

Russo v Rockin Jump NYC LLC
2024 NY Slip Op 35241(U)
April 22, 2024
Supreme Court, Westchester County
Docket Number: Index No. 61616/2023
Judge: William J. Giacomo
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

----- x
OKSANA RUSSO,

Plaintiff,

– against –

ROCKIN JUMP NYC LLC,

Defendant.
----- x

Index No. 61616/2023

DECISION & ORDER

Motion Seq. 3

The following papers, filed electronically on NYSCEF as document numbers 45-61, were read on the motion by the plaintiff, Oksana Russo, for (1) an order, pursuant to CPLR 2221 (f), granting renewal and/or reargue of defendant's prior motion to the extent that this Court, by Decision and Order dated January 30, 2024, granted an award of attorney's fees and costs in favor of the Defendant, and (2) for such other and further relief as this Court may deem just and proper.

Papers Considered

1. Notice of Motion/Affirmation in Support of Kurt Robertson, Esq./Exhibit 1-3
2. Affirmation in Opposition of Kevin T. Fitzpatrick, Esq./Exhibit A/Attorney Affirmation Pursuant to 22 NYCRR 202.8-b
3. Reply Affirmation of Kurt Robertson, Esq.
4. Filed Papers: Affirmation of Attorney Fees/Exhibits A-B/Proposed Order/Court Notices/Defendant's Letter Regarding In-Camera Invoices

Factual and Procedural Background

Plaintiff commenced the present action to recover damages for personal injuries allegedly sustained when she tripped and fell over a dangerous and defective condition at the defendant's premises. The Rockin Jump Ridge Hill Waiver purportedly signed by plaintiff, which is referred to by the parties on this motion as the "Participation Agreement," provides that any dispute arising

out of activities or incidents that occur while on the premises would be subject to arbitration. Moreover, in the Participation Agreement, plaintiff agreed to “pay [defendant] for any attorneys’ fees and/or costs incurred to enforce the Mediation, Non-Binding Arbitration portion of this agreement”

By Notice of Motion filed on October 2, 2023, defendant moved, pre-answer, for an order dismissing the complaint pursuant to CPLR 3211(a)(1) and (7), or alternatively for a stay of the action and compelling arbitration, and for an award of costs and fees pursuant to the terms of the Participation Agreement.

By Decision and Order, dated January 30, 2024 and entered January 31, 2024, this Court denied that branch of the defendant’s motion seeking to dismiss the complaint, granted that branch of the defendant’s motion to compel arbitration and for a stay to the extent that the action was stayed pending the completion of mediation and or non-binding arbitration as required by the parties’ Participation Agreement, and granted that branch of the defendant’s motion seeking an award of attorney’s fees and costs incurred as a result of the motion. Insofar as the defendant failed to submit an Affirmation of Legal Services with a detailed invoice for legal services and costs in support of the prior motion, this Court directed defendant to file a proposed order for attorney’s fees and costs with an Affirmation of Legal Services and detailed invoice of attorneys’ fees and costs within 20 days of entry of the Decision and Order.

On February 20, 2024, defendant filed a Proposed Order and an Affirmation of Attorneys’ Fees with exhibits. The exhibits included a redacted invoice for attorney fees with only the dates and amount charged for each date are visible. The legal services, hours and rate for each date listed were redacted. By Court Notice, entered on March 7, 2024, the Court directed defendant’s counsel to file an unredacted invoice for legal fees. By letter, dated March 13, 2024, defendant’s counsel requested permission to submit the unredacted invoices to the Court for in camera review. By Court Notice, entered March 18, 2024, the Court denied defendant’s counsel’s request to submit the invoices for in camera review, but directed that defendant’s counsel could redact any references in the invoice to legal strategy. Therein, the Court noted that plaintiff had the right to review and object to the legal services provided to defendant the basis for the requested legal fees.

To date, defendant’s counsel has not filed the invoice for legal fees with only legal strategy redacted.

Plaintiff now seeks to reargue or renew that branch of defendant's motion for an award of attorney's fees and costs incurred as a result of the prior motion.

Plaintiff contends that reargument should be granted as there is no authorities on point, cited by defendants, which support the award of attorney's fees and costs in defendant's favor. Plaintiff argues that there is no legally cognizable basis for defendant to allege that plaintiff had acted in a frivolous manner by commencing the personal injury action, as the purported dispute stemmed from forum selection and procedural issues.

Alternatively, plaintiff argues that renewal of the branch of defendant's motion seeking an award of attorney's fees and costs should be granted based upon the submission of proof that plaintiff submitted the dispute to mediation with AAA Arbitration in October 2023. Plaintiff contends that the legal theory raised in opposition to the defendant's motion did not require the submission of such proof. Plaintiff asserts that defendant's request for relief on the original motion centered on a theory that plaintiff was acting in a frivolous manner. Further, plaintiff argues that the present submissions demonstrate that plaintiff did not violate any portion of the Participation Agreement and that no attorney's fees or costs were incurred to enforce the mediation/arbitration terms of the Participation Agreement since plaintiff had already submitted an application for arbitration with AAA.

Defendant opposes the motion. Defendant contends that the branch of the motion seeking to reargue must be denied as plaintiff failed to demonstrate that the Court misapprehended the law and/or misstated the facts in enforcing the attorneys' fee provision of the Participation Agreement. Defendant asserts that plaintiff is not contesting the validity of the Participation Agreement or the fee provision, but rather raises a new argument that there is no basis for a fee award as plaintiff attempted to proceed to arbitration supported by newly produced evidence. Defendant argues that plaintiff failed to provide an excuse for the failure to submit proof of the demand for the arbitration on the underlying motion. Defendant further argues that, in any event, plaintiff's motion should be denied. Defendant asserts that it is uncontested that the Participation Agreement is valid and enforceable and the Court properly upheld the attorneys' fees and cost provision. Moreover, defendant asserts, inter alia, that plaintiff's demand for arbitration was untimely as defendant's prior motion to enforce the Participation Agreement was filed on October 2, 2023, before the demand for arbitration.

DISCUSSION

Reargument

A motion 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]). “While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented” (*Ahmed v Pannone*, 116 AD3d 802, 805 [2d Dept 2014] [internal quotation marks omitted]).

Here, plaintiff failed to demonstrate that the court overlooked or misapplied the facts or a controlling principle of law (CPLR 2221 [d][2]; *Frenchman v Lynch*, 97 AD3d 632 [2d Dept 2012]). The fee and cost provision of the Participation Agreement entitled defendant to an award of attorneys’ fees and costs for its motion which sought to enforce the arbitration/mediation term of the Participation Agreement. Accordingly, neither defendant nor the Court were required to cite to, nor rely upon, caselaw with respect to the award of costs and sanctions based upon frivolous conduct. Therefore, that branch of plaintiff’s motion seeking leave to reargue defendant’s motion with respect to the award of attorneys’ fees and costs is denied.

Renewal

“A motion for leave to renew must be based upon new facts, not offered on the prior motion that would change the prior determination, and the party seeking renewal must have a ‘reasonable justification’ for the failure to present such facts on the original motion” (*Aronov v Shimonov*, 105 AD3d 787, 788 [2d Dept 2013], quoting CPLR 2221 [e][3]). “While a court has discretion to entertain renewal based on facts known to the movant at the time of the original motion, the movant must set forth a reasonable justification for the failure to submit the information in the first instance. When no reasonable justification is given for failing to present new facts on the prior motion, the Supreme Court lacks discretion to grant renewal” (*Bank of N.Y. Mellon Trust Co., N.A. v Talukder*, 176 AD3d 772, 773-774 [2d Dept 2019] [internal quotation marks and 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” (*May v May*, 78 AD3d 667 [2d Dept 2010] [internal quotation marks omitted]).

Here, plaintiff fails to offer a reasonable justification for failing to present proof of the demand for arbitration/mediation with AAA Arbitration in opposition to defendant’s motion (*see*

CPLR 2221 [e][3]). Rather, it appears that plaintiff failed to submit the proof of the demand for arbitration/mediation based on a misapprehension as to defendant's argument with respect to the request for an award of attorneys' fees and costs.

In any event, as argued by defendant, plaintiff's demand for arbitration/mediation was submitted after defendant filed its prior motion to enforce the arbitration/mediation provision of the Participation Agreement. Therefore, defendant had already incurred attorneys' fees and costs for the prior motion when plaintiff sought to arbitrate and/or mediate the claim. In view of the foregoing, that branch of plaintiff's motion seeking leave to renew defendant's motion with respect to the award of attorneys' fees and costs is denied.

The Court has considered the remaining arguments and finds them to be without merit.

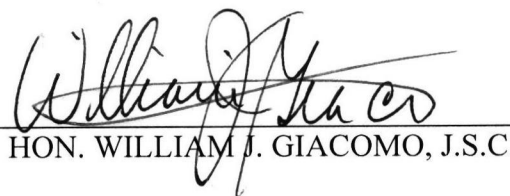
Accordingly, it is hereby

ORDERED that plaintiff's motion, pursuant to CPLR 2221, for leave to renew and/or reargue is denied in its entirety; and it is further

ORDERED that, within 20 days of entry of this decision and order, defendant shall file on NYSCEF the invoices for attorneys' fees incurred with respect to defendant's prior motion (motion sequence no. 2) with **only** legal strategy, if any, redacted; and it is further

ORDERED that the failure of defendant to file said invoices within 20 days of entry of this decision and order shall be deemed a waiver of the award of attorneys' fees such that defendant will only be entitled to an order awarding costs for defendant's prior motion based upon the proof of costs previously filed (NYSCEF doc. no. 48).

Dated: White Plains, New York
April 22, 2024



HON. WILLIAM J. GIACOMO, J.S.C.