

**Pautienis v Legacy Capital Corp.**

2007 NY Slip Op 30974(U)

April 18, 2007

Supreme Court, New York County

Docket Number: 0103264/2004

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

BEATRICE PAUTIENIS,  
Plaintiff,

Index No.: 103264/04

- v -

Motion Date: 01/09/07

LEGACY CAPITAL CORPORATION, SOUTHWEST  
TRADING DIVERSITIES, INC., and RONALD  
WEEMS,

Motion Seq. No.: 03

Motion Cal. No.: 99

Defendants.

The following papers, numbered 1 to 7 were read on this motion to renew.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_

PAPERS NUMBERED

1 - 5

Answering Affidavits - Exhibits \_\_\_\_\_

6

Replying Affidavits - Exhibits \_\_\_\_\_

7

Cross-Motion:  Yes  No

Upon the foregoing papers,

The court shall deny plaintiff's motion to renew.

Plaintiff argues that the court should excuse the failure to submit an affidavit in opposition to defendants' motion for summary judgment on the grounds that plaintiff reasonably believed that defendants had not established their defense prima facie. The court's original determination was based partially upon the failure of plaintiff to submit an affidavit to rebut defendants' prima facie defense on the prior motion and the court now considers the affidavit of merits submitted on the motion at

**FILED**  
APR 30 2007  
NEW YORK  
COUNTY CLERKS OFFICE

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

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

bar. See Torrado v Lutheran Medical Center, 170 AD2d 666, 667 (2d Dept 1991) ("Although the defendant should have explained its failure to include a physician's affidavit of merit as part of its original motion to vacate its default, the court nevertheless retained the discretionary power to grant renewal even if the facts were known, but were not presented to the court at the time the original motion was heard").

After the submission of this motion, the First Department in affirming this court's Order of October 13, 2005, stated that "[a]s to the remaining causes of action, the moving defendants, by adducing the purchase agreements containing disclosures warning plaintiff of the very risks about which she now complains, demonstrated a prima facie entitlement to summary judgment." Pautienis v. Legacy Capital Corp., 36 AD3d 462, 463 (1<sup>st</sup> Dept 2007). This court now holds that plaintiff's papers, including plaintiff's affidavit submitted on this motion to renew, remain insufficient to rebut defendants' defense. Although plaintiff claims that she relied on oral misrepresentations made by defendants, plaintiff's claims do not raise an issue of fact as to the documentary record that establishes that plaintiff signed disclosure forms that warned of the very risks she claims were not disclosed. Nor has plaintiff cited any case that holds that alleged oral misrepresentations can override a party's signed disclaimer. On this evidence,

