

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

CASCO SECURITY SYSTEMS, INC.,

Plaintiff,

v.

DECISION AND ORDER

INDEX No. 2003/09484

DAVENPORT MACHINE, INC., and
BRINKMAN INTERNATIONAL GROUP, INC.,

Defendant.

Defendants move for renewal and for reargument. The court has considered all the papers submitted in support of the motion, and concludes, particularly in view of the 11th hour tactics employed here, which brought defendants' original motion on to be heard only the Wednesday before a long scheduled Monday trial, that no response thereto need be filed and that oral argument is not necessary or desirable.

That aspect of defendants' motion seeking renewal is based on allegedly new evidence obtained from plaintiff's expert shortly after subpoenas were served on him only yesterday, less than a week before a scheduled trial in a matter that has been pending since 2003. Defendants seek reargument based on the contention that the court overlooked or misapprehended matters of fact and law in determining the prior motions.

In 1999, the Legislature codified the rules governing motions for leave to renew and motions for leave to reargue. L 1999, ch 281. In mandatory terms, the Legislature directed, among other things, that motions for *leave to renew* "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]). The Legislature further directed that motions 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 (2). These requirements have been strictly enforced, particularly the requirement that the party seeking leave to renew must proffer a reasonable excuse for failing to come forward with the new material earlier. See Robinson v Consolidated Rail Corp., 8 A.D.3d 1080 (4th Dept. 2004) ("Although a court has discretion to 'grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made,' it may not exercise that discretion unless the movant establishes a 'reasonable justification for the failure to present such facts on the prior motion .'"); Greene v New York City Housing Auth., 283 A.D.2d 458, 459 (2d Dept. 2001) ("In light of the mandatory language ...

we reject the plaintiffs' contention that the Supreme court had discretion to grant renewal, notwithstanding their omission of a reasonable justification.") The distinction between a motion for leave to renew and a motion to reargue is not academic, since no appeal lies from an order denying reargument. Empire Ins. Co. v Food City, 167 A.D.2d 983 (4th Dept. 1990).

"The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if separately made." CPLR 2221 (f). The court therefore separately considers each part of plaintiffs' combined motion.

RENEWAL

That part of defendants' motion seeking renewal is based on two new affidavits. The first is the affidavit of a litigation paralegal in defense counsel's law firm who reports that, after the subpoena was served yesterday on plaintiff's expert, the expert told her that he thought the matter would settle and that he would need more time to pull the documents together. He added that he was only doing a favor for a friend when previously he gave his expert affidavit. The second is the affidavit of defense counsel herself, who states that she talked to her defense expert at some unspecified time, and that he reported that he had a conversation with plaintiff's expert (again the time is not specified) who acknowledged that the building met fire code specifications notwithstanding his affidavit to the

contrary.

Because there is no excuse for the timing of defendants' presentation of these two new affidavits, the motion for renewal is denied. Evidently, investigation of plaintiff's expert's opinion only began yesterday, yet with the trial approaching on Monday. Similarly, the subpoena was served only yesterday. The motion appears to be a delaying tactic.

In any event, the court assumed in its original decision, as it had to in order to grant summary judgment to plaintiff, that the building indeed met code as alleged in the defense expert's affidavit. So the credibility of plaintiff's expert was quite beside the point. Accordingly, the new evidence proffered would not have any effect on the decision, and the motion for renewal must be denied. See Renna v. Gullo, 19 A.D.3d 472 (2d Dept. 2005) (motion denied in part because the new facts tendered would not have changed the outcome) Gorman v. Ochoa, 2 A.D.3d 582 (2d Dept. 2003) (same); Zuccarini v. Ziff-Davis Media, Inc., 306 A.D.2d 404, 406 (same).

REARGUMENT

The balance of defense counsel's affidavit and the supporting memorandum is devoted to the proposition that the court misapprehended the law of fraudulent inducement as it applies to an affirmative defense. Yet these arguments were presented on the original motion and stressed during oral

argument. The one new wrinkle presented is that the court should have only dismissed the affirmative defense, and left for trial the question of the meeting of the minds. Yet even that aspect was fully addressed in plaintiff's cross-motion, i.e., that we have a signed contract with no question of Henderson's authority given that the asset purchase had closed, and that plaintiff only challenged the validity of the same by reference to fraud. Given the clear articulation in the cross-motion of this position, it was incumbent on defendants to "lay bare"¹ their proofs to show that, quite aside from the asserted fraud, there was no meeting of the minds or that otherwise the formalities of contract formation were not present. Defense counsel's reply affirmation, however, wholly fails to address, even, the issue of contract formation in connection with the fire alarm contract. Nor is the issue raised in defendants' original motion papers; indeed Laniak stated in his affidavit: "I authorized James Henderson to have Casco make the necessary changes to remediate the Fire Code violation." Laniak further recited, "After the fire alarm contract was executed by James Henderson. . ." Accordingly, this aspect of the motion to reargue is denied.

¹ In Oot v. Home Ins. Co. of Indiana, 244 A.D.2d 62, 676 N.Y.S.2d 715 (4th Dept. 1998) it was stated: "Further, '[i]n opposing a motion for summary judgment, a defendant must lay bare his proof and show that a genuine question of fact exists' (Little v. Blue Cross of W.N.Y., 72 A.D.2d 200, 204, 424 N.Y.S.2d 553). Defendant has not done this."

The balance of the motion is just a rehash of the arguments raised originally. If the question of code compliance is as complicated as defendants only now characterize it, then the fraud in the inducement defense is precluded as predicated on truly expert opinion, N.Y. PJI ¶3:20, comment at 151 (2005). But the unalterable fact remains that defendants swore in affidavits that they were able to discover the "fraud" within one or two business days after the contract was executed, and so therefore were manifestly able to successfully investigate on their own, something they wholly failed to do. In these circumstances, the doctrine of Danann Realty Corp. v. Harris, 5 N.Y.2d 317 is plainly applicable.

The grant of summary judgment was on liability only; the question of damages will be tried next week, which presumably will include the question of mitigation raised in defense counsel's affirmation in support of the motion to renew/reargue (at ¶¶ 15-16).

Finally, to the extent the papers contain a request for a stay from this court, that request, not referenced in the notice of motion, is denied. The timing of the original motions for summary judgment on the eve of trial and this motion for renewal/reargument suggest that delay is the sought after

objective, not avoidance of true prejudice.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: December 15, 2005
Rochester, New York