

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

D21542
W/kmg

_____AD3d_____

Argued - November 25, 2008

STEVEN W. FISHER, J.P.
ANITA R. FLORIO
EDWARD D. CARNI
CHERYL E. CHAMBERS, JJ.

2008-00319

DECISION & ORDER

Staten Island New York CVS, Inc., appellant, v
Gordon Retail Development, LLC, et al.,
defendants third-party plaintiffs-respondents,
Virga Commercial Contractors, Inc., defendant second
third-party plaintiff-respondent, Nave, Newell & Stampfl,
Ltd., et al., defendants-respondents; Future Tech
Consultants of New York, Inc., third-party
defendant-respondent; et al., second third-party defendants.
(Action No. 1)

Staten Island New York CVS, Inc., et al., appellants,
v MXW Holding Corp., respondent.
(Action No. 2)

(Index Nos. 10972/03, 12197/04)

Allyn & Fortuna, LLP, New York, N.Y. (Nicholas Fortuna of counsel), for appellants.

O'Connell and Aronowitz, Albany, N.Y. (Jeffrey J. Sherrin and William F. Berglund of counsel), for defendants third-party plaintiffs-respondents in Action No. 1.

Newman Fitch Altheim Myers, P.C., New York, N.Y. (Charles W. Kreines and Martin I. Nagel of counsel), for defendant second third-party plaintiff-respondent in Action No. 1.

December 16, 2008

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STATEN ISLAND NEW YORK CVS, INC. v MXW HOLDING CORP.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York, N.Y. (Richard E. Lerner of counsel), for defendants-respondents in Action No. 1.

In related actions, inter alia, to recover damages for breach of contract, breach of warranty, and negligence, the plaintiffs Staten Island New York CVS, Inc., and CVS Pharmacy, Inc., appeal, as limited by their brief, from so much of an order of the Supreme Court, Richmond County (McMahon, J.), dated December 4, 2007, as amended December 5, 2007, as denied their motion denominated as one for leave to renew but which was, in actuality, a motion for leave to reargue their opposition to the motion of the defendants Gordon Retail Development, LLC, MPG Construction Corp., and MPG Construction, LLC, the cross motion of the defendant Virga Commercial Contractors, Inc., and the separate cross motion of the defendants Nave Newell & Stampfl, Ltd., and Nave Newell, Inc., for summary judgment dismissing the complaint insofar as asserted against each of them in Action No. 1, and the motion of the defendant MXW Holding Corp. for summary judgment dismissing the complaint in Action No. 2, which had been determined in an order dated September 7, 2007.

ORDERED that the appeal is dismissed, with one bill of costs to the respondents appearing separately and filing separate briefs.

A motion 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]). Here, the plaintiffs' alleged new evidence had not only been submitted to the Supreme Court in opposition to the original motions, cross motion, and separate cross motion but had also been considered by the court in determining them. Accordingly, that branch of the plaintiffs motion, denominated as one for leave to renew, was, in fact, a motion for leave to reargue (*see* CPLR 2221[e][2]; *Passeri v Children's Vil.*, 277 AD2d 366, 367; *Lowensohn v Bedford Garden Caterers*, 266 AD2d 266, 267), and no appeal lies from an order denying reargument (*see Haggerty v Agawam Realty, Ltd.*, 271 AD2d 408).

FISHER, J.P., FLORIO, CARNI and CHAMBERS, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court