

<b>Commander Terminals, LLC v Commander Oil Corp.</b>
2009 NY Slip Op 30328(U)
January 27, 2009
Supreme Court, Nassau County
Docket Number: 12037-02
Judge: Leonard B. Austin
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INDEX  
NO. 12037-02

**SUPREME COURT - STATE OF NEW YORK  
IAS TERM PART 12 NASSAU COUNTY**

**PRESENT:**

**HONORABLE LEONARD B. AUSTIN**

Justice

Motion R/D: 10-14-08  
Submission Date: 10-28-08  
Motion Sequence No. 004,005,006/  
MOT D

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**COMMANDER TERMINALS, LLC. and  
COMMANDER TERMINALS HOLDINGS,  
LLC**

Plaintiff,

**COUNSEL FOR PLAINTIFF  
Tuan & Cho, LLP  
62 South Street, Suite 14  
Oyster Bay, New York 11771**

- against -

**COMMANDER OIL CORPORATION, the  
Estate of HAROLD D. SHAPIRO, and  
MARK SHAPIRO and KAREN  
SCHWARTZ, as Executors of the  
Estate of HAROLD D. SHAPIRO,**

Defendants.

**COUNSEL FOR DEFENDANT  
(Commander Oil Corporation)  
Richman & Levine, PC  
666 Old Country Rd., Suite 601  
Garden City, NY 11530**

**COUNSEL FOR DEFENDANT  
(Estate of Harold D. Shapiro and Mark  
Shapiro and Karen Schwartz, as  
Executors of the Estate of Harold D.  
Shapiro)  
Dollinger Gonski & Grossman  
One Old Country Rd.  
Carle Place, NY 11514**

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**ORDER**

The following papers were read on Plaintiffs' motion to reargue the amended order of this Court dated August 5, 2008 and the cross-motions of the respective Defendants to reargue said order:

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Notice of Motion dated August 25, 2008;  
Affirmation of Dean T. Cho, Esq. dated August 25, 2008;  
Notice of Cross-motion dated October 6, 2008;  
Affirmation of Matthew Dollinger, Esq. dated October 6, 2008;  
Notice of Cross-motion dated October 14, 2008;  
Affidavit of Joseph Shapiro sworn to on October 14, 2008;  
Affidavit of Keith Richman sworn to on October 14, 2008;  
Reply Affirmation of Dean T. Cho, Esq. dated October 17, 2008.

Plaintiffs move and the respective Defendants Commander Oil Corporation ("Commander Oil") and by the Estate of Harold Shapiro and the Executors of the Estate, Mark Shapiro and Karen Schwartz ("Estate Defendants") cross-move for reargument of this Courts' amended order dated pursuant to CPLR 2221.

PRIOR ORDER

Pursuant to the amended order of this court dated August 5, 2008:

- Plaintiff's motion for summary judgment on the first through sixth, ninth through thirteenth and sixteenth causes of action was denied;
- the Estate Defendants' cross-motion for partial summary judgment was granted to the extent that the eleventh through fifteenth causes of action were dismissed as to said Defendants but was denied as to the sixteenth cause of action; and
- Commander Oil's cross-motion for summary judgment on its counterclaims was denied.

THIS MOTION

Plaintiffs seek reargument on the grounds that the court:

- (1) erroneously applied the doctrine of *caveat emptor* to a situation in which it is alleged that Defendants affirmatively and knowingly misrepresented that they were (a) unaware of facts that would "materially

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adversely affect[s] the value, utility or condition of the Assets” and (b) were in compliance with “all applicable rules, regulations and other requirements of any governmental authority for Seller’s operation of the Assets”;

- (2) erroneously held that issues of fact existed as to the decedent Harold D. Shapiro’s breach of the employment agreement; and
- (3) overlooked controlling legal authority in finding that Plaintiffs’ fraud claims were duplicative of the breach of contract claims.

The Estate Defendants’ cross-motion is predicated on the premise that Plaintiffs’ fraud claim is unsustainable in that they made no representations or warranties to Plaintiffs regarding environmental issues; they had no duty to disclose the information Plaintiffs allege they failed to disclose; and Plaintiffs’ own lack of diligence is responsible for their present predicament.

In support of reargument, Commander Oil contends that its counterclaim for an account stated in the amount of \$101,116.75 was improperly denied given Plaintiffs’ alleged receipt/acceptance/non-rejection of invoices in that amount as and for services rendered from February 18, 2002 through October 2, 2002.

All of the grounds advanced by movants are, in this Court’s view, unavailing.

Notwithstanding assertions to the contrary, in the amended order of August 5, 2008, this Court carefully analyzed the arguments advanced by Plaintiffs regarding

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Defendants' alleged failure to disclose various conditions<sup>1</sup> at the oil facility located at One Commander Square prior to closing.

### DISCUSSION

#### A. Reargument Standard

A motion to reargue is addressed to the discretion of the court and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. CPLR 2221(d)(2). See, Carillo v. PM Realty Group, 16 A.D.3d 611 (2<sup>nd</sup> Dept. 2005); Hoey/Kennedy v. Kennedy, 294 A.D.2d 573 (2<sup>nd</sup> Dept. 2003); and Foley v. Roche, 68 A.D. 2d 558 (1<sup>st</sup> Dept. 1979). It is not designed as a vehicle to afford the unsuccessful party an opportunity to argue once again the very questions previously decided. Amato v. Lord & Taylor, Inc., 10 A.D.3d 374, 375 (2<sup>nd</sup> Dept. 2004). Nor is it designed to provide an opportunity for a party to advance arguments different from those originally tendered (Gellert & Rodner v. Gem Community Mgt., Inc., 20 A.D.3d 388 [2<sup>nd</sup> Dept. 2005]) or argue a new theory of law or raise new questions not previously raised. Giovanniello v. Carolina Wholesale Office Mach. Co., Inc., 29 A.D.3d 737, 738 (2<sup>nd</sup> Dept. 2006).

To recover damages for fraud, a plaintiff must prove that (1) a misrepresentation or omission of a material fact which was false and known to be false by the defendant; (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely on it;

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<sup>1</sup>The conditions include the existence of oil seepage from the facility into the public waters of Oyster Bay and White's Creek and that a number of the facility's storage tanks had not been timely inspected as required by § 3.10.10 of the Nassau County Fire Prevention Ordinance.

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(3) the plaintiff justifiably relied on the misrepresentation/material omission and, as a result; (4) the plaintiff sustained injury. Jablonski v. Rapalje, 14 A.D.3d 484, 487 (2<sup>nd</sup> Dept. 2005). See also, Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413 (1996). The misrepresentations alleged must be the direct and proximate cause of the losses claimed. Laub v. Faessel, 297 A.D.2d 28, 30 (1<sup>st</sup> Dept. 2002).

The *sine qua non* of an action in fraud is reliance on a known representation of fact. Channel Master Corp. v. Aluminum Ltd., 4 N.Y.2d 403, 406-407 (1958). Such reliance must, however, be reasonable or justifiable. *Id.* A claim of fraud will not lie if the representation relied upon was not a matter within the peculiar knowledge of the party against whom fraud is asserted, and could have been discovered by the party allegedly defrauded through the exercise of due diligence. Cohen v. Cerier, 243 A.D.2d 670, 672 (2<sup>nd</sup> Dept. 1997). Whether a party could have ascertained the facts with reasonable diligence so as to negate justifiable reliance is a factual question. Jablonski v. Rapalje, *supra* at 488.

Non-disclosure unaccompanied by some act or conduct which deceives the purchaser is not a representation. Mere silence alone is not actionable as fraud. Matos v. Crimmins, 40 A.D.3d 1053, 1054 (2<sup>nd</sup> Dept. 2007).

Plaintiffs mischaracterize the Court's decision by contending that the Court erroneously applied the doctrine of *caveat emptor*. Under the doctrine, a vendor has no duty to disclose any information in an arm's length transaction (Anderson v. Meador, 56 A.D.3d 1030, 1034 [3<sup>rd</sup> Dept. 2008]), unless there is some conduct (more than mere

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silence) on the part of the seller that rises to the level of active concealment. Rozen v. 7 Calf Creek, LLC, 52 A.D.3d 590, 593 (2<sup>nd</sup> Dept. 2008).

Whether the doctrine is applicable under the facts at bar depends upon whether Defendant sellers were merely silent, engaged in active concealment and/or whether the information at issue could have been (or was) discovered by Plaintiffs through the exercise of reasonable diligence. To maintain a cause of action to recover damages for active concealment, the Plaintiff must show, in effect, that the seller or the seller's agent thwarted Plaintiff's efforts to fulfill its responsibilities fixed by the doctrine of *caveat emptor*. Simone v. Homecheck Real Estate Services, Inc., 42 A.D.3d 518, 520 (2<sup>nd</sup> Dept. 2007).

On a motion for summary judgment, the function of the court is issue finding, and not issue determination. Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957). In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.<sup>2</sup> Glennon v. Mayo, 148 A.D.2d 580 (2<sup>nd</sup> Dept. 1989). The proponent of the motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986). Summary judgment will be denied where there is any doubt as to the

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<sup>2</sup>While the Court's prior order inadvertently referenced the CPLR 3211(a)(7) dismissal standard, the original decision, as well as the decision herein, is properly based upon the appropriate CPLR 3212 standard which requires that the parties' competing contentions be viewed in the light most favorable to the party opposing the motion. Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co., 168 A.D.2d 610 (2<sup>nd</sup> Dept. 1990).

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existence of a triable issue of fact or where the existence of an issue is even arguable.

Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1979).

Notwithstanding Plaintiffs' assertions to the contrary, a factual issue exists as to whether any conduct on the part of the Defendant sellers rose to the level of active concealment *vis-a-vis* the existence of environmental issues at the Oyster Bay facility – – alleged leeching of oil into the contiguous property known as “The Creek”.

As noted in the amended order, the parties reasonably anticipated the need for an environmental investigation, addressed the procedure to be followed, the allocation of the cost and the parties' respective rights. The Court also referenced the special facts doctrine pursuant to which a duty to disclose arises where one party's superior knowledge of essential facts renders a transaction without disclosure of those facts inherently unfair. Invocation of the doctrine, however, requires satisfaction of a two-pronged test; to wit: that the material was information peculiarly within the knowledge of the seller and that information was such that it could not have been discovered by Plaintiff through the exercise of ordinary intelligence. Jana L. v. W. 129<sup>th</sup> Street Realty Corp., 22 A.D.3d 274, 278 (1<sup>st</sup> Dept. 2005). Whether the facts of this case warrant application of the doctrine raises an additional factual issue which militates against an award of summary judgment on the sixteenth cause of action of the second amended complaint either in favor of Plaintiffs and against Defendants or in favor of the Estate Defendants dismissing the cause of action.

Neither Plaintiffs, the Estate Defendants nor Commander Oil has demonstrated that the Court misapprehended the relevant facts or law, to warrant reargument with respect to the Court's amended order.

C. Employment Agreement

Contrary to assertions by Plaintiffs, summary judgment on the breach of employment claims set forth in the first through tenth causes of action of the second amended complaint was denied on the grounds of a specific issue; to wit: whether decedent Harold D. Shapiro's continued employment by Commander Oil, and his management role in the operations at the Kings Park and Great Neck facilities, was in any way adverse to Plaintiffs' interest and/or violative of his obligations and fiduciary duty under the relevant agreements.

D. Account Stated

While Commander Oil has presented what it characterizes as "true copies" of invoices on which its account stated counterclaim rests, as well as the deposition of Plaintiffs' bookkeeper, a question of fact exists as to whether the purported invoices were tendered to Plaintiffs and whether an agreement as to the balance due was reached by the parties.

Accordingly, it is,

**ORDERED**, that Plaintiff's motion to reargue this Courts' amended order of August 5, 2008 is **denied**; and it is further,

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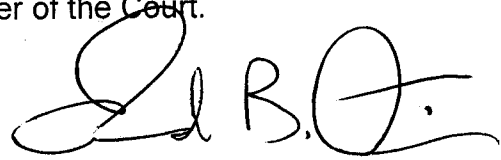
**ORDERED**, that Defendant Commander Oil Corporation's cross-motion to reargue said order is **denied**; and it is further,

**ORDERED**, that the motion of Defendants Estate of Harold D. Shapiro and Karen Schwartz, as executors, to reargue said order if **denied**; and it is further,

**ORDERED**, that counsel shall appear for a status conference on February 27, 2009 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY  
January 27, 2009

  
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Hon. LEONARD B. AUSTIN, J.S.C.

**ENTERED**  
FEB 05 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE