

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

DONNA ANNE MCCANN,

Plaintiff(s),

Index No. 19236/09

-against-

Motion Submitted: 7/20/10

Motion Sequence: 003

JEFFREY A. MANHEIMER and MANHEIMER &
CHARNAS, LLP,

Defendant(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Plaintiff moves this Court, by order to show cause, for an Order granting renewal and re-argument of her opposition to a prior determination of this court which granted defendants' dismissal motion. The Court granted defendants' dismissal motion in an Order dated May 5, 2010. Defendants oppose the requested relief.

Upon review of defendants' motion to dismiss the complaint pursuant to CPLR §3211 (a)(1) and (a)(5) and plaintiff's opposition thereto, in addition to the papers and exhibits submitted in support of and in opposition to the instant motion, this Court has determined that it would be a provident exercise of its discretion to grant plaintiff's motion to reargue based on the finding that this Court overlooked or misapprehended a matter of law related to the standard for review of defendants' dismissal motion (*see Matter of Bastien v. Motor Veh. Acc. Indem. Corp.*, 62 A.D.3d 791, 877 N.Y.S.2d 905 (2d Dept., 2009); *Barrett v.*

Jeannot, 18 A.D.3d 679, 795 N.Y.S.2d 727 [2d Dept., 2005]). Thus, plaintiff's motion to reargue is granted.

Defendants' motion to dismiss made pursuant to CPLR § 3211 was not properly made as such, and should have been treated by the Court as a motion for summary judgment, upon notice to the parties (*CPLR § 3211[c]; Mihlovan v. Grozavu*, 72 N.Y.2d 506, 534 N.Y.S.2d 656, 531 N.E.2d 288 [1988]). Defendants' dismissal motion pursuant to CPLR § 3211(a)(1) and (a)(5) was filed on or about October 21, 2009, well after defendants interposed their answer on or about June 9, 2009. Thus, it was within this Court's discretion to treat the dismissal motion as one for summary judgment.

Although plaintiff treated defendants' dismissal motion as one for summary judgment from the outset, defendants did not consider their motion to be made pursuant to CPLR § 3212 as is evidenced by their reply filed in the original motion sequence (page 3, paragraph 6, fn. 2), and in their opposition to the instant motion (page 3, paragraph 7, fn. 2). Because this matter does not exclusively involve issues of law which were fully appreciated and argued by defendants in the context of a summary judgment motion, this Court hereby vacates its order of May 5, 2010 dismissing the complaint and denying plaintiff's cross-motion for summary judgment as moot (*see F&T Management & Parking Corp. v. Flushing Plumbing Supply Co., Inc.*, 68 A.D.3d 920, 893 N.Y.S.2d 66 (2d Dept., 2009); *Moutafis v. Osborne*, 18 A.D.3d 723, 795 N.Y.S.2d 716 [2d Dept., 2005]).

All motions are adjourned to October 18, 2010 at which time counsel for the parties shall appear for a conference before the Hon. Karen V. Murphy at 9:30 a.m. In view of the fact that the Court intends to treat defendants' motion to dismiss as one for summary judgment, the parties shall submit any additional proof to buttress their positions regarding that motion only on or before October 18, 2010.

The foregoing constitutes the Order of this Court.

Dated: September 30, 2010
Mineola, N.Y.


J. S. C.

ENTERED
OCT 13 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE