

Annex v Telerep, Inc.
2008 NY Slip Op 33267(U)
December 3, 2008
Supreme Court, New York County
Docket Number: 113565/07
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE
JUDITH J. GISCHE, J.S.C. Justice

PART 10

ANNEX, ARNOLD

INDEX NO.

113565/07

MOTION DATE

MOTION SEQ. NO.

02

MOTION CAL. NO.

TELEREP, INC.

- v -

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

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

NOV 08 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: DEC 03 2008

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

DEFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----x
Arnold Annex,

Plaintiff,

-against-

Telerep, Inc.,

Defendant.
-----x

DECISION/ ORDER
Index No.: 113565-07
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Telerep n/m [RR] w/ETB affid, exhs (sep back)	1, 2
Pltf's opp w/NE affirm	3
Telerep's reply w/ETB affid, exhs	4

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NOV 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action to recover damages on a breach of contract claim. Plaintiff Arnold Annex ("Annex") is the former employee of defendant Telerep, Inc. ("Telerep"). The parties entered into a document entitled "agreement," made as of October 25, 1983 ("agreement"). The parties' dispute is over whether the agreement expired in 1984, as Telerep contends, or continued and is, therefore, enforceable through July 2007 when Annex retired. The agreement sets forth the terms of Annex's compensation package and also contains a restrictive covenant. Annex contends that Telerep should have, but failed to, pay him quarterly bonuses since 1984.

A prior motion for summary judgment by defendant Telerep, Inc. ("Telerep") was denied by this court for the reasons set forth in its decision and order dated August 18, 2008 ("prior order"). Telerep now moves to reargue its motion and the court's decision

on the basis that the court misapplied the law.

Annex was pro se on the prior motion; he is now represented by counsel. Annex opposes the motion as not only as being procedurally defective and untimely, but also on the merits. Although Telerep did not initially move to renew its prior motion, in reply it urges the court to nonetheless treat its motion as one for renewal because Annex now has a lawyer and has raised some new claims. In reply only, Telerep has provided the court with some new documents. These documents were not offered in its original motion or in its motion in chief.

At the outset, the court denies Telerep's application to deem this present motion as one for renewal in addition to reargument. Generally, a motion to renew is based upon the discovery of material facts which existed at the time the prior motion was made, but were not then known to the party and for that reason not disclosed to the court. Foley v. Roche, 68 AD2d 558, 567 (1st Dept. 1979). However, an event that takes place after the prior order is made is not considered newly discovered evidence that would support a motion to renew. Donnelly v. Donnell, 114 AD2d 671 (3rd Dept 1985).

The fact that Annex now has a lawyer may be a "new" development in the case, but not the basis for renewal. Even assuming Annex now raises other arguments that he did not raise on the prior motion, he has not cross moved for either reargument or renewal, and therefore, those new arguments or claims are not properly before the court. The new documents defendant provides to the court are apparently responsive to some of those "new" claims. Since they pertain to issues not being considered by the court, they likewise will not be considered and do not support the treatment of this

motion as one for renewal.

The court will, however, consider whether Telerep has raised a sufficient basis for reargument of its prior motion and the court's decision thereon denying it summary judgment. A motion for leave to reargue pursuant to CPLR 2221 is addressed to the court's discretion. Foley v. Roche, 68 AD2d 558, 567 (1st Dept. 1979). It may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision. William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22, 27 (1st Dept 1992).

According to Telerep, the court's decision was correct - up to a point. Telerep agrees the court correctly decided the agreement at issue does not specify an end date. However, Telerep now argues that the court misapplied the law by deciding that because the parties' agreement does not contain an end date, it is subject to different interpretations which must be proved through extrinsic evidence. Although it did not present these arguments in its prior motion, Telerep now claims that Annex was an "at will" employee instead of an employee with a contract. According to Telerep, this is the natural sequella of the court's decision. Thus, Telerep argues the court made a mistake by not deciding on its own that Annex was an at will employee instead of a contract employee. Telerep presently argues that notwithstanding the written agreement between the parties about how compensation would be paid, and the deferred compensation package the parties later agreed to which pertained to years beyond 1984, Annex was only an at will employee, terminable for any reason, or no reason.

Except to the limited extent set forth below, defendant's motion to reargue is

denied for the reasons that follow.

A motion to reargue cannot be based on new arguments raised for the first time or a new theory of law not previously advanced by a party. DeSoignies v. Cornasesk House Tenants' Corp., 21 AD3d 715 (1st Dept 2005). There is no question, nor does Telerep deny, that it failed to raise this argument, that Annex was an at will employee, in its prior motion. When considering a motion for summary judgment, the court can always search the record and grant summary judgment to a nonmoving party. Dunham v. Hilco Const. Co., Inc., 89 NY2d 425 (1996). Therefore the court when considering such a motion must be careful to (and should) not decide issues that have not been placed before it [see Costello v. Hapco Realty, 305 AD2d 445, 446 (2nd Dept 2003)], unless that issue would deprive the court of subject matter jurisdiction [In re Bray v. Marsolis, 21 AD3d 1143, 1145 (3rd Dept 2005) *citing* Matter of Frye v. Village of Tarrytown, 9 NY2d 714, 722 (1997)]. Any claim that the court should have sua sponte raised and decided matters not argued by either side improperly seeks to shift the burden of the adversarial process to the court. Because the issue of Annex's status as an at will employee was never raised in the prior motion, any reargument on this issue is denied.

The court has also considered Telerep's separate argument that its motion should be considered, notwithstanding any procedural deficiencies, because it will save the court from having a pointless trial and serve the salutary goal of judicial economy. Assuming that the court would (or could) now allow a second motion for summary judgment, it is untimely. CPLR § 3212 provides that a motion for summary judgment must be made within 120 days after the note of issue is filed. A late motion may be

considered only if the movant sets forth "good cause" for why the motion is late. The arguments made by Telerep in support of its present motion are reminiscent of those rejected by the Court of Appeals in the case of Brill v. City of New York, 2 NY3d 648 (2004). Brill and other cases since then [Miceli v. State Farm Mut. Auto. Ins. Co., 3 N.Y.3d 725 (2004); Perini v. City of New York, 16 AD3d 37 (1st Dept 2005); Brown v. City of New York, 6 Misc3d 1017(a) (Sup Ct 2005)] have made it perfectly clear that the purported merit of an untimely summary judgment motion cannot be considered to constitute "good cause" for the late filing of the motion. Therefore, just as those arguments did not persuade the Court of Appeals, this court is not persuaded to overlook the "technicalities" of CPLR § 3212 and/or 2221 so that Telerep can raise new arguments that it could have raised in its original motion for summary judgment.

The court has, however, examined its prior order and agrees it contains a mistake that should be corrected. The court erroneously stated that the agreement could be orally modified, when in fact, it cannot be. Therefore, permission is granted to reargue as to this point only as more fully set forth below.

Although the court wrote in its prior decision that the parties agreement "does not contain a prohibition against oral modifications," the agreement actually provides that it "cannot be changed or terminated orally by the parties." As a general rule, an agreement containing such a prohibition can only be changed by a writing signed by the party against whom enforcement of the change is sought. GOL § 15-301. Although the court decided in its prior decision that increases of salary were not inconsistent with the contract, they in fact are because of the prohibition against oral modifications. This, however, is a matter of proof at trial and not conclusive on the issue of whether the

contract expired in 1984.

Although Telerep argues that the agreement expired in 1984, and therefore the provision against oral modifications is completely unenforceable, it has not proved its entitlement to summary judgment as a matter of law. The court has already decided that the agreement is subject to different interpretations and that Telerep did not prove it expired in 1984. There is, therefore, not only a triable issue of fact whether the agreement was non-durational, extending beyond 1984 but also whether the formalities of the agreement (modification in writing) were complied with. Assuming the agreement did not expire in 1984 but was non-durational, the provision against oral termination and modification was still operative.

Despite the court's error, Telerep has failed to prove that it is entitled to summary judgment, as a matter of law or that there are no triable issues of fact. Therefore, although the court makes this correction, it otherwise adheres to its decision for each of the reasons stated herein.

This case is ready to be tried; it was remanded from Part 40 because of this motion which has now been decided. Plaintiff shall serve a copy of this order on the Office of Trial Support so the case can be restored to its rightful place on the trial calendar. Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied. This constitutes the decision and order of the court.

Dated:

New York, New York
December 3, 2008

NOV 08 2008

So Ordered:

FILED
COUNTY CLERK'S OFFICE
NEW YORK

Hon. Judith J. Gische, J.S.C.