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

PRESENT: HON. EILEEN BRANSTEN PART 3

Justice

Index Number : 122439/1999

GASSAB, CHEDLI

VS

R.T.R.L.L.C.

Sequence Number : 016

VACATE STAY/ORDER/JUDGMENT

INDEX NO. 122439/99

MOTION DATE 4-25-08

MOTION SEQ. NO. 016

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to/for reargue/renew

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3,4,5
Replying Affidavits	6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION,

FILED

JUL 09 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7-7-08

HON. EILEEN BRANSTEN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

----------X

CHEDLI GASSAB,

Plaintiff,

-against-

R.T.R.L.L.C.,

Defendants.

AND THIRD AND FOURTH-PARTY ACTIONS

----------X

Index No.: 122439/99
Motion Date: 4-25-08
Motion Sequence No.: 016

PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 2221, plaintiff Chedli Gassab ("Mr. Gassab") moves to renew and reargue his motion to vacate a jury verdict rendered on April 12, 2002 and the resulting judgment of November 24, 2003, which was denied in a Decision and Order dated January 14, 2008 (*see* Affirmation in Support ["Supp"], Ex. A). Mr. Gassab argues that the "underlying opinion is replete with factual and legal errors leading to ill-founded extrapolations of [his] competence under CPLR 1201 during the time of the prior proceedings" (Supp, at ¶ 3). Katz & Kreinces, LLP, Steinberg, Fineo, Berger & Fischoff, P.C., R.T.R.L.L.C., Price Thomas Studios, Inc. and Bronx Builders and Gorton Associates Incorporated all oppose the motion.

Background

In motion sequence number 015, Mr. Gassab, who more than five years earlier (in April 2002) won his personal-injury case after a jury rendered a verdict in his favor and subsequently signed a satisfaction of judgment (in April 2005) acknowledging that defendant The Russian Tea Room paid him $967,888.55, sought to have the verdict set aside, the judgment vacated and a new trial because "throughout the proceedings [he] was incompetent, rendering him incapable of adequately prosecuting or defending his rights, and hence required a guardian ad litem" (Supp, Ex. A, at 1).

This Court carefully considered, among other things, a February 2007 affirmation (prepared almost five years after the trial) from Dr. Daniel Kuhn, who treated Mr. Gassab between October 1999 and June 2003. The Court also considered a February 2007 affidavit by Dr. Kamran Fallahpour, a licensed psychologist, who opined that Mr. Gassab was incapacitated and that it was not until late in 2005 that he showed significant improvement.

In the motion papers, Mr. Gassab's attorney completely mischaracterized the statements of opposing counsel (*see* Supp, Ex. A, at 15-16), to give the misleading impression to the Court that defense counsel believed Mr. Gassab had "serious deficits" when nothing could be further from the truth.

This Court held, based on the evidence and its having had the ability to observe Mr. Gassab first hand throughout the relevant time period--during a trial that lasted several weeks

at which time Mr. Gassab personally participated in conferences and proceedings--that he was "extremely, not just adequately, capable of prosecuting his rights" (Supp, Ex. A, at 15) and denied the motion. The Court further concluded that:

> "In attempting to obtain relief for his client, Mr. Gassab's counsel distorted defense counsel's statement and irresponsibly failed to have the psychiatric experts consider the litigation record and Mr. Gassab's actual conduct in assessing his ability to 'adequately' prosecute this case years ago. Plaintiff's counsel furthermore made a ridiculous cross-motion for sanctions (which itself could be the basis for sanctions). Because there does not appear to have been any intent to maliciously injure the parties in making this motion, however, plaintiff's counsel **barely** escapes the imposition of costs and sanctions pursuant to 22 N.Y.C.R.R. 130-1.1" (Supp, Ex. A, at 17).

Now, Mr. Gassab seeks to reargue and renew his earlier unsuccessful motion. Mr. Gassab's motion is denied in its entirety.

Analysis

Reargument

In support of his motion to reargue, Mr. Gassab urges that the Court mixed up testimonial capacity, which it could ascertain, and party competence pursuant to CPLR 1201, which according to him can only be assessed based on expert evidence. He maintains that at the very least a competency hearing was required.

The opposing parties urge that to the extent the motion seeks reargument it is untimely and simply advances the exact same arguments that were raised below.

On reply, Mr. Gassab urges "the court to undertake the laborious but essential task of carefully reviewing the underlying motion practice, as Justice Bransten's scathing opinion notwithstanding, without such review and comparison the serious jurisdictional infirmity which Justice Bransten unfortunately bypassed may be missed" (Reply Affirmation, at ¶ 3).*

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* On April 28, 2008, this Court received a letter from Carlos J. Cuevas, the managing attorney at the law firm of Flomenhaft & Cannata, LLP, which is counsel for Mr. Gassab. Mr. Cuevas asserts that his compensation is based in part on the firm's performance. He requests that because of my "longstanding relationship with [his] family . . . [i]n order to avoid any appearance of impropriety," I recuse myself. No motion for recusal was ever made. All of the remaining parties vehemently oppose reassignment of the case (*see* April 30, 2008 Letter from William T. McCaffrey [counsel for Katz & Kreinces, LLP, Lawrence K. Katz, Esq. and Matthew R. Kreinces, Esq.]; May 1, 2008 Letter rom Robert Walker [counsel for Price Thomas Studios]; May 1, 2008 Letter from Sean Lasky [counsel for Steinberg, Fineo, Berger & Fischoff, P.C.], May 2, 2008 Letter from John W. Hoefling (counsel for Bronx Builders), and May 6, 2008 Letter from Leonard Toker (counsel for R.T.R.L.L.C.).

There is absolutely no basis for recusal. Though Mr. Cuevas' father is a family friend, I have only met the younger Mr. Cuevas himself, at best, a handful of times among a crowd at his father's gatherings. We have never socialized and I would not characterize our association as anything more than distant acquaintances. Absolutely nothing impedes this Court's ability to fairly and impartially address all of the legal matters presented. The informal recusal request amounts to nothing more than a transparent and ultimately unsuccessful tactical maneuver by Mr. Gassab's counsel to obtain his desired result. This baseless conduct borders on unethical.

The motion's opponents seek, but do not cross-move for, sanctions. Based on the unfounded recusal request and counsel's other questionable behavior--including, mischaracterization of opposing counsel's statements and a frivolous request for sanctions in the underlying motion--it is an exercise of restraint for this Court not to hold a sanctions hearing.

Pursuant to CPLR 2221, a party may move to reargue a motion upon demonstrating that the court, in issuing its decision "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (*Foley v Roche,* 68 AD2d 558, 567 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided" (*Willliam P. Pahl Equip. Corp. v Kassis,* 182 AD2d 22, 27 [1st Dept. 1992], *lv denied in part dismissed in part* 80 N.Y.2d 1005 [1992]).

Nothing was overlooked or misapprehended here.

This Court carefully reviewed Mr. Gassab's submissions. In the end, under these circumstances, considered in light of all of the evidence--including (but not limited to) this Court's personal extended observation of and interaction with Mr. Gassab--the Court did not find the materials generated by the psychiatric professionals years after the trial, which were based on memories and old records, probative on the issue of whether Mr. Gassab was "incapable of adequately prosecuting or defending his rights."

Significantly, Mr. Gassab's own discussions with attorneys and witnesses establish conclusively that he was able to prosecute his rights. The cases upon which Mr. Gassab relies are all distinguishable (*see, e.g., Nussbaum v Steinberg*, 162 Misc 2d 524, 525 [Sup Ct, N.Y. Cty 1994] [competency determination for purposes of CPLR 208's insanity toll "can only be arrived at by the testimony and opinion of mental health experts"], *affd* 269 AD2d

192 (1st Dept 2000); *Bowen v Rubin*, 213 F Supp 2d 220, 224 [EDNY 2001] [psychiatrists' declarations detailing illnesses that caused plaintiffs to reside in adult-care facilities and nursing homes, including schizophrenia, chronic undifferentiated schizophrenia, paranoid schizophrenia and major depressive illness, were sufficient for purposes of having guardian appointed during course of litigation]).

Here, during the relevant time period, the Court actually saw Mr. Gassab more than adequately prosecute his action. He was in Court for several weeks and participated in proceedings and strategic decision making. Under the circumstances, it would be unjust for the Court to vacate the verdict and judgment based on questionable evidence that was generated years after the trial that in no way accounted for Mr. Gassab's behavior during the course of the proceedings.

Mr. Gassab, who has repeated the very same arguments that he raised below that were rejected, has not established entitlement to reargument.

Renewal

In support of his renewal motion, Mr. Gassab submits an incomplete supplemental affidavit from Mary Hibbard, Ph.D. ("Dr. Hibbard"), a licensed psychologist who testified on behalf of Mr. Gassab at trial but never once mentioned his inability to prosecute his rights at that time. It was only on this motion that Mr. Gassab, for the first time, had a mental-

health professional examine the transcript of the 2002 trial in reaching a conclusion. He contends that the evidence was not initially presented because "it was unanticipated that the Court would rely on its own analysis of [Mr. Gassab's] testimonial capacity as a measure of deciding his competence under CPLR 1201" (Supp, at ¶ 9).

Only 13 pages of Dr. Hibbard's affidavit were submitted to the Court; the end of the affidavit, including Dr. Hibbard's signature, is missing entirely. Dr. Hibbard, at the time she prepared her affidavit--at some point after January 2008 (this Court cannot tell when since pages are missing)--stated that:

> "[inconsistencies in Mr. Gassab's deposition and trial testimony] are in themselves reflective of his post-accident diminished cognitive abilities, which specifically bear upon his ability to protect his rights throughout his court proceedings and are reflective of the sequelae associated with his brain injury.
>
> "His acquired cognitive disabilities are casually related to his work related accident and represent his compromised mental capacities that deprived him of the capabilities necessary to make on his own the decisions facing a litigant involved in defending and prosecuting his rights during trial and other Court proceedings" (Supp, Ex. C, at 3).

Mr. Gassab also relies on, among other things, his own affidavit. He states that his girlfriend prepared litigation binders in preparation for the trial because he was unable to retain information (Supp, Ex. E, at ¶ 6). He further relays that although "not evident to the court, [his] handicaps were particularly undermining at trial as there was little [he] could retain that [he] discussed with [his] attorneys in preparation of [his] testimony or in the

course of [his] three days on the witness stand" (*id.*, at ¶ 8). He points out that affidavits he signed in the past were drafted by his attorneys but his "capacity to independently evaluate what [his] attorney instructed was still absent then" (*id.*, at ¶ 10). He sets forth that years "of cognitive rehabilitation with [his] psychologist Dr. Kamran Fallahpour has enabled [him] to recover [his] capacity substantially and the decision making ability that depends upon it" (*id.*).

The opposing parties contend that to the extent the motion seeks renewal based on additional submissions, all of the information--which would make no difference anyway--was available at the time the underlying motion was made and Mr. Gassab has not provided a sufficient reason for initially failing to rely on the evidence.

Pursuant to CPLR 2221, a motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion."

The new affidavits would not change the prior determination. Dr. Hibbard's after-the-fact opinion that "cognitive disabilities . . . deprived him of the capabilities necessary to make on his own the decisions facing a litigant involved in defending and prosecuting his rights during trial and other Court proceedings" is not probative because it was not a conclusion that was reached at the time Mr. Gassab allegedly suffered from the inadequacy.

In fact, Dr. Hibbard testified at Mr. Gassab's trial and did not opine or allude to any inability on his part to prosecute his case.

The affidavits by Mr. Gassab and his friends are unavailing as well. They do not change the fact that Mr. Gassab participated in his trial and discussed litigation decisions with his attorneys and the Court and never demonstrated any inadequacy.

Never once in all of the proceedings did it appear that Mr. Gassab was unable to adequately prosecute his rights. It would make no sense to hold a hearing on the matter since this Court vividly recalls Mr. Gassab's condition at trial and it was in no way consistent with any inability to adequately prosecute. Indeed, Mr. Gassab prevailed at trial but the jury--which found that he was entitled to $300,000 for pain and suffering from October 4, 1999 (the date of the accident) to the date of the verdict and to $302,000 for future pain and suffering over 36 years--did not award the amount of damages Mr. Gassab hoped for because it was apparently unconvinced that his injuries were as serious as those represented by the very expert invoked here, who, significantly, never once mentioned any inability by Mr. Gassab to prosecute his rights at trial.

It would make a mockery of justice to allow Mr. Gassab a second bite at the apple based on belated representations, particularly since Mr. Gassab is now admittedly able to prosecute his rights and the parties would have no way of refuting his representations at this

point other than by referring the Court to Mr. Gassab's condition, which was observed and appreciated by many at his trial.

Mr. Gassab's current self-serving representation that he could not "countermand" or "critique" his trial attorneys' decisions and that post-trial an attorney prepared all of the affidavits that he signed but his "capacity to independently evaluate what [his] attorney instructed was still absent then" (*id.,* at ¶ 10), cannot be credited. Mr. Gassab does not explain how Ms. Matthews, who prepared the affidavit that he signed, obtained the information contained therein: namely, that he "disagreed" with his attorney's tactics at trial, he was concerned about key witnesses at trial, he asked his trial attorney why he wasn't presenting proof related to earnings in his home country, he voiced concerns about how the trial was being prepared, he reviewed strategy with counsel" (Supp, Ex A, at 4-7). He does not assert that the contents of the affidavit he himself signed, which are consistent with his trial attorneys' recollections of the events, were all made up.

Renewal is further denied because Mr. Gassab failed to provide a reasonable justification for failing to present the information earlier in support of his initial motion (*see Ostreich v Present*, 50 AD3d 522 [1st Dept 2008]; *Russek v Dag Media Inc.*, 47 AD3d 457, 459 (1st Dept. 2008]; *Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479, 480 [1st Dept 2007] ["motion to renew properly denied [for failure to] offer a reasonable justification for the failure to obtain foundation evidence for the accident report until after the court's decision

on the underlying motion and nearly five years after plaintiff's accident"]; *Chichilnisky v Trustees of Columbia Univ.*, 45 AD3d 393, 394 [1st Dept 2007]; *NYCTL-1999-1 Trust v 114 Tenth Avenue Assoc.*, 44 AD3d 576, 577 [1st Dept 2007], *appeal dismissed* 10 NY3d 757 [2008]).

The experts should have examined the trial record in considering his competency at the time of the trial. In fact, since having Mr. Gassab undergo a psychiatric examination now would not be probative of his condition at the time of trial, it should have been clear to him that the opponents of the underlying motion would rely heavily on litigation events and the trial transcript.

These are not remotely circumstances under which this Court should exercise its equitable discretion and overlook CPLR 2221's requirement that the motion "shall contain reasonable justification for the failure to present such facts on the prior motion."

Accordingly, it is ORDERED that Mr. Gassab's motion to reargue and renew is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
July 7, 2008

ENTER

Hon. Eileen Bransten