

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

D21638
Y/prt

_____AD3d_____

Submitted - December 3, 2008

PETER B. SKELOS, J.P.
MARK C. DILLON
EDWARD D. CARNI
JOHN M. LEVENTHAL, JJ.

2007-10958

DECISION & ORDER

Amar S. Daulat, appellant, v
Helms Bros., Inc., respondent.

(Index No. 9905/03)

Amar S. Daulat, Astoria, N.Y., appellant pro se.

Salamon, Gruber, Blaymore & Strenger, P.C., Roslyn Heights, N.Y. (Sanford Strenger of counsel), for respondent.

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Queens County (Weiss, J.), dated October 16, 2007, which denied that branch of his motion which was denominated as one for leave to renew or reargue and to vacate a prior order dated May 25, 2007, but which was, in actuality, one for leave to reargue his opposition to the defendant's prior motion for summary judgment on the counterclaim, which had been granted by an order dated May 25, 2007, and denied that branch of his motion which was for recusal.

ORDERED that the appeal from so much of the order as denied that branch of the plaintiff's motion which was denominated as one for leave to renew or reargue and to vacate the order dated May 25, 2007, but which was, in actuality, one for leave to reargue his opposition to the defendant's prior motion for summary judgment on the counterclaim is dismissed; and it is further,

ORDERED that the order is affirmed insofar as reviewed; and it is further,

ORDERED that one bill of costs is awarded to the defendant.

December 30, 2008

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That branch of the plaintiff's motion which was denominated as one for leave to renew or reargue his opposition to the defendant's prior motion for summary judgment on the counterclaim and to vacate a prior order dated May 25, 2007, granting the defendant's motion for summary judgment on the counterclaim was, as the Supreme Court found, actually one for leave to reargue his opposition to the defendant's prior motion, the denial of which is not appealable (*see Trahan v Galea*, 48 AD3d 791, 792; *Eight In One Pet Prods. v Janco Press, Inc.*, 37 AD3d 402).

That branch of the plaintiff's motion which was for recusal failed to set forth proof which required the Supreme Court Justice hearing this motion to recuse himself. "Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal" (*People v Moreno*, 70 NY2d 403, 405). The plaintiff failed to set forth any proof of bias or prejudice to warrant the conclusion that the Justice's failure to recuse himself was an improvident exercise of discretion (*see Modica v Modica*, 15 AD3d 635, 636; *Matter of Firestone v Siems*, 272 AD2d 544, 545; *Anjam v Anjam*, 191 AD2d 531, 532-533).

The plaintiff's remaining contentions are without merit.

SKELOS, J.P., DILLON, CARNI and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court