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

PRESENT: JANE S. SOLOMON Justice

PART 55

IMO INDUSTRIES, INC.,

- v -

ANDERSON KILL + OLICK, P.C.

INDEX NO. 120260/97

MOTION DATE 1/26/04

MOTION SEQ. NO. 011

MOTION CAL. NO.

The following papers, numbered 1 to 13 were read on this motion to/for renew/reargue

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-5
Answering Affidavits — Exhibits	6-8
Replying Affidavits	4-13

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED

MAR 22 2004

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 3/11/04

JANE S. SOLOMON
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

----------X

IMO INDUSTRIES, INC.,

Plaintiff,

-against-

ANDERSON KILL & OLICK, P.C. (formerly known as Anderson Kill Olick & Oshinsky, P.C.), ANDERSON KILL & OLICK (formerly known as Anderson Kill Olick & Oshinsky), and ANDERSON KILL & OLICK, LLP (formerly known as Anderson Kill Olick & Oshinsky),

Defendants.

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Index No: 120260/97

DECISION AND ORDER

JANE S. SOLOMON, J.:

Plaintiff seeks to renew and reargue the decision and order of this court dated July 18, 2003, which granted to defendant summary judgment dismissing the complaint, and denied plaintiff's cross-motion for summary judgment ("July Order"). For the reasons below, the motion is denied.

The July Order

This action for legal malpractice arises from a "Joint Stipulation of Undisputed Facts Pertaining to Motions'' ("joint stipulation") executed by defendant Anderson Kill & Olick, P.C. ("Anderson Kill") and filed with the United States District Court for the Northern District of California, pursuant to that court's rules, in the case of International Insurance Co. v Red and White Co., et al., Civ Case No, C 93-0659 (N.D.Cal.) ("Federal Case").[1]

[1] The facts of the underlying lawsuit are discussed in greater detail in the decision and order for motion sequence 03, dated July 31, 2002.

The plaintiff herein, Imo Industries, Inc. ("Imo"), was a defendant in the Federal Case represented by Anderson Kill.

That lawsuit involved whether one of Imo's insurers could recover defense costs it advanced to Imo in a prior lawsuit (where Imo's predecessor was sued by the Long Island Lighting Company ["LILCO"]) under what was described as a "Johansen-type agreement." (See, Johansen v California State Automobile Assoc. Inter-Insurance Bureau, 15 Cal.3d 9 [1975]). In the Johansen case, an insurer was permitted *to* recover settlement payments made on behalf of an insured in a subsequent coverage action where the insurer and insured had agreed to the arrangement. In **the** Federal Case, International Insurance Co. ("International"), one of Imo's insurers in **the** LILCO litigation, sought to recover **defense** costs it had advanced. The defense costs **were** paid after a negotiation between International's counsel and Anderson Kill, with the participation ***of*** Imo's general counsel **(Stephen** Agocs). The defense costs were not paid without objection, or as a loan, but subject to International's desire **to** recover the money in the event that it was determined that it was not obligated to pay. Both here and **in** the Federal Case, Imo contends that International's purported reservation of rights was inadequate.

International's complaint in the Federal Case alleged that it had advanced defense costs to Imo on a "Johansen-type" basis, which included an agreement that defense costs would be

reimbursed in the event that the court found that the relevant policies provided no coverage. Imo's answer, drafted by Anderson Kill, admitted that Imo agreed that International would participate in defending the LILCO lawsuit on a "Johansen-type" basis, but denied International's characterization of the agreement.

In the joint stipulation, Anderson Kill admitted (on Imo's behalf) the existence of a "Johansen-type agreement". Anderson Kill argued that the terms of the agreement were that International would not automatically get **back** the defense costs from Imo if it was found that LILCO's claim was not covered under the International policy; the question of whether the cost of defense was nevertheless covered under the **policy** would be litigated, mindful that the duty ***to*** defend is generally broader than the duty to indemnify.

In this action, Imo argues that admitting to the "Johansen-type agreement'' in the joint stipulation was negligent because it had no agreement with International on these matters. Imo now seeks to recover the money it paid to International to settle the Federal Case after an adverse ruling from the court.

The July Order was issued after oral argument. As part of that decision, I found that Imo had not shown, by probative evidence from an expert or any other source, that Anderson Kill departed from the professional standard of care, and thus I

granted Anderson Kill's motion for summary judgment dismissing the complaint, and denied Imo's cross-motion for summary judgment in its favor.

The Expert Opinion

Before the summary judgment motions were submitted in this case, counsel for Imo and Anderson Kill were before the court on March 31, 2003. The need for an expert opinion was discussed:

> THE COURT: The way you establish a legal malpractice claim is the way you establish any malpractice claim. And that is that there was negligence. Negligence in a professional malpractice claim is a departure from the standard of care governing practice by the professionals in the relevant professional community.
>
> MR. GREENE [Imo's attorney]: That I agree with.
>
> THE COURT: So, what's the departure that Anderson Kill made, and how are *you* going to [prove it]? . . . What expert's opinion will you have expressed?
>
> Because I believe that one cannot establish negligence in New York without an expert's opinion.

Following this exchange, counsel sent letters to the court regarding Imo's potential reliance on expert opinion. Imo disclosed the identity of its expert, Kevin Culhane, Esq., and the basis for his opinion that Anderson Kill was negligent. In a letter dated May 21, 2003, Anderson Kill's lawyer wrote to the court asking for the court's intervention in preventing Imo from using the expert's affidavit in the summary judgment motions. Imo's lawyers wrote to the court in response on May 28, 2003, arguing that expert testimony is appropriate in this action,

writing that "the expert disclosure provided by Imo provides for testimony on the standard of care and Anderson Kill's breach of such standard; and therefore, it is not only appropriate in an attorney malpractice case, but within the established confines for such testimony." See, Exhibit 2 to the Affirmation of Alvin M. Stein, Esq. in Opposition to Plaintiff's Motions to Renew and Reargue, at 6. Imo contended that the court's intervention with respect to its use of an expert's opinion on the motion was not warranted. I agreed with Imo's attorney, and Anderson Kill's request for intervention was denied.

Renewal

On this motion, Imo's counsel now expresses surprise that the issue of whether defendant departed from the applicable standard of care would arise on the dispositive motions. Imo argues that it should be permitted renewal, this time armed with the opinion of a legal expert who opines that Anderson Kill breached the standard of care. See, Affidavit of Kevin R. Culhane in Support of Motion for Leave to Renew and Reargue of Plaintiff Imo Industries, Inc. ("Culhane Affidavit"), paragraph 7.

A motion to renew shall be based on new facts not offered on the prior motion that would change the prior determination. CPLR 2221 (e)(2). The motion shall contain a reasonable justification for the failure to present such facts on

the prior motion. CPLR 2221 e)(3).

Obviously, the Culhane Affidavit is a matter not offered on the prior motion, and under normal circumstances could not form the basis for reargument because it does not offer new facts. The Culhane Affidavit is a statement of opinion based on facts **already** in the record. Culhane Aff., paragraphs 4-6.

Imo relies on the decisions of the Appellate Division, First Department, in the cases of Peebles v **New** York City Housing Auth. (295 AD2d 189 [1st Dept. 20021) and Allison v D'Agostino Supermarkets, Inc. (282 AD2d 219 [1st Dept. 2001]), in which plaintiffs in personal injury negligence cases were permitted to submit expert affidavits for the first **time** on renewal. In these cases, **the** Appellate Division found that **the** experts' opinions were "new evidence." In each case, plaintiff's counsel was found to have offered a reasonable excuse for failing to produce the expert **opinion** in the first instance.

In Allison, the Appellate Division excused counsel's failure to proffer the affidavit with the comment that "There is no evidence that the failure was dilatory or strategic." 282 AD2d at 220. Here, there is evidence that **the** expert opinion was withheld strategically. The need for an expert opinion was discussed with the court; Imo disclosed its expert and the basis for his opinion before the motion was submitted; Imo's counsel successfully argued against court intervention that would **have**

precluded his expert's opinion from consideration in the underlying motion; and the substance of the expert's opinion was articulated by Imo's counsel in its papers and at oral argument.

There is no reasonable justification for failing *to* include **the** expert opinion in the motion. IMO's counsel states that it **"did** not believe **it** was necessary or **appropriate** to submit an expert affidavit on standard of care." Affirmation of Norman Greene in Support of Plaintiff's Motion for Leave **to** Renew and Reargue ("Greene Aff."), paragraph 2. This is a strategic determination, and not one compelled by the circumstances. (See transcript *of* March 31, 2003, supra, in which the appropriateness of an expert opinion is endorsed by the court). IMO's counsel contended in his May 28, 2003 letter to the court that, although the decision whether or not to rely on an expert opinion in the motions was not yet made, a decision *to* include an expert opinion was defensible.

That said, the expert states that the standard ***of*** care with respect to this case does not appreciably differ in California from the standard of care "employed nationally." Culhane **Aff.,** paragraph 10. By that, he presumably means that the standard **is** the same in New York, and his opinion on the standard of care *for* a lawyer may well be superfluous. **He** also opines that "Johansen-type agreement" is not a term of art under California law and has no precise meaning, which **seems** to

undercut Imo's contention that the joint stipulation contained a devastating admission. Apart from this, the opinions expressed by Mr. Culhane were substantially presented by Imo in the briefs, affirmations and oral argument in the prior motion. So far as his opinion regarding what would have been the better argument in the Federal Case augments the material already submitted, it is too late.

In its decision in the case of Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Basg, 301 AD2d 63 (1st Dept 2002), the Appellate Division considered a legal malpractice case where the plaintiff relied upon the affirmation of an attorney who concluded that the defendant was negligent. The Appellate Division could have been discussing the Culhane Affidavit when it stated that:

> It is tinged with the sense that since the affiant would have done things differently, therefore the attorney being challenged was incompetent. Such a contest of strategies is easily reduced *to* a malpractice standard that impermissibly compares the defendant-attorney's choice of strategies with the afterthoughts later offered by plaintiff's now-favored attorney, for whom bias is a necessary concern, rather than measuring counsel's performance against the much more objective standard of the profession's commonly prevailing practices.

301 AD2d at 69. The Appellate Division's reasoning is reflected in the July Order:

> Against Anderson's proof that its decision to choose its battlefield was an

> exercise of professional judgment, Imo submits **no** evidence, expert or other, that this was a departure from the professional standard of an attorney practicing in California.
>
> Instead, Imo attacks the contention that any enforceable agreement existed.
>
> That isn't the issue before me, as **I** have been explaining.
>
> In effect, Imo is trying to relitigate the [Federal Case] with an alternate theory that was rejected by its attorneys of record in that case, [Anderson Kill], but Imo has failed to show Anderson's decision not to pursue Imo's present strategy was itself a negligent exercise of professional judgment.

See Transcript, Exhibit A to the Greene Aff., p. 92.

To the extent that Mr. Culhane provides an alternate strategy, even a better one, to the strategy Anderson Kill employed in the Federal Case, Imo's counsel was permitted the opportunity to articulate that argument both in its papers and at oral argument. If counsel now believes that it would have been better to present that argument through the expert it had earlier disclosed, the change of heart is not a legitimate basis **for** renewal. See Russo, supra.

In sum, IMO has not demonstrated that the Culhane Affidavit contains facts that IMO was reasonably justified in failing to present on the prior motion. CPLR 2221 (e)(3).

Reargument

A motion to reargue shall be based upon matters of law allegedly overlooked or misapprehended, but shall not include any matters not offered on the prior motion. CPLR 2221(d) (2).

Imo claims that the court improperly imposed upon Imo the burden of showing that Anderson Kill was negligent. Anderson Kill, as the proponent of the motion for summary judgment, had "the burden of setting forth evidentiary facts to establish [its defense] sufficiently to entitle [it] to judgment as a matter of law." Yates v Dow Chemical Co., 68 AD2d 907, 909 (1st Dept 1979); and see, Zuckerman v City of New York, 49 NY2d 557 (1980). Anderson Kill met this burden by demonstrating that the legal arguments it presented in the Federal Case (including admitting that there was an agreement regarding International's tender of defense costs, but that International was not entitled *to* recover the money under California law) were arrived at in the exercise of professional judgment; that the arguments had a factual foundation (i.e., that Imo had accepted International's offer to pay defense costs subject to an understanding that it could seek to recover the money); and that Imo's general counsel had been consulted regarding the strategy. It accomplished this without relying upon expert testimony.

Imo was then obligated to "present admissible evidence showing the existence of triable issues of fact ... warranting the denial of summary judgment." Plantamura v Penske Truck Leasing, Inc., 246 AD2d 347, 348 (1st Dept. 1998) (citation omitted). This is not an improper shifting of the burden of proof on a summary judgment motion.

Imo also argues that the court overlooked the law *of* the case, i.e., that the Appellate Division reversed an early order granting Anderson Kill's motion to dismiss based on documentary evidence, and reinstated the complaint. Imo Indus., **Inc.** v Anderson Kill & Olick, P.C., 267 AD2d 10 (1st Dept. 1999). The Appellate Division stated that Anderson Kill could not rely on the answer it drafted in the Federal Case as grounds under CPLR 3211(a)(1) or (a)(7) to dismiss this malpractice action, since its drafting of that answer may itself have been negligent.

In the summary judgment motions underlying the July Order, Anderson Kill relied on the testimony *of* Rhonda Orin (a partner in the firm who worked on the Federal Case), and others, that Anderson Kill conferred extensively with Imo's in-house counsel (Thomas Bird, **Esq.)** in drafting the answer, that the in-house counsel proposed changes but accepted the admission that a Johansen-type agreement existed; and that Anderson Kill complied with Imo's drafting proposals, suggesting that Imo's general counsel participated with outside counsel in structuring the answer most favorably to the client. To the extent that Imo suggests that the answer filed in the Federal Case is an evidentiary third rail that cannot **be** touched, it is wrong. The evidence submitted on the motions fleshed out the background of **how** the answer was created, which supported Anderson Kill's contentions.

The affidavits that Imo alleges were overlooked were not: The May 7, 2003 affidavit of Mr. DeVries is instructive. He is a former Anderson Kill attorney who was a partner of the firm in its California office. He signed Imo's answer in the Federal Case, in which it admitted at paragraph **18** that Imo and International would participate in defense or settlement of the LILCO action on a Johansen-type basis. In his affidavit, he claims at paragraphs 7 through 9 that other attorneys at Anderson Kill had never told him about the issues surrounding the Johansen-type agreement, and that it was his understanding that no such agreement existed. How he then signed Imo's answer, subject to Federal Rule of Civil Procedure 11,[2] is unknown. His affidavit appears to be an admission of sanctionable conduct, but presents no triable issues of material fact.

With respect to the affirmation of Thomas Bird, Imo's general counsel at the time of the Federal Case litigation, his allegations are conclusory. He admits conferring with Anderson Kill attorneys in drafting the answer, which admitted the

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[2] Rule 11 (b) provides as follows, in relevant part: "By presenting to the court . . . a pleading, written motion or other paper, an attorney . . . is certifying that to the **best** of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,--

* * *

(2) the claims, defenses and other legal contentions therein are warranted by existing law . . .

(3) the allegations and **other** factual contentions have evidentiary **support** . . ."

existence of a Johansen-type agreement, but denies that he reviewed the document "carefully." He states that "Anderson never told me that it was waiving or otherwise compromising or weakening Imo's defense to reimbursement in the International case, or that Imo's defense was a dead or virtually dead issue; and I never agreed that Anderson could do so." This allegation, a testament to hindsight, also presents no triable issue *of* fact. The papers Anderson Kill presented to the court in the Federal Case demonstrate that it did not waive or compromise Imo's rights, but that substantial arguments **were** made that were contested by International, while the judge, who accepted much of the analysis presented on behalf of Imo, made an unfavorable ruling.[3]

Finally, Imo argues that the court failed to accept as true **all** the allegations made in affidavits it submitted in the summary judgment motions. In the July Order, I said that **the** denials by Imo's former general'counsel, Stephen Agocs, of the existence of any agreement regarding International's payment of defense costs or its implication put him in a negative light, a result Anderson Kill sought to avoid. The reasons for that statement are discussed in the July Order, but it should be noted

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[3] According to counsel, the **Supreme** Court of California subsequently overruled a decision principally relied upon **by** the judge in **the** Federal Case, suggesting that Anderson Kill's argument was viable, if not successful. Vandenberg v Superior Court of Sacremento Co., 21 Cal.4th 815 (1999).

that the court's statement is not a comment on Agocs' credibility, but on the potential impact of his contentions. Imo's other arguments have been considered, and are unavailing.

Anderson Kill's Cross-motion for Sanctions

The cross-motion for sanctions is denied, in the court's discretion, because Imo's argument regarding the availability of a second bite at the apple where an expert opinion is first offered on a motion to renew, which has no merit under the present circumstances, arguably finds some basis in the Appellate Division, First Department's decisions in Peebles and Allison.

Accordingly, it hereby is

ORDERED that the motion by Imo to renew and reargue is denied, with $100 costs to defendant, and the cross-motion by Anderson Kill for sanctions is denied.

Dated: March 4, 2004

ENTER: