus

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY**

PRESENT: HON. SABRINA B. KRAUS PART 57

Justice

-----X INDEX NO. 506594/2020

J.K., MOTION DATE N/A

Plaintiff,

THE VISCARDI CENTER INC, HENRY VISCARDI
SCHOOL, DIANA DEVIVIO, DOES 1-10, MOTION SEQ. NO. 003
Defendants.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48 – 65, as well as all documents on NYSCEF under this Index Number

were read on this motion to/for RENEW/REARGUE/RESETTLE

Plaintiff commenced this action by filing a summons and complaint on March 16, 2020.

On September 10, 2021, Plaintiff filed his motion for a default judgment.

That motion appears to have been marked submitted on or about October 25, 2021.

On Or about October 31, 2021, one of the named defendants, Diana DeVivio died.

By letter dated November 1, 2021, Defendants' counsel advised the court of her passing and requested a stay pursuant to CPLR § 1015(a). (NYSCEF Doc 39).

On April 25, 2022, Plaintiff's counsel filed a request for a preliminary conference.

On August 15, 2022, the court directed the parties to file a first compliance conference stipulation and order within 60 days. (NYSCEF Doc 43).

On August 23, 2022, Defendants' counsel again advised the court in writing of DeVivio's death and the "request" for a stay. The letter indicates that a copy of the death certificate was provided to the court separately via email. Counsel also asserted that there was a pending motion 506594/2020 JK V THE VISCARDI CENTER ET AL MOTION NO.003

before the court which needed to be addressed prior to the parties being able to enter the requested stipulation and order.

On October 24, 2022, the Court (Love, J) issued a decision and order denying Plaintiff's motion for a default judgment, holding that Plaintiff had failed to take proceedings pursuant to CPLR § 3215(c), for the entry of a judgment within one year and dismissing the action on that basis.

On December 9, 2022, Plaintiff filed a notice of appeal and the instant motion for reargument. Defendants filed opposition on December 16, 2022. On March 6, 2024, the Court confirmed with the parties that the motion had been fully briefed and that Plaintiff still wished to proceed with the motion, notwithstanding the fact that a new action was commenced.

For the reasons stated below the motion is granted.

DISCUSSION

Plaintiff moves for reargument based on his allegation that the motion for a default judgment was not untimely once the COVID tolls were applied. Plaintiff also argues that the Court should not have dismissed the action where defendants did not move for dismissal or argue that dismissal was required based on the delay in moving for a default judgment.

Defendants argue that the underlying motion for a default was properly decided because their opposition highlighted defects in service, and those arguments were adopted by the Court.

"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(d)(2). The purpose of such a motion is, "to afford a party an opportunity to establish that the court overlooked or

misapprehended the relevant facts, or misapplied any controlling principle of law." *Kent v. 534 East 11th Street*, 80 A.D.3d 106, 116 (1st Dep't 2010).

CPLR §2221(a) provides that a motion for leave to reargue shall be made to the judge who signed the order unless he is for any reason unable to hear it. On July 28, 2023, Justice Love was appointed to sit on the Appellate Division, Second Department. On August 18, 2023, Deputy Chief Administrative Judge Deborah A. Kaplan issued an administrative order (AO/131/2023) which provided:

Pursuant to the authority vested in me as Deputy Chief Administrative Judge, and in order to bring about the fair and expeditious resolution of all cases currently pending in New York City under the Child Victims Act (CVA), aggregated pursuant to 22 NYCRR 202.72(1), I hereby direct that those cases previously assigned to the Honorable Laurence Love, be forthwith reassigned to the Honorable Sabrina Kraus due to Justice Love's designation to the Appellate Division, Second Department. Justice Kraus is designated as co-coordinating judge with the Honorable Alexander Tisch for all purposes until further order.

Based on the foregoing, the court holds that Justice Love is unable to hear the motion pursuant to CPLR §2221(a) and that the motion is appropriately before this Court for determination.

While the Court finds that Plaintiff is correct in arguing the motion for a default judgment was timely after application of the COVID tolls, the Court also finds that there is a more compelling basis for reargument, admittedly not addressed by the parties, which is that the time the underlying decision and order was issued the action was stayed as a matter of law.

As noted above, Diana DeVivio, a named defendant in this action died on or about October 31, 2021.

CPLR § 1015(a) provides "(i)f a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties." N.Y. C.P.L.R. 1015 (McKinney).

The death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made pursuant to CPLR 1015(a) (see *Giroux v. Dunlop Tire Corp.*, 16 A.D.3d 1068, 791 N.Y.S.2d 769; *Gonzalez v. Ford Motor Co.*, 295 A.D.2d 474, 744 N.Y.S.2d 468; *Kelly v. Methodist Hosp.*, 276 A.D.2d 672, 714 N.Y.S.2d 524). **Moreover, any determination rendered without such substitution will generally be deemed a nullity** (see *Hicks v. Jeffrey*, 304 A.D.2d 618, 757 N.Y.S.2d 474; *Meehan v. Washington*, 242 A.D.2d 286, 660 N.Y.S.2d 737).

Singer v. Riskin, 32 A.D.3d 839, 839–40 (2nd Dept, 2006)(*emphasis added*).

Based on the foregoing, the motion to reargue is granted, and upon reargument the October 24, 2022, order dismissing the action is vacated. The action is stayed pending either a motion to substitute DeVivio’s estate or personal representative pursuant to CPLR § 1021, or Plaintiff, if so advised, may discontinue as to DeVivio. The motion for a default judgment shall be held in abeyance pending said substitution or discontinuance.

This constitutes the decision and order of the Court.

3/5/24
DATE


HON. SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: