

Wallach v Wallach

2007 NY Slip Op 30864(U)

April 10, 2007

Supreme Court, Suffolk County

Docket Number: 0007083/2004

Judge: Thomas F. Whelan

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ORDERED that this motion(#007) by Gale Ann Wallach, for an Order pursuant to CPLR 3124 and 3126 to compel Robert Wallach, to comply with her Notice of Discovery and Inspection dated September 21, 2006 and striking Robert Wallach's pleadings unless he provides documents responsive to her September 21, 2006 request within a reasonable time frame to be determined by the Court, is granted to the extent that Robert Wallach shall respond to the Gale Ann Wallach's Notice of Discovery and Inspection within thirty-five (35) days of the date of this Order; and it is further

ORDERED that the cross motion (#008) by Robert Wallach, for an Order (1) pursuant to CPLR 3103, granting a protective order limiting and conditioning Gale Ann Wallach's requests for discovery in this action to the determination of the pre-tax earnings of the Robert Wallach's company, the Robert Plan for the years 1996 to 2004, and prohibiting Gale Ann Wallach from obtaining discovery of the his personal financial documentation for the years 1996 to date; (2) compelling Gale Ann Wallach to cooperate in executing a confidentiality agreement in connection with the release of the relevant portions of the financial statements of the Roberts Plan regarding pre-tax earnings for the years 1996 to 2004; (3) upon the granting of the Order compelling the Gale Ann Wallach, and her attorneys to execute the confidentiality agreement and upon Robert Wallach's submissions to Gale Ann Wallach of those relevant portions of the Robert Plan's audited financial statements regarding pre-tax earnings provided to the Court herein, and granting Gale Ann Wallach leave to submit an additional response and opposition to Robert Wallach's instant motion; (4) pursuant to CPLR 2221, granting Robert Wallach leave to reargue the Order dated September 14, 2006, entered September 27, 2006, based upon newly discovered evidence and upon reargument granting the Robert Wallach's motion dated April 5, 2006 for partial summary judgment with respect to Gale Ann Wallach's second cause of action under Suffolk County Index number 9380/2006; and (5) compelling Gale Ann Wallach to produce a filed copy of the retainer agreement in accordance with 22 NYCRR § 1400, is granted to the limited extent that the request of Robert Wallach for an Order compelling Gale Ann Wallach and her attorneys to execute the confidentiality agreement and is in all other respects, denied; and it is further

ORDERED that within ten (10) days of the date of this Order, the parties are directed to sign the proposed Confidentiality Agreement in the form annexed to the cross motion as Exhibit "D". This Confidentiality Agreement shall be enforceable only as to those discovery documents which are identified by Robert Wallach as being trade secrets and which are exchanged as discovery documents between the parties in the present actions under Suffolk County Index Numbers 7083/2004 and 9380/2006; and it is further

ORDERED that counsel for each party shall serve a copy of this Order with notice of Entry upon respective counsel pursuant to CPLR 2103(b)(1), (2) or (3), within twenty-five (25) days of the date herein and thereafter file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that the parties are directed to appear at the compliance conference scheduled for **April 24, 2007**, at 9:30 a.m. in Part 33, at the courthouse located at 1 Court Street, Riverhead, New York.

Gale Ann Wallach (hereinafter “defendant”) moves for an Order pursuant to CPLR 3124 and 3126 to compel Robert Wallach (hereinafter “plaintiff”), to comply with her Notice of Discovery and Inspection dated September 21, 2006 and striking plaintiff’s pleadings unless he provides documents responsive to defendant’s September 21, 2006 request within a reasonable time frame to be determined by the Court. The plaintiff opposes the motion and cross moves seeking a protective order limiting and conditioning the defendant’s discovery requests to the determination of the pre-tax earnings of the plaintiff’s company, the Robert Plan (hereinafter “RP”) and prohibiting the defendant from obtaining discovery of the plaintiff’s personal financial documentation from 1996 to the present. Plaintiff submits his affidavit in opposition to the motion, in addition to the affidavit of Philbert Nezamoodeen, the CFO of “RP.” The contention of this action by the defendant is her entitlement to additional maintenance based upon the parties’ Stipulation of Settlement, Article VII, entitled Maintenance, specifically paragraph 2(iii). This paragraph concerns any additional maintenance defendant may become entitled to upon the payment of a cash bonus to the plaintiff by “RP.” during the years set forth in the Stipulation.

CPLR 3101(a) requires a party to make full disclosure upon request of “all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof.” (*see Diamond State Ins. Co. v Utica First Ins. Co.*, 37 AD3d 160, 829 NYS2d 465 [1st Dept 2007]; *Anonymous v High School for Env’tl. Studies*, 32 AD3d 353, 820 NYS2d 573 [1st Dept 2006]; *cf Kingston v Breslin*, ___ AD3d ___, ___ NYS2d ___ [2d Dept 2007]). The Court of Appeals has stated the words “material and necessary” are, in their view, to be interpreted to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406, 288 NYS2d 449 [1968]; *see also The Roman Catholic Church of the Good Shepard v Tempco Sys.*, 202 AD2d 257, 608 NYS2d 647 [1st Dept 1994]). Liberal discovery is favored and pretrial disclosure extends not only to evidence that is admissible, but also to matter that may lead to the disclosure of admissible evidence (*see Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance Inc.*, 226 AD2d 175, 640 NYS2d 114 [1st Dept 1996]; *In re New York County DES Litig.*, 171 AD2d 119, 575 NYS2d 19 [1st Dept 1991]).

The law in New York imposes a heavy burden against the forced disclosure of individual tax returns. Tax returns are discoverable only upon a “strong showing” that “the information contained in the tax returns is indispensable to the litigation and unavailable from other sources” (*Britton v Knott Hotel Corp.*, 111 AD2d 62, 489 NYS2d 186 [1st Dept 1985]; *see also Xamaka v 166 E. 61 St. Assoc’s.*, 277 AD2d 35, 715 NYS2d 145 [1st Dept 2000]; *Nanbar Realty Corp. v Pater Realty*

Co., 242 AD2d 208, 661 NYS2d 216 [1st Dept 1997]; *Matthews Indus. Piping Co. v Mobil Oil Corp.*, 114 AD2d 772, 495 NYS2d 35 [1st Dept 1985]). “The party seeking to compel the production of a tax return must identify the particular information the return will contain and its relevance and explain why other possible sources of the information sought are inaccessible or likely to be unproductive and limit examination of the return to relevant material through redaction of extraneous information” (*Nanbar Realty Corp. v Pater Realty Co.*, 242 AD2d 208, 210, *supra*; *see also Slate v State*, 267 AD2d 839, 699 NYS2d 824 [3d Dept 1999]). It is the defendant’s burden to show that the relevant information possibly contained therein cannot be obtained from any alternative source, such as other financial or business records (*see Walter Karl, Inc. v Wood*, 161 AD2d 704, 555 NYS2d 840 [2d Dept 1990]). This burden cannot be satisfied with conclusionary and unsubstantiated averments (*see Costentino v Schwartz*, 155 AD2d 640, 548 NYS2d 232 [2d Dept 1989]). The disclosure of tax returns is not necessary where the information may be obtained from other sources (*see Samide v Roman Catholic Diocese of Brooklyn*, 5 AD3d 463, 773 NYS2d 116 [2d Dept 2004]; *Abbene v Griffen*, 208 AD2d 483, 616 NYS2d 1015 [2d Dept 1994]). Tax returns are not freely discoverable, but are only available where there are “special or unusual circumstances” justifying the request (*Giuliano v Hunts Point Coop. Mkt., Inc.*, 56 AD2d 909, 392 NYS2d 850 [2d Dept 1977]). The issue in question is the bonus or bonuses that the plaintiff may have or may not have received from his employment agreement under the RP, thus, his personal tax returns are irrelevant (*see Butt v New York Med. Ctr.*, 7 AD3d 744, 76 NYS2d 897 [2d Dept 2004]).

CPLR 3103 provides that the “Court may at any time and on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting or conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (*see Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 470 NYS2d 122 [1983]). CPLR 3103 embodies the policy determinations that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility of ambush and unfair surprise (*see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 575 NYS2d 809 [1991]). A party moving for a protective order bears the burden of making a factual showing of annoyance, expense, embarrassment, disadvantage, or other prejudice to be entitled to a protective order (*see Hartheimer v Clipper*, 288 AD2d 263, 732 NYS2d 866 [2d Dept 2001]; *Willis v Cassia*, 255 AD2d 800, 680 NYS2d 313 [3d Dept 1998]; *State of New York v General Elec. Co.*, 215 AD2d 928, 626 NYS2d 861 [3d 1995]; *Brignola v Pei-Fei Lee, M.D., P.C.*, 192 AD2d 1008, 597 NYS2d 250 [3d Dept 1993]; *Brossoit v O’Brien*, 169 AD2d 1019, 565 NYS2d 299 [3d 1991]; *Bigman v Dime Sav. Bank of New York*, 153 AD2d 912, 545 NYS2d 721 [2d Dept 1989]; *People v Skylift Intl.*, 72 AD2d 599, 421 NYS2d 102 [2d Dept 1979]).

A review of the defendant’s discovery demands reveals that certain demands are overly intrusive. When granting a protective order, the Court must analyze the issue of whether the

discovery demand is one of usefulness and reason (*see Glachman v Perlen*, 159 AD2d 552, 552 NYS2d 416 [2d Dept 1990]). In her action, defendant seeks documentation concerning plaintiff's bonus plan. Based upon the facts and circumstances presented in this matter, the Court finds that plaintiff has met his burden in his cross motion for a protective order regarding the disclosure of his personal income tax returns and defendant has failed to sustain her burden regarding the discovery of plaintiff's personal income tax returns. Therefore, plaintiff's application is granted to the extent that the defendant's discovery demands which seek the production of all of plaintiff's personal federal and state tax returns for the years 1996 through to the present date, is denied. The remainder of the documents demanded in defendant's notice of discovery demand shall be served upon the office of defendant's counsel within thirty-five (35) days of the date herein.

In his cross motion, plaintiff points out the fact that he was previously granted a protective order in the matrimonial action before Justice Lifson in a memorandum decision, dated May 25, 2001, regarding further discovery. Whether by purposeful procrastination, lack of attention or inattention, the determination in the matrimonial matter by Justice Lifson was apparently based upon the fact that the matter had lingered far too long on the court's calendar and that "at some point the discovery process must end" (*Philpot v Bernales*, 196 Misc2d 117, 762 NYS2d 771 [2d Dept 2003]). The issues in this post judgment plenary action are not the same as in the matrimonial matter. Therefore, any previous Court Order would not be binding on this Court (*cf. Brownrigg v New York City Hous. Auth.*, 29 AD3d 721, 815 NYS2d 81 [2d Dept 2006]; *Stone v Stone*, 19 AD3d 404, 795 NYS2d 893 [2d Dept 2005], *lv app dism.* 5 NY3d 824, 804 NYS2d 38 [2005], *rearg den.* 5 NY3d 850, 806 NYS2d 169 [2005]).

The parties signed a Stipulation during the matrimonial matter wherein they charted their own procedural course, which they were certainly free to do under the advice of counsel, as long as it did not conflict with public policy (*see Mitchell v New York Hosp.* 61 NY2d 208, 473 NYS2d 148 [1984]; *T.W. Oil v Consolidated Edison Co. of New York*, 57 NY2d 574, 457 NYS2d 458 [1982]; *Stevenson v New Syndicate Co.*, 302 NY 81 [1950], *rearg den.* 302 NY 690 [1951]). There is no evidence in the record that the parties' stipulation violated public policy. "The parties can stipulate to almost anything in an action. The litigation is theirs and they can pretty much dispose of their rights any way they want to" (Siegal, NY Prac. § 204 at 337 [4th Ed.]).

At the time of the signing of the Stipulation, plaintiff did not seek to impose a confidentiality agreement on any disclosure regarding his corporate business records. However, he now seeks in his cross motion to have the Court compel the defendant to sign a confidentiality agreement. In New York State, confidentiality agreements are normal, customary and routine in complex commercial civil litigation (*see Snyder v Parke*, 56 AD2d 536, 391 NYS2d 579 [1st Dept 1977]; *McLaughlin v G.D. Searle, Inc.*, 38 AD2d 810, 328 NYS2d 899 [1st Dept 1972]). A confidentiality agreement may be entered where a party demonstrates a legitimate concern for exposure of trade secrets (*see*

Hodgson, Russ, Andrews, Woods, Goodyear, LLP v Isolatek Intl. Corp., 300 AD2d 1047, 752 NYS2d 472 [4th Dept 2002]; *Camenos v F.W. Woolworth Corp.*, 233 AD2d 212, 650 NYS2d 3 [1st Dept 1996]; *Finch, Pruyn & Co., Inc. v Niagara Paper Co.*, 228 AD2d 834, 643 NYS2d 773 [3d Dept 1996]; *app dismiss* 88 NY2d 979, 648 NYS2d 878 [1996]).

Here, in his affidavit, the plaintiff has expressed his non-conclusory assertion that providing the discovery would be extremely prejudicial as his company is in litigation with another insurance provider and the disclosure of and of RP's financial status may be detrimental to the company (*see Bristol, Litynski, Wojcik, P.C. v Town of Queensbury*, 166 AD2d 772, 562 NYS2d 976 [3d Dept 1990]; *cf. Sheldon v Kimberly-Clark Corp.*, 111 AD2d 912, 490 NYS2d 810 [2d Dept 1980]). Such disclosure would place RP in a prejudicial position and possibly a competitive disadvantage in the automobile insurance business (*see Jackson v Dow Chem. Co.*, 214 AD2d 827, 624 NYS2d 675 [2d Dept 1995]).

Accordingly, that portion of plaintiff's application for an order to impose a confidentiality agreement, is granted (*see McLaughlin v G.D. Searle, Inc.*, 38 AD2d 810, *supra*). This confidentiality agreement shall not be considered by either party to be a reformation or modification of the parties' Stipulation of Settlement. The Court's Order to compel the parties to be signatories to the confidentiality agreement is based solely on plaintiff's sworn affidavit that he is requesting this relief to shield and protect his corporation's financial status based upon his fear that this information may be disseminated whether by design or inadvertence. Thus, upon the signing of the confidentiality agreement there will be no need to redact any of the records (*cf. Kovacs v Dr. Bloom and Dr. Costin Med. Assocs., P.C.*, 267 AD2d 357, 699 NYS2d 922 [2d Dept 1999]).

CPLR 3126(3) provides that the Court has the discretion to strike a pleading for failure to abide with discovery. The striking of pleadings is an extreme remedy and should not be taken absent a showing of wilful and contumacious actions or bad faith on behalf of the defaulting party (*see Vancott v Great Atl. & Pac. Tea Co.*, 271 AD2d 438, 705 NYS2d 640 [2d Dept 2000]; *Davidson v Aetna Cas. & Sur. Ins. Co.*, 237 AD2d 321, 655 NYS2d 446 [2d Dept 1997]; *Stathoudakis v Kelmar Contr. Corp.*, 147 AD2d 690, 538 NYS2d 297 [2d Dept 1989]; *Lull v Breiter*, 127 AD2d 530, 512 NYS2d 370 [1987]; *Delaney v Automated Bread Corp.*, 110 AD2d 677, 487 NYS2d 402 [2d Dept 1985]). The drastic remedy of striking an answer is inappropriate absent a clear showing that such failure is wilful, contumacious, or in bad faith (*see Pascarelli v City of New York*, 16 AD3d 472, 791 NYS2d 617 [2d Dept 2005]; *Soto v City of Long Beach*, 197 AD2d 615, 602 NYS2d 691 [1993]). Generally, "wilfulness" can be inferred from a party's repeated failure to respond to demands and/or to comply with disclosure orders, coupled with inadequate excuses for its defaults" (*DiDomenico v C&S Aeromatik Supplies*, 252 AD2d 41, 52, 682 NYS2d 452 [1998] *citations omitted*). However, such remedy should be as "narrowly tailored as possible to the circumstances of the individual case" (*Matusewicz v Jo Jo's Auto Parts*, 18 AD3d 828, 829, 796

NYS2d 385 [2d Dept 2005], *citation omitted*) because CPLR 3126 is “designed ‘to prevent a party who has refused to disclose evidence from affirmatively exploiting or benefitting from the unavailability of the proof during the pending civil action’” (*DiDomenico v C&S Aeromatik Supplies, supra* at 49; *accord Matusiewicz v Jo Jo’s Auto Parts, supra*). A court cannot impose a sanction under CPLR 3126 unless the disobedience by the defaulting party is shown to be wilful and no reasonable excuse for the disobedience can be shown. A party can satisfy their burden of showing wilfulness by showing repeated non-compliance of court orders by the opposing party (*see Kubacka v Town of No. Hempstead*, 240 AD2d 374, 657 NYS2d 770 [2d Dept 1997]; *Garcia v Kraniotakis*, 232 AD2d 369, 648 NYS2d 156 [2d Dept 1996]).

It is well settled that the nature and degree of the penalty imposed pursuant to CPLR 3126 is a matter within the discretion of the trial court (*see Herrera v City of New York*, 238 AD2d 475, 656 NYS2d 647 [2d Dept 1997]). Although courts favor the resolution on the merits of an action whenever possible (*see Espinal v City of New York*, 264 AD2d 806, 695 NYS2d 610 [2d Dept 1999]), a court may strike the pleadings or any part thereof as a sanction against a party who “refuses to obey an order for disclosure or willfully fails to disclose information that the court finds should have been disclosed upon notice” (*Devito v J&J Towing, Inc.*, 17 AD2d 624, 794 NYS2d 74 [2d Dept 2005]). Although, there has been reluctance on the plaintiff’s part to provide discovery as sought by the defendant, the Court does not find that the plaintiff’s conduct has risen to the level where the draconian sanction of striking one’s pleading is applicable (*see E.W. Howell v S.A.F. La Sala Corp.*, 36 AD3d 653, 828 NYS2d 212 [2d Dept 2007]; *compare Alizo v Alizo*, 300 AD2d 515, 752 NYS2d 553 [2d Dept 2002]; *Vatel v City of New York*, 208 AD2d 524, 617 NYS2d 61 [2d Dept 1994]).

A party making a motion pursuant to CPLR 2221 must set forth certain criteria. A combined motion for leave to reargue and renew shall identify separately and support separately each item of relief sought (*see* CPLR 2221[f]; *see also* Kelner, R.S. and G.S., Trial Practice, *Motions to Renew and Reargue*, NYLJ, Tuesday May 25, 2004 at 3, col 1). A motion to renew must be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination. A motion to renew must not only be based upon new facts or newly discovered evidence which was not offered on the previous motion, but also contain a reasonable justification for the failure to present such facts on the prior motion (*see* CPLR 2221[e][2][3]; *see also* *Vincente v Roy Kay, Inc.*, 35 AD3d 448, 826 NYS2d 361 [2d Dept 2006]; *Greene v New York City Hous. Auth.*, 283 AD2d 458, 724 NYS2d 631 [2d Dept 2001]; *Cannistra v Gibbons*, 224 AD2d 570, 639 NYS2d 48 [2d Dept 1996]).

Furthermore, a motion to renew may be based upon additional material facts which existed at the time the prior motion was made but not previously known to the party seeking leave to renew

and consequently, not made known or brought to the to the Court's attention (*see Kraker v Consolidated Edison, Co., Inc.*, 23 AD3d 531, 806 NYS2d 651 [2d Dept 2005]; *Morrison v Rosenberg*, 278 AD2d 392, 717 NYS2d 354 [2d Dep 2000]; *Fandy Corp. v Lung-Fong Chen*, 265 AD2d 450, 697 NYS2d 90 [2d Dept 1999]; *Santa Maria v Schwartz*, 238 AD2d 569, 657 NYS2d 68 [2d Dept 1997]; *Spa Realty Assocs. v Spring Assocs.*, 213 AD2d 781, 623 NYS2d 22 [3d Dept 1995]; *Silverman v Leucadia, Inc.*, 59 AD2d 254, 552 NYS2d 248 [1st Dept 1990]; *Echeverri v Flushing Hosp. & Med. Ctr.*, 123 AD2d 818, 507 NYS2d 433 [2d Dept 1986]). Although it is true that leave to renew may be granted in the trial court's discretion, even where the additional facts were known to the party seeking renewal at the time of the original motion was made (*see Daniel Perla Assocs. v Ginsberg*, 256 AD2d 303, 681 NYS2d 316 [2d Dept 1998]), renewal should be denied unless the moving party offers a valid excuse and reasonable justification for not presenting the additional material facts upon the original motion (*see Aviles v San Rafael Cooperativa de Ahorro Y Credito*, 7 AD3d 431, 776 NYS2d 486 [1st Dept 2004]; *Cole-Hatchard v Grand Union*, 270 AD2d 447, 705 NYS2d 605 [2d Dept 2000]; *Matter of Shapiro v State of New York*, 259 AD2d 753, 687 NYS2d 401 [2d Dept 1999]; *Danker v Szuran & Dorf*, 226 AD2d 669, 641 NYS2d [2d Dept 1996]).

Here, in his cross motion, plaintiff states that renewal of the September 14, 2006 order is warranted as upon the execution of the requested confidentiality agreement, the plaintiff will be submitting to defendant's counsel the actual portions of the audited financial statements of RP, which are the documents expressly provided to be relied upon in determining whether a cash bonus is earned; that when the confidentiality agreement is ordered by the Court, plaintiff will then forward the complete and actual financial statements; and that the reason the complete documentation was not included in his previous motion, which resulted in the Order of September 14, 2006, was that he believed the affidavit of Philbert Nezamodeen, the schedule of pre-tax profits and the letters from accountants indicating that RP's financial statements were audited, would have been sufficient.

Renewal is not warranted where, as in the matter before the Court, plaintiff, in his strategic response to defendant's motion, had decided to submit only limited documentation which he deemed to be sufficient. It is neither a reasonable excuse nor justification as to why the documentation on which plaintiff now currently relies was not submitted on the prior motion (*see CPLR 2221[e][3]*; *see also Kingston v Brookdale Hosp. and Med. Ctr.*, 4 AD3d 397, 771 NYS2d 385 [2d Dept 2004]; *Paul v Long Island Lighting Co.*, 306 AD2d 260, 760 NYS2d 345 [2d Dept 2003]; *Good Samaritan Hosp. Med. Ctr. v Ruscito*, 287 AD2d 538, 731 NYS2d 645 [2d Dept 2001]; *Greene v New York City Hous. Auth.*, 283 AD2d 458, 724 NYS2d 631 [2d Dept 2001]; *Scottsdale Ins. v Nelson Maint. Serv.*, 276 AD2d 688, 716 NYS2d 582 [2d Dept 2000]; *Matter of Beiny*, 132 AD2d 190, 522 NYS2d 511 [1st Dept 1987]; *app disp* 71 NY2d 994, 529 NYS2d 277 [1988]). Further, a motion for leave to renew is not a second chance which is freely given to a party who has not exercised due diligence in making their first factual presentation (*see Elder v Elder*, 21 AD3d 1055,

802 NYS2d 457 [2d Dept 2005]; **Renna v Gullo**, 19 AD3d 472, 797 NYS2d 115 [2d Dept 2005]; **O'Dell v Caswell**, 12 AD 3d 492, 784 NYS2d 603 [2d Dept 2004]; cf **Bank One v Mon Leang Mui**, ___ AD3d ___, ___ NYS2d ___ [2d Dept 2007]). Moreover, there is nothing in the record from which it may be inferred that the documentation plaintiff now relies upon was previously unavailable (see **Flomenhaft v Baron**, 281 AD2d 389, 721 NYS2d 381 [2d Dept 2001]) and “with due diligence available to them at the time of the original motion” (**Dawkins v Long Island Rail Road**, 302 AD2d 349, 753 NYS2d 893 [2d Dept 2003]). It also does not qualify as newly discovered or unavailable facts (see **Riccio v DePeralta**, 274 AD2d 384, 711 NYS2d 17 [2d Dept 2000], *lv app dismiss in part, den in part*, 95 NY2d 957, 722 NYS2d 470 [2000]; **Delvecchio v Bayside Chrysler Plymouth Jeep Eagle, Inc.**, 271 AD2d 636, 706 NYS2d 724 [2d Dept 2000]).

There are no old, new or prior unknown facts or issues shown on this renewal motion to reflect that the Order dated September 14, 2006 was incorrect or that relevant facts were overlooked, misapprehended or misinterpreted. Renewal is not an opportunity for delay, to repeat prior arguments or present issues and objections previously decided, defectively presented or subject to appeal (see CPLR 2221; **Foley v Roche**, 68 AD2d 558, 418 NYS2d [1st Dept 1979], *app after rem.* 86 AD2d 887 [2d Dept 1982], *app den* 56 NY2d 507 [1982]; **Simpson v Loehmann**, 21 NY2d 990, 290 NYS2d 914 [1968]). Thus, renewal is unwarranted herein and must be denied (see **Kingston v Brookdale Hosp.**, 4 AD3d 397, *supra*; **Pisciotta v Dries**, 306 AD2d 262, 760 NYS2d 526 [2d Dept 2003]; **Sherman v Picone**, 304 AD2d 552, 757 NYS2d 112 [2d Dept 2003]; **Spatola v Tarcher**, 293 AD2d 523, 739 NYS2d 848 [2d Dept 2002]; **Malik v Campbell**, 289 AD2d 540, 735 NYS2d 793 [2d Dept 2001]; **Delvecchio v Bayside Chrysler Plymouth Jeep Eagle, Inc.**, 271 AD2d 636, *supra*).

Therefore, the motion to “renew and reargue” is in fact, a motion to reargue (see **Olson v Russell**, 35 AD3d 684, 828 NYS2d 417 [2d Dept 2006]; **Giovanni v Moran d/b/a Cabinet Emporium**, 11 AD3d 429, 782 NYS2d 384 [2d Dept 2004]; **Frisenda v X Large Enter., Inc. d/b/a Iguana Wana**, 280 AD2d 514, 720 NYS2d 187 [2d Dept 2001]; **Estate of Malik v New York City Hous. Auth.**, 287 AD2d 435, 730 NYS2d 872 [2d Dept 2001]; **Eagle Ins. Co., v Lucero**, 276 AD2d 695, 716 NYS2d 317 [2d Dept 2000]).

A motion to reargue is designed to afford a party the opportunity to establish that the court overlooked or misapplied any controlling principle of law (see **Rivera v Touruno**, 19 AD3d 473, 796 NYS2d 708 [2d Dept 2005]; **Matter of Lyerly v Victoria Fire & Cas. Co.**, 245 AD2d 515, 666 NYS2d 698 [2d Dept 1997]; **Schneider v Soloway**, 141 AD2d 813, 529 NYS2d 1017 [2d Dept 1988]) and “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion” (CPLR 2221[d][2]; see also **Town of Riverhead v TS Haulers**, 275 AD2d 774, 776, 713 NYS2d 740 [2d Dept 2000]; **Spatola v Tarcher**, 293 AD2d 523, 739 NYS2d 848 [2d Dept 2002]; **McGill v Goldman**, 261 AD2d 593, 691 NYS2d 593 [2d Dept 1999]). It is within the Court’s sound discretion to grant a motion to reargue (see **Schneider v**

Solowey, 141 AD2d 813, *supra*). The purpose of the motion to reargue, however, is not to afford the aggrieved party a second chance to argue over the very questions previously decided (*see Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661 [1st Dept 1984]; *Foley v Roche*, 68 AD2d 558, *supra*). The party seeking a motion to reargue must set forth the facts or law the court overlooked in making the original decision in an attempt to convince the court that it was wrong and ought to change its mind (*see Siegal*, NY Prac. § 254, at 434 [4th Ed]).

Here, in his application for reargument, plaintiff merely restates his previous arguments regarding issues already decided, which is inappropriate (*see Bliss v Jaffin*, 176 AD2d 106, 573 NYS2d 687 [1st Dept 1991]) and has neither articulated the precedent which the Court allegedly misapplied, nor specified the facts which were overlooked or misapprehended. The Court, after a thorough review of the papers presented on the original motion, finds that there were sufficient reasons for its decision and did not overlook or misapprehend the facts as presented by the parties nor misapplied any controlling principles of law (*see Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 588 NYS2d 8 [1st Dept 1992]; *Foley v Roche*, 68 AD2d 558, *supra*). Plaintiff has failed to set forth any valid grounds for reargument under the principles of reargument. Additionally, plaintiff has not set forth any factual matter or legal authority overlooked by this Court (*see Flynn v Town of North Hempstead*, 114 Misc2d 125, 451 NYS2d 352 [Sup Ct, Nassau County 1982], *aff'd* 97 AD2d 430, 467 NYS2d 395 [2d Dept 1983]; *Cisco v Levine* 72 Misc2d 1087, 341 NYS2d 719 [Sup Ct, Nassau County 1973]). The Court finds that no basis for reargument exists here and plaintiff has not demonstrated that this Court overlooked or misapprehended the facts or the law to warrant reargument and a change in its prior determination (*see Elarac v Masara*, 96 NY2d 847, 729 NYS2d 60 [2001]). Therefore, that part of plaintiff's motion seeking reargument is denied.

Also, CPLR 2221(d) specifically provides that a motion to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion with notice of its entry". The Order which reargument is sought, was served by the plaintiff's attorney with notice of entry on September 27, 2006. The thirtieth day thereafter would have been October 27, 2006. Plaintiff's cross motion to renew reargue was not interposed until November 14, 2006, approximately sixty days later. The record does not indicate that plaintiff has filed a timely notice of appeal of the September 14, 2006 Order which would extend plaintiff's time to bring a motion to reargue (*see Itzkowitz v King Kullen Grocery Co.*, 22 AD3d 636, 804 NYS2d 350 [2d Dept 2005]; *Garcia v Jesuits of Fordham, Inc.*, 6 AD3d 163, 744 NYS2d 503 [1st Dept 2004]; *Leist v Goldstein*, 305 AD2d 468, 760 NYS2d 191 [2d Dept 2004]; Siegal's Prac. Rev. 4, September 2004). Accordingly, that branch of plaintiff's cross motion seeking reargument is considered untimely and must also be denied on this ground (*see CPLR 2221[d][3]*; *Glicksman v Board of Education/Central School Bd. of Comsewogue Union Free School Dist.*, 278 AD2d 364, 717 NYS2d 373 [2d Dept 2000]).

The Court notes that in reaching its decision to deny reargument, the merits of plaintiff's


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position have not been specifically discussed, as to do so, would improperly result, upon appeal, in this being deemed to have granted reargument (*see State of New York v Gruzen Partnership*, 239 AD2d 735, 657 NYS2d 830 [3d Dept 1997]; *Durham v Hilco Constr. Co., Inc.* 221 AD2d 586, 634 NYS2d 208 [2d Dept 1995], *lv app granted* 88 NY 807, 647 NYS2d 164 [1996], *order reversed* 89 NY2d 425, 650 NYS2d 335 [1996]).

Although plaintiff has stated in his answering papers and in his previous motions, that this action is one for breach of contract of the parties' Stipulation of Settlement, as well as, other causes of action including specific performance, accounting, reformation and attorney's fees, the action before the Court, originally brought in New York County by the defendant, is a plenary action (*see Fine v Fine*, 26 AD3d 406, 810 NYS2d 211 [2d Dept 2006]; *Gottlieb v Gottlieb*, 294 AD2d 537, 742 NYS2d 873 [2d Dept 2002]; *Zavaglia v Zavaglia*, 234 AD2d 1010, 652 NYS2d 572 [4th Dept 1996]; *accord Hotel Cameron, Inc. v Purcell*, 35 AD3d 153, 827 NYS2d 13 [1st Dept 2006]; *Stoddard v Stoddard*, 227 NY 13 [1919]). Therefore, defendant is not subject to the requirements of 22 NYCRR § 1400 *et seq.* (*cf. Ross v DeLorenzo*, 28 AD3d 631, 813 NYS2d 756 [2d Dept 2006]).

Accordingly, the motion and cross motion are decided as herein indicated. This constitutes the Order and decision of the Court.

DATED: 4/10/07



THOMAS F. WHELAN, J.S.C.