SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x TRIAL TERM PART: 48

PATRICK DONOVAN,

INDEX NO.: 005520/06

Plaintiff,

MOTION DATE:5-22-08
SUBMIT DATE:5-22-08
SEQ. NUMBER - 004

-against-

ROCKLYN FUEL OIL CORP.,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 4-17-08.....1
Affirmation in Opposition, dated 5-5-08.....2

Defendant's motion for leave to reargue and renew this Court's decision dated March 25, 2008, (Prior Decision) pursuant to CPLR §2221 (d) and (e), is denied. The procedural events, facts and contentions of the parties are set forth in the Court's Prior Decision. The Prior Decision (i) denied a motion (Seq. 1) and a cross motion (Seq. 3) by defendant to dismiss this action based on discovery violations by plaintiff and (ii) granted plaintiff's motion (Seq. 2), based on the failure of defendant to appear and attend an examination before trial. Preclusion was granted against defendant by the Prior Decision based in part upon

defendant's failure to have a representative appear at an examination before trial. However, preclusion was limited only to those category or classes of persons described in the Prior Decision and only as to the events described in the complaint.

Defendant's motion to enforce its discovery demand was denied in part because discovery was sought from a non-party. The Prior Decision did not bar the defendant from obtaining discovery from the non-party and on these motions, defendant is silent as to what attempts if any have been made to obtain such non-party discovery. The remaining demands by defendant were found to have been met and defendant does not, in this motion, specify what discovery demands have not been answered. Other demands were found to have been improper as well as duplicative and defendant has not attempted to otherwise specify why they are not. The Prior Decision also denied defendant's request for summary judgment based on a prior release. That prong of the Prior Decision has not been disputed.

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 *Ellner v. Schwed*, 48 AD3d 739 (2d Dept. 2008). 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 defendant fails 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 defendant suggests that an incorrect legal result was reached, the court chooses

to adopt the legal conclusions previously made. Defendant's suggestion that preclusion should not apply because it is unduly harsh, misperceives the purpose of the sanction which is to hold a party accountable for wilful refusal to comply with Court orders. A defendant is 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. The preclusion was measured and limited only to the potential testimony of a specified category of persons and only as to the events described in the complaint. Judgment was not granted against the defendant and defendant was not precluded from calling non-precluded witnesses nor of cross examining plaintiff's witnesses. In sum, the Court believes the sanction imposed by the Prior Decision is appropriate. In sum defendant's 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 previously made. As such defendant's request for reargument is denied.

A "new' fact proffered to support renewal consists of an affidavit from a clerk at defendant's office not offered on the original motion. This affidavit deals with only one adjournment of the defendant's examination before trial scheduled for November 2007 and does not address the numerous other instances of noncompliance. Also submitted as a "new" fact is the concession that "the prompt scheduling and completion of defendant's deposition, may have inadvertently fallen by the wayside ..." and casts the blame upon an attorney no longer with the law firm. Notably absent is any discussion of the orders issued by the Court

on the subject of defendant's deposition. In any event consideration of the proposed new facts would not have altered the result of the Prior Decision. The new information does not deny or adequately explain noncompliance with this Court's orders and is essentially a reaffirmation of the previously advanced positions. *Lardo v. Rivlab Transportation Corp.*, 46 AD3d 759 (2d Dept. 2007).

In sum, the Court's reasons for imposing the measured remedy of limited preclusion and denial of the improper or duplicative discovery demands made by defendant remain unaltered. This motion does not address the claim of the defense of release and hence is not discussed.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: June 4, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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