

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

D33422
O/ct

_____AD3d_____

Argued - November 29, 2011

REINALDO E. RIVERA, J.P.
RUTH C. BALKIN
RANDALL T. ENG
LEONARD B. AUSTIN, JJ.

2010-08326

DECISION & ORDER

Brenda Andrews, etc., et al., appellants, v New York
City Housing Authority, respondent.

(Index No. 21511/04)

The Ashley Law Firm, PLLC (Arnold E. DiJoseph, P.C., New York, N.Y., of
counsel), for appellants.

Lester Schwab Katz & Dwyer, LLP, New York, N.Y. (Herzfeld & Rubin, P.C.
[Miriam Skolnik] of counsel), for respondent.

In an action to recover damages for personal injuries and wrongful death, etc., the
plaintiffs appeal from an order of the Supreme Court, Kings County (Schmidt, J.), dated June 11,
2010, which denied that branch of their motion which was for leave to renew their opposition to the
defendant's prior motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

By order dated March 18, 2008, the Supreme Court denied the defendant's motion
for summary judgment dismissing the complaint. By decision and order dated October 6, 2009, this
Court reversed that order and granted the defendant's motion for summary judgment (*see Andrews
v New York City Hous. Authority.*, 66 AD3d 619). In the order appealed from here, the Supreme
Court denied that branch of the plaintiffs' motion which was for leave to renew their opposition to
the defendant's prior motion for summary judgment. We affirm.

Pursuant to CPLR 2221(e), a motion for leave to renew "shall be based upon new
facts not offered on the prior motion that would change the prior determination . . . and shall contain

December 27, 2011

Page 1.

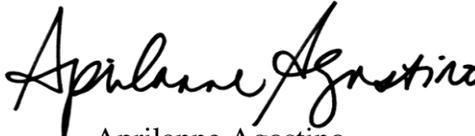
ANDREWS v NEW YORK CITY HOUSING AUTHORITY

reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221[e][2], [3]). “[O]n [a] postappeal motion [to renew] the [movant] bears a heavy burden of showing due diligence in presenting the new evidence to the Supreme Court in order to imbue the appellate decision with a degree of certainty” (*Estate of Essig v 5670 58 St. Holding Corp.*, 66 AD3d 822, 823 [emphasis omitted], quoting *Levitt v County of Suffolk*, 166 AD2d at 423). A “motion for leave to renew ‘is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation’” (*Renna v Gullo*, 19 AD3d 472, 472, quoting *Rubenstein v Goldman*, 225 AD2d 328, 329).

Here, the plaintiffs failed to meet their “heavy burden” of showing due diligence (*Estate of Essig v 5670 58 St. Holding Corp.*, 66 AD3d at 823; see *Zarecki & Assoc., LLC v Ross*, 50 AD3d 679, 680; see also *Ferdico v Zweig*, 82 AD3d 1151, 1152; *Elder v Elder*, 21 AD3d 1055, 1056; *Renna v Gullo*, 19 AD3d at 473; *Yarde v New York City Tr. Auth.*, 4 AD3d 352, 353; *Welch Foods v Wilson*, 247 AD2d 830, 830-831; *Levitt v County of Suffolk*, 166 AD2d at 423; *City of White Plains v Deruvo*, 159 AD2d 534, 534). Accordingly, the Supreme Court properly denied that branch of the plaintiffs’ motion which was for leave to renew.

RIVERA, J.P., BALKIN, ENG and AUSTIN, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court