Cooke v Greenhouse Hudson, LLC
2024 NY Slip Op 35548(U)
September 9, 2024
Supreme Court, Columbia County
Docket Number: Index No. E012022018190
Judge: Richard L. Mott
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF COLUMBIA

DECISION/ORDER

ERIN GOLDMAN COOKE,

Plaintiff,

Index #: E012022018190

-against-

GREENHOUSE HUDSON, LLC, GREEN STREET FLORAL, LLC, JENNIFER MOJO, individually and as aider and abettor, and DAVID MOJO, individually and as aider and abettor,

Richard Mott, J.S.C.

Defendants.

GREEN STREET FLORAL, LLC,

Third-Party Plaintiff,

-against-

ERIN GOLDMAN COOKE,

Counterclaim Defendant,

-and-

G.G. & G. FLOWER CO., LLC and DARREN COOKE,

Third-Party Defendants.

Motion Return Date: July 31, 2024 (Motion Seq. #s 11, 12)

APPEARANCES:

Plaintiff:
Carlo A. Camurati de Oliveira, Esq.
Cooper Erving & Savage, LLP
20 Corporate Woods Blvd., Suite 501
Albany, NY 12211

Defendants:
Edward J. Phillips, Esq.
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Third-Party Defendants:
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Mott, J.

This action arises from the sale of a retail flower shop (hereinafter "the Shop") and the real estate upon which the Shop is situated, from Plaintiff, Erin Goldman Cooke, who owned same with her husband, Third-Party Defendant, Darryn Cooke, under the auspices of Third-Party Defendant, G.G. & G. Flower Co., LLC, ("hereinafter "GGG"), to Defendants, Jennifer and David Mojo. Defendants move for re-argument relative to this Court's Decision and Order dated March 20, 2024, which (a) dismissed Defendant, Green Street Floral, LLC's (hereinafter "Green Street") counterclaim for breach of contract; (b) dismissed Green Street's claim against GGG for breach of the duty of good faith and fair dealing; (c) denied Defendants' motion for summary judgment dismissing Cooke's claims regarding breach of an Employment Agreement, denial of her request for reasonable accommodations, and retaliation for having asked for a reasonable accommodation; and (d) denied Defendants' motion to dismiss all claims against David Mojo.

Additionally, Defendants move to strike the Note of Issue because Cooke's expert witness disclosure, filed on the same day as the Note of Issue, revealed that two doctors who had examined the Plaintiff had not previously been disclosed. Cooke opposes both motions.

BACKGROUND

The sale of the Shop occurred in July 2021. Defendant, Green Street, runs the Shop and Defendant, Greenhouse Hudson, LLC, (hereinafter "Greenhouse"), owns the real property. Part of the transaction involved Cooke's agreement to manage the day-to-day operations of the Shop on behalf of the Mojos because they were residing in Seattle, WA, and were unable to move to New York until June 2022. A Post-Closing Employment Agreement (hereinafter "Employment

Agreement") was signed in September 2021 which provided for Cooke to work a minimum of 30 hours per week at $35.00 per hour as an "at will" employee through June 30, 2022.

In December 2021, Cooke advised the Mojos that she suffered from asthma, anemia, and a blood disorder, rendering her more susceptible to COVID-19 and requested accommodations, including a socially distanced workstation and permission to work from home. The Mojos agreed to some accommodations but did not agree to allow Cooke to work fully from home as essential duties of her position as Shop manager required her to be physically present. The Shop was re-opened to the public later that month with COVID-19 safety measures including a plexiglass divider at the front register, vaccination requirements for employees, and a mask requirement for customers.

Cooke advised the Mojos on February 12, 2022, that she was terminating her employment with the Shop effective February 14, 2022, because the Mojos had removed the plexiglass divider and other COVID-19 safety measures. Cooke then deleted all emails from her business email account. On February 13, 2022, David Mojo advised Cooke not to report for work on the 14th. On March 3, 2022, the Mojos demanded that Cooke provide them with all keys to the premises and access to the Shop's Square and GoDaddy accounts.

Cooke thereafter commenced this action asserting claims of discrimination, failure to accommodate a disability, and retaliation pursuant to New York's Human Rights Law (Executive Law Article 15). Defendants answered, with Green Street asserting counterclaims against Cooke for breach of contract, acting as a faithless servant, conversion, and tortious interference with a business relationship. Green Street also asserted claims against Third-Party Defendant, GGG, for breaching the duty of good faith and fair dealing in the sale of the Shop, and against Third-Party

Defendant, Darryn Cooke, for breach of contract relating to his provision of web-hosting services to the Shop.

DEFENDANTS' CONTENTIONS

Defendants argue that the Court, in deciding the summary judgment motion, overlooked findings made by the Court earlier in the case in deciding Cooke's motion to dismiss. One such finding was that the Mojos were entitled, under the Asset Purchase Agreement, to assign their rights and interests in the Shop to Green Street, and that they had done so. This included assigning to Green Street the obligations of Cooke's Employment Agreement. The Court also previously found that GGG had a contractual relationship with Green Street and that all rights to the Shop were transferred to the Mojos, who then assigned same to Green Street. Thus, in making the Decision and Order challenged herein, Defendants claim the Court overlooked the prior rulings and undisputed facts when it found that Greenhouse was the "signatory to the Employment Agreement" and, consequently, Green Street had not established the existence of a contract between itself and Cooke. The Mojos had the right to make the assignment to Green Street and did so, thus Green Street may enforce the terms of the Employment Agreement. Accordingly, Green Street's claim for breach of contract should be reinstated.

Defendants further argue that the Court's finding on the dismissal motion that Greenhouse was "the signatory to the Employment Agreement" is erroneous because only Cooke's signature appears on the Employment Agreement. The signature line provided therein for "Company" is blank. Thus, the Court's finding that the "Employment Agreement was between Greenhouse and plaintiff, not Green Street and plaintiff" is erroneous. It is also inconsistent with the Court's own findings that Cooke "was not employed by Greenhouse

Hudson within the meaning of the HRL" and that "Green Street owns the [Shop]". Therefore, Green Street's counterclaim against Cooke for breach of contract should be reinstated.

Additionally, because the Court overlooked the Mojos' assignment of their rights to Green Street, the Third-Party claim against GGG for breach of the duty of good faith and fair dealing should also be reinstated.

Defendants also claim that the Court misapprehended the basic terms of the Employment Agreement in denying their motion for summary judgment dismissal of Cooke's breach of contract claim regarding failing to schedule her for at least 30 hours of work per week. Whereas the Employment Agreement states, "[Cooke] shall devote a minimum of 30 hours per week to the Company", Defendants assert this does not mean that the Shop was obligated to schedule Cooke for 30 hours of work. The obligation to devote 30 hours per week was solely on Cooke, such obligation was not "bilateral" so as to require the Shop to schedule Cooke for 30 hours of work. Defendants contend that such an interpretation would render meaningless the immediately preceding sentence which states that Cooke "will devote such time and attention as are required or reasonably requested by the Company in order to render the services described herein". They also contend that interpreting the Employment Agreement to require a minimum of 30 hours of work per week is inconsistent with the "Employment at Will" provision of the contract.

Cooke's Failure to Accommodate Claim should have properly been dismissed because Cooke quit in the same conversation in which she objected to the removal of the plexiglass divider, thereby failing to engage in the "good faith interactive process" required by the Human Rights Law.

As to Cooke's claim for retaliation, Defendants assert that the Court misapprehended the holding in *Murphy v Department of Education of the City of New York*, 155 AD3d 637 (1st Dept., 2017), resulting in the erroneous finding that an issue of fact exists regarding whether "the Mojos deliberately made working conditions so intolerable that [Cooke] was forced into involuntary resignation after she requested accommodations for her medical condition".

Finally, Defendants contend that the Court misapplied the holdings in *Griffin v Sirva, Inc.,* 29 NY3d 174 (2017) and *Palmer v Cook*, 64 Misc.3d 1222(A) in finding that an issue of fact exists as to whether David Mojo "had the power of dismissal and control over [Cooke's] conduct".

PLAINTIFF'S CONTENTIONS

In opposition, Cooke points out that the previous holdings upon which Defendants rely were rendered by the Court in deciding a pre-discovery motion to dismiss, whereas the standard is different on a motion for summary judgment. On the motion to dismiss, the Court was bound to accept as true the allegations in the pleadings. The summary judgment motion, by contrast, is decided upon a post-discovery, full evidentiary record.

Cooke notes that the Court's finding, on the motion to dismiss, that "[T]here is nothing in the purchase agreement or employment agreement that prevented the [Mojos] from assigning their rights to other entities" is factually correct. However, the Asset Purchase Agreement states, "[T]his Agreement may not be assigned without the prior written consent of the Seller [the Cookes, in their capacity as principals of GGG] in each instance and any purported assignment made without such consent shall be void". During her pre-trial deposition, Jennifer Mojo testified that prior written consent was never provided by the Cookes for the Mojos to assign their rights under the Asset Purchase Agreement to Green Street Floral. Accordingly, the purported assignment of the Asset Purchase Agreement from the Mojos to Green Street is void and the Court correctly ruled that Green Street could not assert a claim thereunder against GGG.

Additionally, the Employment Agreement only allowed for Greenhouse to assign their rights therein under certain conditions, which have not occurred. Accordingly, the Court properly found that the Employment Agreement was made between Greenhouse and Cooke, not Green Street and Cooke.

Cooke also asserts that the Court's statement in deciding the pre-discovery motion to dismiss, "G.G.&G. did have a contractual relationship with Green Street Floral. All rights to the G.G.&G. d/b/a Rosery Flower Shop were transferred and assigned to Green Street Floral" is mere dicta, thus the Court is not bound by the law of the case doctrine, especially where it is in direct contradiction to the post-discovery record. Based upon the full, post-discovery record, the Court properly found that Green Street was not a party to the Asset Purchase Agreement or the Employment Agreement.

Cooke further argues that the Court properly dismissed all breach of contract claims asserted by Green Street because Defendants admitted that they never signed the Employment Agreement. Though Defendants claim that an unsigned contract may be enforceable where there exists objective evidence establishing that the parties intended to be bound, the record herein is devoid of any evidence that Cooke intended to be bound by any agreement with Green Street that had not be assigned in accordance with the contract.

In opposition to the Defendants' motion to strike the Note of Issue, Cooke contends that her expert witness disclosure was timely filed. She also asserts that Defendants were provided unrestricted HIPAA-compliant authorizations for all of Cooke's health care providers. She claims that Defendants were on notice of Dr. Celestin because there is a mention in one of Cooke's medical records that she was referred for treatment to Dr. Celestin. Cooke asserts that Defendants therefor had the opportunity to search through the medical records, discover the reference to Dr.

Celestin and obtain the records. Additionally, discovery is now closed, a point which Defendants have previously argued herein, and Defendants are not entitled to further discovery.

DISCUSSION/MOTION TO REARGUE

Pursuant to CPLR § 2221(d)(2), "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". "A motion to reargue is premised upon the theory that the Court has overlooked significant facts or misapplied the law in its original decision". *Town of Poestenkill v New York State Dept. of Envtl. Conservation*, 229 AD2d 650, 651 (3d Dept., 1996); *Greene Major Holdings, LLC v Trailside At Hunter, LLC*, 148 AD3d 1317, 1319 (3d Dept., 2017). A motion to reargue is addressed to the sound discretion of the Court. Id.

"The law of the case doctrine generally precludes relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue" (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 40 AD3d 1177, 1179 [3d Dept., 2007]). "However, a court may revisit a prior ruling where there is subsequent evidence affecting the prior determination (*see Matter of Hersh*, 129 AD3d 840, 840, 11 NYS3d 630 [2015]; *Lipp v Port Auth. of N.Y. & N.J.*, 57 AD3d 953, 954, 871 NYS2d 307 [2008]; *Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 40 AD3d at 1179)". *Gitman v Martinez*, 169 A.D.3d 1283, 1284 (3d Dept., 2019). The doctrine is "amorphous" in that it "directs a court's discretion," but does not restrict its authority. *People v Evans,* 94 NY2d 499, 503 (2000), quoting *Arizona v California*, 460 US 605, 618, 103 S Ct 1382, 75 L Ed 2d 318 (1983); *Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, supra.

The findings made by the Court in the pre-discovery motion to dismiss were not based upon a full evidentiary record and, because the motion to dismiss requires a court to accept the allegations in the pleading as true, said motion does not constitute a "full and fair opportunity to address the issue" of whether the assignment of rights was validly executed. Furthermore, subsequent evidence affecting the prior determination was developed in discovery and presented on the summary judgment motion. The Court, in deciding the summary judgment motion, was not bound by the law of the case doctrine to adhere to findings made during the motion to dismiss.

Furthermore, the Court on this motion does not perceive that it overlooked or misapprehended any matters of law or fact. Accordingly, the Court denies the motion to reargue.

DISCUSSION/MOTION TO STRIKE THE NOTE OF ISSUE

"While a note of issue will generally be stricken if the case is not ready for trial, the motion to strike can be denied where the parties had sufficient time to complete discovery (*see Simmons v Kemble*, 150 A.D.2d 986, 987, 541 N.Y.S.2d 875 [1989]; *Bycomp, Inc. v New York Racing Assn.*, 116 A.D.2d 895, 498 N.Y.S.2d 274 [1986]). To vacate the note of issue, discovery requests must be legitimate and pending (*see Tilden Fin. Corp. v Muffoletto*, 161 A.D.2d 583, 555 N.Y.S.2d 161 [1990]), not resolved or contrived." *Ireland v. GEICO Corp.*, 2 A.D.3d 917, 917-918 (3d Dept., 2003); *Jablonsky v Nerlich*, 189 AD3d 1561, 1563 (3d Dept., 2020).

Defendants contend that there are two doctors mentioned in the Expert Witness Disclosure who were not previously identified to them by Cooke. Defendants assert that discovery is incomplete because they were unaware of treatment by Dr. Jacqueline Basjoff, Ph.D. and Dr. Jocelyn Celestin, M.D. and were therefore unable to obtain their records.

Here, Defendants point to their Combined Demands For Disclosure To Plaintiff, (NYSCEF Doc. 11), which includes a Demand for Expert Information. Defendants' Combined Demands do not include a request for names and addresses of treating health care providers, or a demand for medical records and/or medical authorizations. Cooke's response to Defendants' Demand for Expert Information was timely, having been filed simultaneously with the Note of Issue, in accordance with the Expert Disclosure Rule of the Third Judicial District, and there is no claim that it is insufficient. Defendants, in their original motion submission, point to no outstanding discovery demand which sought the names and addresses of treating health care providers. Defendants have failed to establish herein that there is a "legitimate and pending" discovery demand with which Cooke has failed to comply. *Ireland v. GEICO Corp*., supra.

However, in their reply papers, Defendants refer to their First Set of Interrogatories to Plaintiff, which, at Interrogatory #8, asks for Cooke to "[I]dentify all of Cooke's medical and psychological health care providers…for the past 10 years". The referral to Dr Jocelyn Celestin is part of a medical report dated December 5, 2013, clearly falling within the time frame of Interrogatory #8. While it appears that Cooke did not properly respond to the Interrogatory, Cooke has not had an opportunity to respond to new information first set forth in Defendants' reply papers. Accordingly, the Court hereby denies the motion to strike the Note of Issue, without prejudice, and with leave to resubmit.

Any other contentions of the parties have been considered and are deemed to be without merit or have been rendered academic.

Therefore, it is hereby

ORDERED, that Defendants' motion to reargue is denied; and it is further

ORDERED, that Defendants' motion to strike the Note of Issue is denied without prejudice, with leave to resubmit.

Counsel are directed to appear for a conference on September 24, 2024, at 1:00 PM.

This shall constitute the Decision/Order of the Court. The Court is e-filing the original of this Decision/Order, relieving the parties of their obligations, pursuant to CPLR §2220, regarding filing and entry thereof, but that does not relieve the parties of their obligations regarding service of same with notice of entry thereon.

ENTER

Dated: September 9, 2024
Hudson, NY

Richard Mott, J.S.C.

Papers considered:

Motion seq. #11
1. Notice of Motion dated June 20, 2024; and Memorandum of Law in Support.
2. Declaration of Carlo A.C. de Oliveira, Esq., in Opposition, dated July 3, 2024, with Exhibits A-E; and Memorandum of Law in Opposition.
3. Memorandum of Law in Reply.

Motion seq. #12
1. Notice of Motion dated July 10, 2024; and Affirmation of Edward J. Phillips, Esq., in Support, dated July 10, 2024, with Exhibits A-C.
2. Declaration of Carlo A.C. de Oliveira, Esq., in Opposition, dated July 24, 2024, with Exhibit 1; and Memorandum of Law in Opposition.
3. Reply Affirmation of Edward J. Phillips, Esq., with Exhibit D.