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

PRESENT: Hon. DORIS LING-COHAN, Justice PART 36

VAN-TULCO, INC.,

Plaintiff,

- v -

NEW YORK TELEPHONE COMPANY, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. and COLONIAL ORNAMENTAL IRON WORKS, INC.,

Defendants.

(And Third-Party Actions)

INDEX NO. 100244/95
MOTION DATE
MOTION SEQ. NOS. 003 & 004
MOTION CAL.NO.

The following papers, numbered 1 to 6 were read on these motions to/for : renewal and reargument.

Papers	Numbered
Notice of Motion/Order to Show Cause (No. 003) - Affidavits - Exhibits	1,2
Notice of Motion/Order to Show Cause (No. 004) - Affidavits - Exhibits	3,4
Notice of Cross Motion - Affidavits - Exhibits (Memo)	5,6
Replying Affidavits (Reply Memo)	

Cross Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that the motions and cross motion are denied, for the reasons set forth below.

Background

Motion sequence numbers 003 and 004, brought under Index No.: 100244/95[1], are consolidated for decision. In motion sequence number 003, defendant New York Telephone Company (NYT) moves or an order, pursuant to CPLR 2221, to renew and reargue the decision and order of this Court, dated January 9, 2006 and entered on March 10, 2006 (the Decision), which, among other things, denied its motion for summary judgment. In motion sequence number

[1] The Court notes that the court computer indicates that the case under Index No. 100244/95 is consolidated with the case under Index No. 100243/95.

003, plaintiff Van-Tulco, Inc. (Van-Tulco) moves for an order, pursuant to CPLR 2221 (d), to reargue this Court's Decision. In motion sequence number 004, defendant Consolidated Edison Company of New York, Inc. (Con Edison) moves for an order, pursuant to CPLR 2221, to renew and reargue this Court's Decision which, among other things, denied its cross motion for summary judgment and to dismiss the complaint. The relevant facts are set forth in this Court's Decision.

Discussion

Firstly, it should be noted that although the motions by NYT and Con Edison are denominated as motions to renew, in addition to motions for reargument, these motions actually seek relief limited to reargument pursuant to CPLR 2221 (d). Significantly, NYT and Con Edison do not assert that there are "new facts not offered on the prior motion" or "a change in the law", either of which "would change the prior determination", as is required for a motion to renew pursuant to CPLR 2221 (e) (2).

A motion for leave to reargue, pursuant to CPLR 2221 (d) (3), "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." This Court's Decision was entered on March 10, 2006. Nevertheless, NYT did not serve its motion to reargue until September 7, 2006, nearly six months after the underlying Decision was entered. Although NYT refers, in a footnote, to an order dated July 13, 2006 purportedly extending its time to move for reargument, NYT has failed to submit a copy of such order. Further, this Court is unaware of any order issued by the judge who issued the original Decision to extend the parties' time to move to renew and/or reargue the March 10, 2006 Decision[2]. Accordingly, NYT's motion for reargument is untimely. In addition, Van-Tulco's cross motion to reargue, served on September 27, 2006, and Con Edison's motion to reargue, served on November 14, 2006, are, likewise, untimely.

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[2] CPLR 2221 (a) provides, in pertinent part, "A motion for leave to renew or to reargue a prior motion ... shall be made on notice to the judge who signed the order, unless he or she is for any reason unable to hear it." NYT has not demonstrated that the judge who issued the Decision was unable to decide the motion to reargue and any application to extend the time to make such a motion.

Further, the parties failed to follow the proper procedures for making an application for reargument, pursuant to CPLR 2221 (d). They failed to move by order to cause, addressed to this Court, and, most significantly, failed to submit, along with their motion papers, copies of all of the papers submitted in support of the original summary judgment motions by NYT and Con Edison[3] (*see People v Jenkins*, 39 AD2d 924, 925 [2d Dept 1972]; *Rubin v Dondysh*, 147 Misc 2d 221, 222 [Civ Ct, Queens County 1990], *rearg denied* 147 Misc 2d 221 [Civ Ct, Queens County 1990], *app dismissed* 153 Misc 2d 657 [App Term 2d Dept 1991]).

As the Appellate Division stated, "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*Pahl Equip Corp.v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv dismissed in part, denied in part* 80 NY2d 1005 [1992], *citing Schneider v Solowey*, 141 AD2d 813 [2d Dept 1988]; *see also DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 [1st Dept 2005]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). In order to render a decision on a motion to reargue, it is important to review all of the papers submitted on the underlying motions, as "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided" (*Pahl Equip. Corp.v Kassis*, 182 AD2d at 27; *see also Foley v Roche*, 68 AD2d at 567). "Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application" (*Foley v Roche*, 68 AD2d at 567-568; *see also DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d at 718; *Pahl Equip. Corp. v Kassis*, 182 AD2d at 27).

Accordingly, it is

ORDERED that the motion for leave to renew and reargue by defendant New York Telephone Company is denied; and it is further

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[3] Con Edison has included some of the papers submitted in support of and in opposition to its original cross motion for summary judgment.

ORDERED that the cross motion for leave to reargue by plaintiff Van-Tulco, Inc. is denied; and it is further

ORDERED that the motion for leave to renew and reargue by defendant Consolidated Edison Company of New York, Inc. is denied; and it is further

ORDERED that, within 30 days of entry, plaintiff shall serve upon all parties to this action, a copy of this decision and order, together with notice of entry.

This constitutes the Decision and Order of the Court.

Dated: 3/7/07 **ENTER:** _____,
Doris Ling-Cohan, JSC

Check One: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION
Check if Appropriate: [ ] DO NOT POST [ ] REFERENCE

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