

**Bernal v Singh**

2009 NY Slip Op 32071(U)

September 2, 2009

Supreme Court, Nassau County

Docket Number: 018477/03

Judge: Daniel R. Palmieri

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**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: 47**

**RENATO BERNAL,**

**Plaintiff,**

**-against-**

**INDEX NO.: 018477/03**

**MOTION DATE: 8-13-09**

**SUBMIT DATE: 8-20-09**

**SEQ. NUMBER - 003**

**PARAMINDER SINGH and MANGAL SINGH,**

**Defendants.**

-----X

**The following papers have been read on this motion:**

- Order to Show Cause, dated 7-31-09.....1**
- Affirmation in Opposition, dated 8-12-09.....2**
- Reply Affirmation, dated 8-19-09.....3**

Defendant's motion (i) for leave to reargue this Court's decision dated July 17, 2009, (Prior Decision) pursuant to CPLR §2221 (d), (ii) to renew pursuant to CPLR §2221(e) is denied. That prong of defendant's motion which seeks leave to conduct an independent medical examination and to stay the previously scheduled inquest pending such examination is granted in accordance with the conditions set forth herein. The procedural events, facts and contentions of the parties are set forth in the Court's Prior Decision which granted

plaintiff's motion, based on the failure of defendant to appear and attend an examination before trial. The Court found that the failure to comply with discovery obligations was wilful and pursuant to the authority set forth in CPLR §3126(3) granted judgment in favor of plaintiff and directed an inquest as to damages.

In the present motion, defendants contend that the Court improperly granted judgment because in effect, defendant's failure to comply was not wilful and the case law relied upon by the Court does not, in the circumstances of this case, support the sanction that was imposed.

A 1999 amendment to CPLR 2221 addresses the rules for making a motion to reargue or a motion to renew and describes the differences. 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 (1<sup>st</sup> Dept. 2000); *Tesa v. NYCTA*, 184 AD2d 421 (1<sup>st</sup> Dept. 1992) or the appearance of a further medical report from the defendant, *Puntino v. Chin*, 288 AD2d 202 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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 (1<sup>st</sup> Dept. 2001). See also *Ramos v. Dekhtyar*, 301 AD2d 428 (1<sup>st</sup> 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 (2<sup>nd</sup> 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 defendants 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 defendants suggest that an incorrect legal result was reached, the Court chooses to adopt the legal conclusions previously made. The suggestions that preclusion should not apply because defendants made some effort to comply or that defendants have a meritorious defense, thus rendering preclusion as unduly harsh, misperceive the purpose of the sanction which is to hold a party accountable for wilful refusal to comply with Court orders. In

essence, defendants claim that they did not appear at the last scheduled deposition because their counsel was not able to satisfy compliance with its internal confirmation policies. While counsel may establish internal procedures for the scheduling of depositions, those procedures do not excuse compliance with the orders of this Court. Notably, defendants do not address the several stipulated conference orders which they chose to ignore and disregard, or the preliminary conference order dated August 29, 2008, which designates depositions at the court house at 9:30 a.m.

Absent from the initial or present 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. In sum, the Court believes the sanction imposed by the Prior Decision is appropriate, defendants' contentions to support reargument are unsupported by any persuasive citation to legal authority or analysis and are simply an elaboration of the arguments previously made. As such, the request for reargument is denied.

To the extent that portions of the moving papers might be deemed to be new facts not previously submitted, they do not alter the result. There are no new facts or excuses offered that could not have been previously submitted and defendants' explanation as to why any such new facts were not offered is insufficient.

The additional or new information that may be said to be contained in the submission, 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).

The contention that plaintiff's motion should have been denied because plaintiff failed to submit an affirmation of good faith has been waived by a failure to make such objection on the original motion.

Defendants are correct that they are entitled to present evidence on the issue of damages and hence, defendants shall have the right to conduct, pursuant to CPLR §3121 and applicable Court rules, no more than two independent medical examinations of plaintiff in Nassau County, New York, at a reasonable time and place to be designated in writing by defendants at least seven days prior to the date selected. In the event defendants fail to designate dates, times and locations within ten days of the date of this decision and order or fail, through no fault of plaintiff, to conduct such examinations within forty days after the date of this decision and order, defendants shall be deemed, without the necessity of any further order, to have waived the right to conduct the examinations. Plaintiff shall make himself available for the examinations.

The previously scheduled inquest is adjourned until October 29, 2009, in order to allow time for compliance with the foregoing.

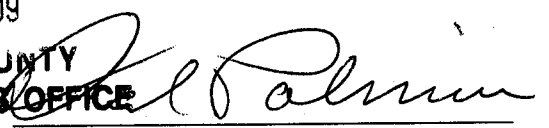
In sum, the Court's reasons for imposing judgment against defendants remain the same.

This shall constitute the Decision and Order of this Court.

**ENTERED**

DATED: September 2, 2009

SEP 04 2009 <sup>ENTER</sup>  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**

  
 HON. DANIEL PALMIERI  
 Acting Supreme Court Justice

**TO: George Boss, Esq.**  
**Attorney for Plaintiff**  
**245 Hillside Avenue**  
**Williston Park, NY 11596**

**Mark N. Antar, Esq.**  
**Cheven Keely & Hatzis, Esqs.**  
**Attorney for Defendants**  
**40 Wall Street, 15<sup>th</sup> Floor**  
**New York, NY 10005**