

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

890

CA 12-00304

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

J.N.K. MACHINE CORPORATION,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TBW, LTD., WOOLSCHLAGER INC., AND BERNARD C.
WOOLSCHLAGER, DEFENDANTS-APPELLANTS.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (RICHARD F. GIOIA OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered October 25, 2011. The order denied the motion of defendants for leave to serve an amended answer and counterclaim.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Supreme Court properly denied defendants' motion seeking leave to amend their answer to include additional allegations in their counterclaim for the breach of an agreement allowing defendants to use plaintiff's inventory computer program. The court previously issued an order granting in part an amended motion by plaintiff for partial summary judgment, and we modified the order by denying the amended motion "on the issue concerning defendants' use of the computer inventory program owned by plaintiff," determining that there was a triable issue of fact whether the parties' written contract was supplemented by an oral agreement concerning defendants' use of the computer inventory program (*J.N.K. Mach. Corp. v TBW, Ltd.*, 81 AD3d 1438, 1440). "Although leave to amend should be freely granted, it is properly denied where the proposed amendment is lacking in merit" (*Manufacturers & Traders Trust Co. v Reliance Ins. Co.*, 8 AD3d 1000, 1001; see *Christiano v Chiarenza*, 1 AD3d 1039, 1040). Here, the proposed amendment improperly sought relief that was inconsistent with this Court's decision in the prior appeal. "Our prior decision in [a] case is the law of the case until modified or reversed by a higher court, and the trial court is bound by our decision" (*Senf v Staubitz*, 11 AD3d 997, 997 [internal quotation marks

omitted]).

Entered: September 28, 2012

Frances E. Cafarell
Clerk of the Court