

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D16681
W/hu

_____AD3d_____

Submitted - October 3, 2007

ROBERT W. SCHMIDT, J.P.
ROBERT A. SPOLZINO
PETER B. SKELOS
ROBERT A. LIFSON
WILLIAM E. McCARTHY, JJ.

2006-09477

DECISION & ORDER

Terry Daniels, appellant, v Millar Elevator
Industries, Inc., defendant third-party
plaintiff-respondent; Marriott Marquis
Hotel, Inc., third-party defendant-respondent.

(Index No. 28379/90)

Goldstein & Goldstein, P.C., Brooklyn, N.Y. (Mark I. Goldstein of counsel), for
appellant.

Sonageri & Fallon, Garden City, N.Y. (James L. Sonageri of counsel), for defendant
third-party plaintiff-respondent.

Garbarini & Scher, P.C., New York, N.Y. (Thomas M. Cooper of counsel), for third-
party defendant-respondent.

In an action to recover damages for personal injuries, the plaintiff appeals, as limited
by her brief, from so much of an order of the Supreme Court, Kings County (Balter, J.), dated August
21, 2006, as denied her motion which was, in effect, for leave to renew her opposition to the prior
motion of the defendant third-party plaintiff to dismiss the complaint pursuant to CPLR 3404, which
had been granted in an order of the same court dated April 2, 1998.

ORDERED that the order is affirmed insofar as appealed from, with one bill of costs.

October 23, 2007

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In an order dated April 2, 1998, the Supreme Court granted the motion of the defendant third-party plaintiff to dismiss the complaint pursuant to CPLR 3404. By notice of motion dated February 28, 2006, the plaintiff moved “to reargue and or renew” her opposition to the prior motion, and to restore the action to active status. Since the plaintiff’s motion was based upon “a change in the law that would change the prior determination” it was, in actuality, a motion for renewal (CPLR 2221[e][2]; *see e.g. Auguste v Linden Gardens Condominium*, 8 AD3d 414, 416). Absent circumstances set forth in CPLR 5015, which are inapplicable here, a motion for leave to renew based upon a change in the law must be made before the time to appeal the final order has expired (*see Matter of Huie [Furman]*, 20 NY2d 568, 572; *Matter of Eagle Ins. Co. v Persaud*, 1 AD3d 356, 357; *Glicksman v Board of Educ./Cent. School Bd. of Comsewogue Union Free School Dist.*, 278 AD2d 364, 366; *see also Benitez v City of New York*, 2 AD3d 285). The plaintiff’s motion, in effect, for leave to renew was untimely since her time to appeal the order dated April 2, 1998, had expired. Nor did the plaintiff demonstrate any valid grounds for restoring this action. Accordingly, the plaintiff’s motion, in effect, for leave to renew her opposition to the prior motion of the defendant third-party plaintiff to dismiss the complaint pursuant to CPLR 3404, was properly denied.

SCHMIDT, J.P., SPOLZINO, SKELOS, LIFSON and McCARTHY, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court