Rizzuti v Laucella
2007 NY Slip Op 33611(U)
November 2, 2007
Supreme Court, Nassau County
Docket Number: 3559-06/
Judge: Daniel R. Palmieri
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

TRIAL PART 50

ANGELA RIZZUTI and JOSEPH RIZZUTI,

Plaintiff,

-against-

MICHAEL LAUCELLA, MARIE LAUCELLA and JOHN DOES 1-10 INCLUSIVE,

Defendants.

INDEX NO.:003559/06

MOTION DATE:9-26-07
SUBMIT DATE: 10-31-07
SEQ. NUMBER - 004

MOTION DATE: 10-17-07
SUBMIT DATE: 10-31-07
SEQ. NUMBER - 005

The following papers have been read on this motion:

Notice of Motion, dated 8-29-07....................................1
Notice of Cross Motion, dated 10-9-07..........................2
Reply Affirmation, dated 10-19-07...............................3

Plaintiff's motion for leave to reargue and renew this Court's decision dated July 16, 2007 pursuant to CPLR §2221 (d) and (e) is denied. Defendant's cross motion for sanctions and costs pursuant to 22 NYCRR §130-1.1 is also denied. The facts and contentions of the the parties are set forth in the Court's prior decisions dated February 7, 2007 and July 16, 2007. The February decision directed compliance by plaintiffs with certain discovery demands and the second decision found that there was a wilful noncompliance. Both decisions considered

and made reference to the relief sought.

A 1999 amendment to CPLR 2221 addresses the rules for making a motion to reargue or a motion to renew and describes the differences. New paragraph (f) of CPLR 2221 permits the movant to combine in one motion both a reargument and renewal request, but adds the requirement that the movant "identify separately and support separately each item of relief sought". David Siegel, Esq. suggests the most practical method of dealing with this requirement is by separately labeling each segment of the motion and referring to the separate segments in any accompanying memorandum. See, *Siegel's Practice Review, No. 86, August 1999 p. 2.* See also, *Aloe, Revamping Motions to Reargue or Renew, NYLJ, October 1, 1999 p. 1.* The Court is directed to decide the combined motion as if separately made and to address each separately.

A motion to reargue is designed to afford a party an opportunity to establish that the Court overlooked or misapprehended the relevant facts or misapplied principles of law. It is not a vehicle to permit a party to argue again the very questions previously decided *Foley v. Roche*, 68 AD2d 558 (1st Dept. 1979); see also *Frisenda v. X Large Enterprises Inc.*, 280 AD2d 514 (2d Dept.2001) and *Rodney v. New York Pyrotechnic Products Co., Inc.*, 112 AD2d 410 (2nd Dept. 1985) or to offer an unsuccessful party successive opportunities to present arguments not previously advanced. *Giovanniello v. Carolina Wholesale Office Mach. Co., Inc.*, 29 AD3d 737 (2d Dept. 2006).

A motion to renew must be based on new facts not offered in the prior motion that would change the prior determination. Renewal should be denied in the absence of a reasonable justification for not submitting the additional facts upon the original application.

CPLR 2221(e) see, *Foley v. Roche*, *supra, Kwang Bok Yi v. Ahn,* 278 AD2d 372 (2nd Dept. 2000) and *Wavecrest Apartments Corp.* v. *Jarmain*, 183 AD2d 711 (2nd Dept. 1991). A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation *Renna v. Gullo*, 19 AD3d 472 (2d Dept. 2005).

Examples of what constitutes reasonable justification include the locating of a witness, *Szentmiklosy v. County Neon Sign Corp.,* 276 AD2d 406 (1st Dept. 2000); *Tesa v. NYCTA*, 184 AD2d 421 (1st Dept. 1992) or the appearance of a further medical report from the defendant, *Puntino v. Chin*, 288 AD2d 202 (2nd Dept. 2001). Provided supporting facts are offered, law office failure can be accepted as an excuse as to why the additional facts were not submitted on the original application but mere neglect is not an acceptable excuse. *Morrison v. Rosenberg*, 278 AD2d 392 (2nd Dept. 2000); *Cole-Hatchard v. Grand Union*, 270 AD2d 447 (2nd Dept. 2000).

Renewal may also be granted in rare instances, in the interest of justice upon facts which were known to the movant at the time of the original motion in order to avoid substantive unfairness. *See Tishman Construction Corp v. City of New York*, 280 AD2d 374 (1st Dept. 2001). See also *Ramos v. Dekhtyar*, 301 AD2d 428 (1st Dept. 2003) granting renewal where an unsworn affirmation of a chiropractor was initially inadvertently submitted and later resubmitted in affidavit form, and *Mejia v. Nanni,* 307 AD2d 870 (1st Dept. 2003), granting renewal because the newly submitted evidence was overwhelming and not contradicted. In *Ortiz v. Tusa*, 300 AD2d 288 (2nd Dept. 2002) renewal was denied where no justification was offered for failing to submit chiropractic affidavits on the original

motion. Even a motion to renew dismissal of a cause of action pursuant to CPLR §3211 (a)(7) on the basis of newly discovered evidence is permissible, notwithstanding that such a motion is addressed to the pleadings. *Blume v. A & R Fuels, Inc.*, 32 AD3d 811 (2d Dept. 2006).

With respect to reargument, in the present case, the plaintiffs fail to direct the court to any facts disclosed on the original motion which the court may have overlooked or to legal issues or principles that the court may have overlooked or misapprehended. To the extent that plaintiff suggests that an incorrect legal result was reached, the court chooses to adopt the legal conclusions previously made. Plaintiff's suggestion that preclusion should only apply to certain causes of action misperceives the purpose of the sanction which is to hold a party accountable for wilful refusal to comply with Court orders. Plaintiffs are not permitted to in effect make an election as to the remedy for noncompliance. Notably absent from the moving papers is any denial of noncompliance or any specific facts that were overlooked and which should change the result or any contrary legal authority. Plaintiffs previously argued that appointment records are not maintained and that argument was addressed in the Court's latest decision. In sum plaintiffs' contentions to support reargument are unsupported by any persuasive citation to legal authority, lacking in legal analysis and are simply a restatement of the arguments made in the prior motions. As such plaintiff's request for reargument is denied.

The "new' facts proffered to support renewal consist of affidavits from the plaintiffs which were not offered on the original motion. No explanation is offered as to why these affidavits were not submitted in connection with the original motion, however, if the

affidavits had been submitted, the would not have altered the result. The affidavits do not deny or adequately explain noncompliance with this Court's orders and are essentially a reaffirmation of the previously advanced positions with respect to appointment records. The prior decision addresses the change in contention with regard to appointment records and the new affidavits do not disclose any new or additional information. Specifically, the plaintiffs do not dispute that a new argument was made on the prior motion to the effect that records are not maintained however, they do not explain the reasons for this change of defense to the discovery and do not dispute that this change in defense was belatedly made in a letter just prior to the previous motion.

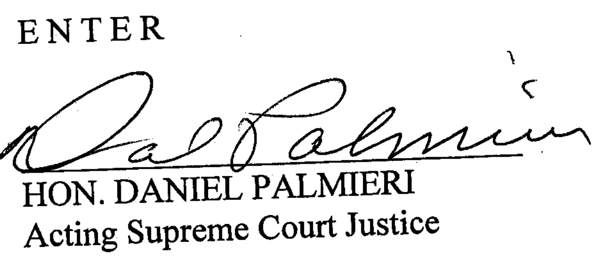
In sum, the Court's reasons for imposing the drastic remedy of dismissal are unaltered.

Defendants' cross motion for sanctions and costs is denied. While the legal and factual arguments in connection with this motion may have been found to be insufficient, the Court does not find that they are "frivolous" as such term is defined in the regulations

This shall constitute the Decision and Order of this Court.

ENTER

DATED: November 2, 2007



HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED
NOV 0 8 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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