

**Gest v Minnelli**

2006 NY Slip Op 30353(U)

June 14, 2006

Supreme Court, New York County

Docket Number:

Judge: Jane S. Solomon

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

PART 55

PRESENT: \_\_\_\_\_

**JANE S. SOLOMON** Justice

*Gest*

*Minnelli*

- v -

INDEX NO. 118332/03  
MOTION DATE 7/31/06  
MOTION SEQ. NO. 12  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 7 were read on this motion to/for Reargue

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1-3</u>
<u>4-5</u>
<u>6-7</u>

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.

The papers on this motion were filed under seal, but the decision may be posted.

**FILED**

JUN 22 2006

NEW YORK COUNTY CLERK

JANE S. SOLOMON

J.S.C.

Dated: 6-14-06

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

MOTION/CASE IS REGISTERED FULLY. THE ENTRY IS VALID.

FOR THE FOLLOWING REASON(S):

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

-----x  
DAVID GEST,

Plaintiff,

DECISION AND ORDER

-against-

Index No: 118332/03

LIZA MINNELLI,

Defendant.

-----x  
LIZA MINNELLI,

Third Party Plaintiff  
And Counterclaim  
Defendant,

-against-

DAVID GEST,

Plaintiff, Counterclaim  
Defendant,

DAVID GEST PRODUCTIONS, INC. and  
DAVID GEST & ASSOCIATES, INC.,

Third Party Defendants.  
-----x

**FILED**  
JUN 22 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

SOLOMON, JANE J.:

Plaintiff David Gest ("Gest") moves to reargue three prior orders deciding motions 09, 10 and 11, made on the record on February 6, 2006. He also seeks an order compelling disclosure or, in the alternative, striking the third-party complaint. The motion is denied as follows.

A. Reargument

The complaint alleges that defendant assaulted Gest on June 10, 2003, and that as a result he sustained personal

injuries that interfered with his ability to pursue a livelihood. He demanded damages in the amount of ten million dollars. Under motion 09, Gest sought to amend his complaint to allege that the June 10, 2003 assault was an act of negligence, and to recast the ad damnum clause. The proposed amendment would claim unspecified damages for the personal injury and economic loss, plus ten million dollars in punitive damages.

Motion 09 was denied because the proposed amendments are based entirely upon the attorney's affirmation, and no new facts were offered to enhance the intentional tort claim as originally pleaded. Moreover, defendant argued that she was prejudiced by Gest's delay in alleging a new theory of recovery based on the same set of facts, because it would now be too late for her to tender her defense to an insurance carrier that may have indemnified a negligence claim if made timely. Mere lateness is not a barrier to amending a complaint. Heller v Louis Provenzano, Inc., 303 AD2d 20 (1<sup>st</sup> Dept 2003). Here, defendant demonstrated that she was prejudiced by the delay, and there was no reason offered for the amendment at this late stage except a change in legal strategy based on the same core of facts.

The court's computers indicate that motion 10 was made by Gest to compel disclosure. He failed to submit the papers in that motion here. The transcript of the proceedings before the

court on February 6, 2006, when counsel argued these motions and decisions were issued, shows that Gest presented a "laundry list" of items. He sought a protective order from a prior order that required him to produce telephone records. The deadline for Gest to produce the records had passed before the motion was submitted, and in any event, Gest's lawyer stated that the records were produced before February 6. Gest sought to expand discovery by deposing a number of non-party witnesses. Leave to conduct non-party witnesses was granted without opposition as to all but one witness. Gest's request to videotape the trial testimony of his own physicians was denied, there being no evidence that they were unavailable for trial. Gest sought defendant's tax returns, which was denied because such material is not routinely provided, and because he had already deposed her accountant.

The court's computer indicates that motion 11 was made by defendant, and sought an order striking Gest's answer to the counter-claim. The order was granted to the extent that Gest was precluded from offering at trial evidence that was not already produced pursuant to earlier orders, and otherwise was denied.

As a preliminary manner, plaintiff submits a mass of papers in support of this motion, completely untabbed, none of which is clearly identifiable as the papers submitted on the underlying motions. Consequently, it is impossible to determine

the basis plaintiff now claims that the court misunderstood the relevant facts or misconstrued legal arguments. Under CPLR 2221(d), a motion to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, and shall not include any matters of fact not offered on the prior motion.

Plaintiff's motion here displays no effort to state what matters of fact or law were presented on the prior motions, or how the court overlooked or misapprehended them. Indeed, defendant credibly contends that the moving affirmation is little more than an incomprehensible cut-and-paste job. See, *Aff. Of Dorothy M. Weber, Esq. in Opposition*, at paragraphs 7-8.

Plaintiff's reply consists of a twenty-five page affidavit from Gest and a twenty-five page affirmation of his attorney, neither of which were submitted in the prior motions, plus a thick book of untabbed documents that clearly are not the papers from the prior motions. In fact, some of the documents submitted in reply appear to be the same as documents submitted on the motion. The fifty pages of reply affidavit provide no explanation for this.

Gest argues that defendant agreed to withdraw her motion to strike his pleading (motion 11), and he refers to a partial copy of a stipulation signed by his lawyer, but not by defendant's. The unsigned partial stipulation states that defendant will withdraw her motion, and that the motion will be

returnable February 6, 2006. It cannot "plainly be seen" that the parties mutually agreed that defendant withdrew her motion, as counsel maintains. Omansky Aff., at paragraph 6.

The order deciding motion 11 precludes Gest from "offering evidence at trial of lost business opportunities other than (1) the 3 alleged contracts discussed at oral argument . . . ." In support of his economic loss claim, Gest argued that he had "contracts or deal memos" with four entities, a matter discussed in some detail at oral argument. Defendant maintained that she only had been provided documentation regarding three entities, which were identified by name at oral argument. It seems that Gest's lawyer now contends that he had disclosed four such entities. A review of the transcript does not reveal any fourth entity identified by name. The gist of the decision was that Gest was precluded from relying on material not already produced. In the event, if Gest shows at trial that he disclosed four contracts as of February 6, 2006, he will be able to seek introduction of the same. That relief cannot be granted on the papers here.

Gest's lawyer further contends, in reference to defendant's alleged withdrawal of her motion and documentation of the undisclosed fourth entity, that the court was misinformed "in many instances" by defendant (Omansky Aff., at paragraph 8). He does not state how the court was misinformed, or in what way it

resulted in an inappropriate decision. Gest's counsel was present at oral argument, and had the opportunity to explain his client's position.

B. Compel Further Disclosure

The basis for this part of the motion is not easily discerned, but it appears that Gest is seeking further material needed to defend against the counter-claims or third-party complaint which his lawyer failed to address in opposition to motion 11. The connection between these issues is unclear, but the argument lends credence to defendant's claim that the request for relief here is addressed to matters previously ruled upon. In reviewing the underlying decisions, this appears to be true. Accordingly, that part of the motion is denied. If defendant failed to provide relevant material regarding her counter-claim or third-party complaint, she risks losing these claims, and such failures may be addressed by the court on motions for summary judgment or for in limine relief at trial. Accordingly, it hereby is

ORDERED that the motion is denied; and defendant is awarded \$100 in costs on this motion to be taxed upon the entry of judgment; and it further is

ORDERED that counsel shall appear for a pre-trial conference in Part 55 on July 24, 2006 at 3 PM.

Dated: June 14, 2006

ENTER:

  
\_\_\_\_\_  
J.S.C.

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**JANE S. SOLOMON**

**FILED**  
JUN 22 2006  
NEW YORK  
COUNTY CLERK'S OFFICE