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

PRESENT: Charles Edward Ramos PART 53

0605388/2001

PARKER & WAICHMAN
VS
NAPOLI, PAUL J.

INDEX NO. 0605388/01

MOTION DATE

MOTION SEQ. NO. 14

SEQ 14

REARGUMENT/RECONSIDERATION

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

RECEIVED
SEP 13 2005
PAPERS NUMBERED
IAS MOTION
SUPPORT OFFICE

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE NO. 14

FILED
OCT - 5 2005
COUNTY CLERK'S OFFICE
NEW YORK

is decided in accordance with accompanying memorandum decision and order.

Dated: 9/23/05

HON. CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

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PARKER & WAICHMAN,

Index No. 605388/01

Plaintiff,

-against-

PAUL J. NAPOLI, GERALD KAISER, MARC J. BERN,
NAPOLI, KAISER & ASSOCIATES, LLP,
NAPOLI, KAISER & BERN, LLP,
NAPOLI, KAISER, BERN & ASSOCIATES, LLP, and
LAW OFFICES OF MARC JAY BERN, P.C.,
LAW OFFICES OF MARC JAY BERN, P.C.,

Defendants.

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NAPOLI KAISER BERN & ASSOCIATES LLP, on behalf of themselves and on behalf of the Clients Allegedly Retained By Parker & Waichman,

Third-Party Plaintiffs, Index No. 591271/04

-against-

JERROLD PARKER, HERBERT WAICHMAN,
PARKER & WAICHMAN LLP, JERROLD PARKER
LLP, HERBERT WAICHMAN LLP, TRIEF & OLK, LLP,
TED TRIEF,

Third-Party Defendants.

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Charles Edward Ramos, J.S.C.

In motion 07 in the Abramova action and motion 014 in the Parker and Waichman[1] action, third-party defendant Trief & Olk[2] moves pursuant to CPLR 2221 to reargue its motion to dismiss the

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[1]Plaintiff in action II and third-party defendant Parker & Waichman ("PW") is a law firm with its principal place of business in Great Neck, New York. Third-party defendants Jerrold Parker and Herbert Waichman are attorneys and members of PW.

[2]Third-party defendant Trief & Olk is a partnership existing under the laws of New York with its principal place of business in New York City. Third-party defendant Ted Trief is an attorney and member in Trief & Olk. A third-party action was filed against T&O in both actions I and II.

third-party claims against it which was denied in a decision on the record on February 10, 2005.

On September 15, 1997, the FDA recalled two prescription diet drugs, commonly referred to as Fen-Phen, because of concerns of, *inter alia*, valvular heart disease. Subsequent to the recall, individuals injured by ingesting Fen-Phen filed class action lawsuits against the drug manufacturer in a number of states. NKB and Trief allegedly co-counseled the federal class action brought against the drug manufacturer in New York. Allegedly, PW referred many of the claimants to NKB in that action.

At some time prior to May 2000, approximately 5,600 persons opted out of the federal class action. Trief allegedly advised against the opt-out and did not continue as counsel for the opt-out claimants. NKB was appointed sole counsel for the opt-out claimants. Subsequently, NKB filed personal injury actions against the drug manufacturer on behalf of each of the opt-out claimants.[3]

Between May 2000 and March 2001, NKB began settlement discussions for all of the personal injury actions. PW, because of their referral services to NKB, was an active party in the settlement agreement. Trief was also present during settlement hearings. Additionally, Trief allegedly had an active

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[3]Justice Helen Freedman, New York State Supreme Court, New York County, consolidated these claims (i.e. those brought on behalf of the opt-out claimants) under the caption In re New York Diet Litigation, Index No. 700000/98.

involvement in the settlement discussions because (a) although Trief was no longer counsel to opt-out claimants, it allegedly participated in the preparation and filing of the joint consolidated complaint and the briefing in the litigation, and (b) the New York class action is only one part of an overall national settlement agreement in which Trief has both an active role and also a financial interest.

On March 20, 2001, Justice Freedman held a hearing on the status of the settlement agreement. Present at the meeting, among others, were (a) NKB, on behalf of claimants, and (b) Trief, on behalf of PW. At some point during the hearing, Mr. Murakami, a disgruntled former NKB employee (who had worked on Fen-Phen litigation prior to his termination from NKB), alleged that (a) NKB had overcharged referred clients on disbursements and costs, and that (b) NKB was shorting the referring attorneys (i.e. PW). These statements were made in open court, on the record. The court then noted that Murakami's statements should put the referring attorneys (i.e. PW), on notice of a potential problem that they might want to investigate. The court then addressed Mr. Trief directly to inquire about the purpose of his presence in the courtroom. Mr. Trief replied that "he could care less about the dispute concerning the split of fees between sides." Rather, he was present in the courtroom because "we"[4] referred hundreds of cases to NKB and thus have responsibilities

[4]It is unclear if in saying "we", Mr. Trief was referring to Trief and PW collectively, or if he misspoke and actually intended to refer to his client, PW.

to these clients to oversee any related proceedings.

On November 7, 2001, Justice Freedman entered an order approving the settlement. PW, either individually or by its counsel, Trief, allegedly did not report any problems to Justice Freedman prior to accepting the settlement.

On June 13, 2003, subsequent to receipt of its settlement fees, PW filed two actions against NKB in the New York State Supreme Court, New York County, Commercial Division. The first action, index number 601332/03, was filed on behalf of those opt-claimants referred to NKB by PW (hereinafter referred to as "Abramova claimants"). The second action, index no. 0605388/2001, was brought by PW individually against NKB. Trief & Olk represent PW in this latter action. The basic premise of both actions is that NKB skewed settlements in a manner that favored those clients that PW did not refer thereby undermining the settlement rights of (a) the Abramova claimants and (b) PW.

On December 13, 2003, NKB filed third-party complaints against Trief and PW for, *inter alia*, contribution and breach of duty in each of the two actions. The basic claim in the respective third-party complaints is that if NKB is liable to the Abramova claimants and PW respectively, so too are PW and Trief because (a) they had full knowledge of the settlement agreement and any potential problems with its contents prior to the final settlement order, and (b) both parties were in a position to object to the settlement prior to the final order.

Third-party defendants Trief and PW moved the Court to

dismiss the third party claim pursuant to 3211(a)(7).[5] During argument on February 10, 2005 of the motion to dismiss, Trief contended, *inter alia*, that it is undisputed that Trief was not co-counsel to the opt-out claimants. Therefore, Trief concluded that it (a) owed no duty to the Abramova claimants throughout the settlement discussions, and (b) had no duty of contribution to NKB.

Furthermore, Trief argued that it is inaccurate for NKB to allege that there is an issue of fact as to whether Trief served as co-counsel to the opt-out claimants. NKB alleges that Mr. Trief's use of the words "we" and "responsibility" in front of Justice Freedman on March 20, 2001, implies that Trief was co-counsel with NKB to the Abramova claimants. However, Trief argues that Mr. Trief's use of the word "we" actually referred to his client, PW. This Court conceded that Mr. Trief's statements do not necessarily establish that Trief was co-counsel to the referred clients. However, this Court noted it does raise an issue of fact on the matter and thus is not a valid argument on a motion to dismiss. Trief then began to explain the setting at the March 20, 2001 hearing to give the Court a better idea of the circumstances that gave way to Mr. Trief's statements. The Court interrupted Trief to acknowledge that his arguments, although potentially correct, again raise issues of fact not law.

The Court denied Trief's CPLR 3211 motion concluding that

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[5]The motion for reargument is made only by third-party defendant Trief. Therefore this memorandum will only discuss those arguments Trief made to the Court on its CPLR 3211 motion.

the allegations set forth in the third-party complaint suffice to form a legally cognizable action. The Court stated that indeed Trief's contentions might ultimately be correct. However, the Court noted that such a conclusion is based on issues of fact that would be more appropriately raised on a summary judgment motion.

Trief moves pursuant to CPLR 2221 to reargue the Court's denial of its motion to dismiss on the basis that the Court overlooked law and facts.

Initially, NKB objects to the motion to renew and reargue on procedural grounds. Unfortunately, there is no formal rule that movant, when making a CPLR 2221 motion, should attach (a) a copy of the Order from which the movant seeks to reargue, (b) copies of the papers submitted before the Court on the prior motion, and (c) a copy of the transcript, if any, from the previous argument. Therefore, Trief was not wrong by failing to attach a transcript of the February 10, 2005 argument. However, for future reference, it would be helpful, and respectful to the Court, for any movant to annex the order which they challenge on a motion to renew or reargue such documentation to a CPLR 2221 motion.[6]

The motion to renew, reargue and reconsider is denied because the arguments asserted by Trief are identical to those submitted to the Court in its previous motion to dismiss.

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[6]22 NYCRR 202.8 states that "[a]ffidavits shall be for a statement of the relevant facts , and briefs shall be for a statement of the relevant law." As this case continues, parties are urged to submit the relevant law in briefs, not affirmations.

A motion to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and "is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." *Pro Brokerage Inc. v Home Ins. Co.*, 99 AD2d 971 (1st Dept), appeal dismissed without opinion, 64 NY2d 646 (1984). However, reargument is not intended "to afford the unsuccessful party successive opportunities to reargue issues previously decided." *William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992).

On its motion to dismiss, Trief asserted two major arguments. First, Trief contended that it owed no duty to the Abramova claimants or to NKB because it is undisputed that Trief was not counsel to the opt-out claimants. Second, Trief argued that it is inaccurate for NKB to allege that there is an issue of fact as to whether Trief did represent the opt-out claimants. NKB contended that Mr. Trief's use of the word "we" at the March 20, 2001 hearing to supports its allegation that Trief was co-counsel with NKB to the Abramova claimants. However, Trief argued that the phrase "we " was taken out of context and, in truth, the word "we" only referred to its client, PW. After hearing arguments, the Court concluded that Mr. Trief's statements sufficed to support a legally cognizable action because they support the notion that Trief and NKB allegedly served as co-counsel to the Abramova claimants.

On the motion to reargue, Trief asserts the identical

arguments. First, Trief contends that its representation of the claimants ceased when they opted out of the class action. Trief maintains that it is disingenuous for NKB to argue that there is an issue of fact as to whether Mr. Trief's use of the word "we" implies that Trief was co-counsel with PW to the opt-out claimants. Trief again claims that NKB takes the word "we " out of context given that (a) Trief never claimed to represent anyone other than PW at the March 20, 2001 hearing, (b) that Mr. Napoli states in his affidavit that Trief was not counsel for the opt-out claimants, and (c) Mr. Trief never made any statements that he represented anyone other than PW at the hearing. However, by attempting to assert the same defense on reargument, Trief fails to provide a basis from which the Court can conclude that reargument is proper. *See Kassis*, 182 AD2d at 28.

Trief fails to show that the Court overlooked or misapprehended any relevant facts or misapplied any controlling principles of law. The purpose of reargument is not to serve as a vehicle to permit the unsuccessful party to advance arguments different from those tendered on the original application or to repeat the initial unsuccessful arguments. *Foley v Roche*, 68 AD2d 558 (1st Dept 1979). Disagreeing with the Court's conclusion does not demonstrate that the Court misunderstood the facts or misapplied the law.

Accordingly, it is

ORDERED, that motion 07 in the Abramova action to renew and reargue its motion, to dismiss the third-party claims against it

which was denied in a decision on the record on February 10, 2005, is denied; and it is further

ORDERED, that motion 014 in the Parker and Waichman action, to renew and reargue its motion, to dismiss the third-party claims against it which was denied in a decision on the record on February 10, 2005, is denied.

Dated: September 28, 2005

HON. CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.