

Coratti v The Wella Corp.

2007 NY Slip Op 32470(U)

August 2, 2007

Supreme Court, New York County

Docket Number: 0106168/2001

Judge: Walter Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____

PART _____

Justice

Index Number : 106168/2001

CORATTI, JOHN

vs

WELLA CORP.

Sequence Number : 004

RENEWAL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

AUG 10 2007

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/2/07

WALTER B. TOLUB ^{S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
JOHN CORATTI and SHARON CORATTI

Plaintiffs,

Index No. 106168/01
Mtn Seq.004

-against-

THE WELLA CORPORATION, WELLA CAPITAL, INC.,
THE WELLA CORPORATION, also known as WELLA
CAPITAL INC., L'OREAL USA PRODUCTS, INC.,
L'OREAL USA SALES INC., COSMAIR INC., and
L'OREAL USA PRODUCTS INC., also known as
L'OREAL USA SALES, INC., and COSMAIR, INC.,

Defendants.
-----x

WALTER B. TOLUB, J.:

By this motion, Plaintiffs seek an order granting renewal and reargument of this court's decision and order dated December 15, 2006 granting summary judgment to the Defendants. Plaintiffs motion is denied.

Facts

This is a products liability/tort action where Plaintiff John Coratti, a hair dresser, claims that from 1990 through 2000 he spent the majority of his work day coloring hair with products manufactured by Defendants L'Oreal and Wella. Defendants moved for summary judgment on the basis of Plaintiff's inability to prove the dispositive issue of causation. Plaintiff brought this motion to renew and reargue this court's decision and order dated December 15, 2006 which granted Defendants' motion for summary judgment. The decision and order stated that Plaintiffs "failed

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to present reliable or admissible expert opinion evidence that exposure to the chemicals in Wella's hair coloring products Koleston Perfect, Color Perfect and Color Touch and L'Oreal's haid coloring products Majirel and Majiblond can cause Multiple Chemical Sensitivities [MCS], Inclusion Body Myositis [IBM] and Chronic Obstructive Pulmonary Disease [COPD]." (Decision and Order dated December 15, 2006).

Plaintiff's motion to renew and reargue is denied.

Discussion

The only question on a motion to reargue is whether the court overlooked or misapprehended fact or law in determining a prior motion. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very same questions previously decided. (Foley v. Roche, 68 A.D.2d 558, 418 NYS2d 588, 593-94 [1st Dept. 1979]) citing Fosdick v. Town of Hempstead, 126 NY 651). Moreover, a motion for leave to reargue may not include "any matters of fact not offered on the prior motion." (CPLR §2221(d)(2)).

Plaintiffs' motion must be denied because the motion fails to qualify as a motion to renew because, inter alia, there is no new evidence that was not known to Plaintiffs at the time they made their prior application, and they have not proffered a reasonable excuse for failing to submit additional evidence in their earlier application. The motion also fails to qualify as

one for reargument because there are no facts or laws which this court overlooked or misapprehended in its prior determination.

Plaintiff argues that this court misstated the facts of the case by ignoring Plaintiff's use of Koleston Perfect in 1998, which allegedly created symptoms that Plaintiff had not previously experienced. However, Plaintiff's deposition testimony fails to offer any information about Koleston products creating new symptoms, rather Plaintiff states that the use of Koleston products heightened existing symptoms of chemical sensitivity. Based on Plaintiff's deposition testimony, the court did not overlook or misapprehend the facts of this case.

In support of their renewal application, Plaintiffs have submitted a revised expert affidavit of Dr. Sawyer, a toxicologist (Plaintiffs' Ex. F). However, this affidavit is not "new" within the meaning of CPLR § 2221(e) because it is based on facts that were previously known to Plaintiffs and to Dr. Sawyer.

Additionally, Plaintiffs quote extensively from a variety of "new" sources including scientific journals, textbooks and websites to bolster previously submitted arguments. Aside from not annexing copies of the materials, Plaintiffs fail to offer a reasonable excuse as to why these "new" materials were not submitted in opposition to Defendants motion for summary judgment. (Yarde v. New York City Transit Authority, 4 AD3d 352 [1st Dept 2004]; Cuccia v. City of New York, 306 AD2d 2 [1st Dept

2003)).

Plaintiffs argue in this motion to renew and reargue that the court should have held a Frye hearing. Oral argument was held on the question of whether or not there should be a Frye hearing. Both sides agreed that no such hearing was required in this case since there was no novel scientific issue involved. Consequently, Plaintiffs argument fails since, at a minimum, Plaintiffs waived such a possibility.

It follows that Plaintiffs motion is denied since they have neither proffered new facts that were not previously known to them nor provided a reasonable excuse for failing to raise those facts on their prior application and have failed to show how this court misapprehended facts or law.

Accordingly it is

ORDERED that Plaintiffs' motion to renew and reargue this court's December 15, 2006 decision and order is denied in its entirety.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/2/07

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HON. WALTER B. TOLUB, J.S.C.