S

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 30
NASSAU COUNTY

HEBREW ACADEMY OF FIVE TOWNS.

Plaintiff.

- against -

Sequence No.: 016, 017, 018 & 019
Index No.: 014613/05

HERALD COMMUNITY NEWSPAPER, RICHNER COMMUNICATIONS, INC., WESTBURY PAPER STOCK CORP. And NANOIA RECYCLING EQUIPMENT, INC.

Defendants.

PG INSURANCE COMPANY OF NEW YORK, as subrogee of RICHNER COMMUNICATIONS, INC.

Index No.: 003
Index No.: 004604/07

Plaintiff.

- against -

WESTBURY PAPER STOCK CORP. And NANOIA RECYCLING EQUIPMENT, INC.

Defendants.

HANOVER INSURANCE COMPANY a/s/o RECOGNITION SYSTEMS, INC.

Plaintiff.

Index No.: 003291/06

- against -

WESTBURY PAPER STOCK CORP. And NANOIA RECYCLING EQUIPMENT, INC.

Defendants.

CHUBB INDEMNITY INSURANCE COMPANY a/s/o HARRIET SWIEDLER.

Plaintiff.

- against -

Index No.: 012708/06

RICHNER COMMUNICATIONS, INC., WESTBURY PAPER STOCK CORP. And NANOIA RECYCLING EQUIPMENT, INC.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motions and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

In four actions consolidated for the sole purpose of a joint trial, stemming from claims (based on different theories of liability) arising from a fire occurring on June 15, 2004, several motions were made requesting that the court reconsider its order of April 24, 2009. The parties who prevailed on the initial applications oppose these applications in the nature of reargument and renewal.

The defendant in action #1 Nanoia moves (motion #16) for reargument and renewal of the court's order of April 24, 2009 in so far as it granted defendant Richner's cross-motion dismissing the negligence claims asserted against Richner and others based on the court's rejection of the affidavit of Peter Davis, an expert's whose identity was not disclosed prior to the filing of the note of issue.

Defendant Richner cross moves (motion #17) for reargument of that portion of the court's order of April 24, 2009 which dismissed all negligence claims against the defendant Nanoia. That motion relies exclusively on a motion by the plaintiff in action #2, to wit; PG Insurance Company as subrogee of Richner which in essence objects (via motion #3 in action #2) to the court's dismissal of the negligence claims asserted against Nanoia. The parties have differing opinions as to whether the order dismissed the negligence claims against Nanoia or just the original movant Westbury in that motion. PG argues that the order cannot be read as dismissing claims asserted against Nanoia, because Nanoia was a non-moving party.

Defendant Westbury moves (motion #18) for reargument and renewal seeking to reinstate the claims and cross claims which the court dismissed against the defendant Richner predicated on the rejection of the affidavit of Peter Davis.

Finally, the plaintiff in action #1 Hebrew Academy cross moves (motion #19) for an order rearguing and renewing seeking the same relief on the identical grounds sought by the plaintiff in action #2 PG Insurance.

At the outset, however denominated, none of the motions can be fairly construed as

seeking renewal. A motion to renew is a vehicle to bring to the court's attention facts or controlling issues of law which were not capable of presentation to the court in the first instance. See, DeRaffele Mfg. Co. Inc. v. Kaloakes Management Corp., 48 A.D.3d 807, 852 N.Y.S.2d 390; Lardo v. Rivlab Transportation Corp., 46 A.D.3d 759, 848 N.Y.S.2d 337. However, where the information submitted is not new, or previously unknown, a motion for renewal will not be granted. City of New York v. St. Paul Fire and Marine Ins. Co., 21 A.D.3d 982, 801 N.Y.S.2d 389. In the instant case, there is no allegation that some pertinent evidence was not capable of presentation in the initial motions papers submitted to the court. Accordingly, to the extent that any of the movants seek renewal those applications are denied.

Thus, the only viable basis for reconsideration of the respective motions would be a claim that reargument is in order. On an application for reargument, the movant must demonstrate that the court overlooked, misapprehended or misapplied a controlling issue of law or fact. In this regard, the movants claim that the court erred in not considering the affidavit of Peter Davis. Secondarily, the movants allege that the court's dismissal of the negligence claims against Nanoia was inappropriate since such relief was not the direct object of any of the initial motions.

The motions arise in the context of the difficulty in completing discovery within the time frame contemplated by the standards and goals fixed by the court administrators. As the prior decision referenced, strict adherence to those parameters was not possible and the parties, apparently, agreed to certain discovery post note of issue; a circumstance which the court considered in extending the time for the submission of motions for summary judgment beyond the norm. Significantly absent from the moving papers is any unequivocal statement that within the parameters of their post note of issue discovery that the parties had agreed to waive the demand for disclosure of experts or to extend the time to identify said experts. In recognition of these circumstances, the attorneys for Nanoia argue that the court considered the experts of some of the parties, disclosed post note of issue but not the experts of Nanoia and Westbury. In essence, there is an inference that the court has inconsistently applied the rules of discovery. Counsel for Nanoia urges the court to consider not only the affidavit of Peter Davis, but also the affidavit of another expert James Crabtree. However, as counsel for Richner points out all the parties were aware of all the experts (other than Peter Davis), they intended to utilize (ostensibly in compliance with the various outstanding demands) well before the respective summary judgment motions were filed.

With respect to the affidavit of James Crabtree, the court notes that it was submitted not in support of Westbury's motion in chief, but is clearly labeled a reply affidavit which can and was considered in opposition to the motions of the other parties. This detailed affidavit sets forth expert reasons why an electrical failure in the baler could not have been the cause of the fire. It does not offer an explicit opinion as to what caused the fire and, viewed in the light most favorable to Westbury, merely speculates as to other possible causes of the fire. Thus, the Crabtree affidavit suffers several distinct infirmities. The first infirmity is that new material may not be offered in a reply affidavit; since to do so would deprive the other parties of an opportunity to respond to such new material Spears v. Spears Fence Inc., 60 A.D.3d 752, 875

N.Y.S.2d 166; Keitel v. Kurtz, 54 A.D.3d 387, 866 N.Y.S.2d 195. The second infirmity and of greater import, the Crabtree affidavit is consistent with the key findings of the court under attack, to wit; that neither Westbury or Nanoia had actual or constructive notice of any defect in the replacement baler; thus, negating the claims of negligence asserted against them and inferentially such claims of negligence against Richner. The third infirmity is that the Crabtree affidavit does not demonstrate any negligence of any party seeking dismissal that caused the fire. Without explicitly stating so, Nanoia argues that if the baler did not cause the fire, it must have been caused by Richner, Westbury or Herald. However, a party may not defeat a motion for summary judgment by demonstrating the weakness of the other party's case and must demonstrate that an issue of fact exists, to wit; by identifying a cause of the fire attributable in this instance to the Richner, Westbury, Herald or another identifiable party. Cf Barr v. 157 5th Ave. LLC., 60 A.D.3d 796, 875 N.Y.S.2d 228; See, Troy Sand & Gravel Co. Inc., 256 A.D.2d 903, 682 N.Y.S.2d 263. Thus, the court gave the Crabtree affidavit the consideration it was due and found that it could not be a basis for defeating the motions for summary judgment granted by the court.

The gravamen of the various arguments submitted is that the court erred in not considering the affidavit of Peter Davis (a circumstance explicitly so stated in the court's decision). Unlike the Crabtree affidavit, the Davis affidavit was submitted in direct opposition to a motion for summary judgment and was not offered as a reply affidavit. Unlike the Crabtree affidavit, there was no notice to any of the parties in compliance with outstanding discovery demands that Davis was to be a designated expert.

The court properly rejected the Davis' affidavit for two reasons. First, the court correctly rejected the affidavit for failure to timely disclose such expert. The inexcusable delay in disclosing this expert warranted this court's refusal to consider the affidavit. King v. Gregruss Management Corp., 57 A.D.3d 851 (2nd Dept. 2008). The Second Department's recent decision in Howard v. Kennedy (60 A.D.3d 905) on which Nanoia relies is distinguishable. In that case, the court specifically found that there was a "factual dispute" as to whether the plaintiff had complied with CPLR 3101(d) (a circumstance not present herein). Nanoia's motion for reargument on that ground is denied. Construction by Singletree, Inc. v. Lowe, 55 A.D.3d 861 (2nd Dept. 2008); *see also*, Wartski v. C.W. Post Campus of Long Island University, 63 A.D.3d 916 (2nd Dept. 2009). The court notes the potential harsh result that might result in the rigid application of this rule of law where the parties have embarked on their own discovery odyssey post note of issue. The court also notes the practical difficulties facing an attorney who may be reluctant to burden the client with the expense of an expert until such expert is truly needed. On the other hand, the purpose of the rule; to avoid litigation by ambush, should not lightly be disregarded. Notwithstanding the foregoing, a sufficient basis for reconsideration of the court's prior order has not been demonstrated in this instance.

On a motion for reargument, the applicant must establish that the court overlooked a controlling principle of law or a dispositive fact. Pryor v. Commonwealth Land Title Ins Co., 17 A.D.3d 434, 793 N.Y.S.2d 452; 300 West Realty Co. v. City of New York, 99 A.D.2d 708, 471 N.Y.S.2d 858. In the present case, the movants have failed to sustain their burden with respect to

the Davis affidavit. In addition to being served in violation of the appropriate time frame, an examination of that affidavit shows that this affidavit is not as detailed as the Crabtree affidavit and consists solely of conjecture and surmise. The tenor of the affidavit is summarized by Mr. Davis when he states. "Based on my inspection of the fire loss location, it is my opinion that one specific cause of the fire cannot be determined." (Affidavit of Peter Davis ¶ 3). This statement which is reiterated in the last paragraph of his affidavit. Affidavits based solely on conjecture or surmise should not be considered on applications for summary judgment. See, Ramos v. Howard Industries Inc.,10 N.Y.3d 218, 855 N.Y.S.2d 412; Xhemal v. Xhika, 49 A.D.3d 719, 854 N.Y.S.2d 449. Moreover, once a proponent of summary judgment has established a *prima facie* basis for summary judgment the burden shifts to the opponent to establish an issue of fact. Pellicane v. Lambda Chi Alpha Fraternity Inc., 228 A.D.2d 569, 644 N.Y.S.2d 769; Meyers-Kraft v. Keem, 64 A.D.3d 1172, 883 N.Y.S.2d 838. In the instant case, the Davis affidavit fails to prove any negligence on the part of Richner, Westbury, Herald or any other person, and therefore, even if it had been considered, it would not have been an impediment to the relief granted by the court since it was without probative value. The parties should note that the court's ruling was made in the context of the issue of liability and the parties did not present, and the court did not pass on, any facts or circumstances which might be presented on the issue of damages.

Turning to the last argument offered, to wit; that the court erred in searching the record to grant summary judgment to Nanoia who had not requested summary judgment, the court finds such argument without merit. The authority for such power is set forth in CPLR§ 3212 (b) which states "If it shall appear that any other party other than the moving party is entitled to summary judgment, the court may grant such judgment without the necessity of a cross-motion." Thus, there is no question where one party raises an issue against a claim asserted by another party, a non-moving party not seeking such relief may nonetheless benefit from findings of fact in its favor. A classic example would be where there are multiple defendants in a motor vehicle accident, and only one moves successfully for summary judgment on the basis that no serious injury was sustained by the plaintiff. Despite the fact that the other defendants have not moved for dismissal of the compliant against them, the court can nonetheless afford the non-moving defendants of the benefits of its finding by dismissing the complaint in toto. To hold otherwise would force courts to entertain claims that have been held to be without merit.

The facts herein are different in two important respects. First the issue of Nanoia negligence was not directly or indirectly raised by any of the prior motions. Secondly, the potential liability of Nanoia and Richner were not inextricably interwoven. The proof demonstrated that Richner had neither actual or constructive notice of any defect in the baler. Also there is no viable allegation that Richner created the condition. On the other hand, the allegations against Nanoia include an assertion that the condition was created by Nanoia and the court was not provided sufficient information to rule one way or the other on such circumstance The court notes, the court's decision never states it was searching the record to grant any relief to a non moving party. In view of the circumstances set forth above, a searching of the record was not intended or implemented. See, Baker v. Bouza Falco Co., 28 A.D.3d 503, 814 N.Y.S.2d 188

lv to appeal dnd, 7 N.Y.3d 707, 821 N.Y.S.2d 812. The court's order is not necessarily to the contrary. The court ruled as follows:

> "On the other hand, the proof submitted by Westbury shows that neither Westbury Paper Stock or Nanoia had actual or constructive knowledge of any defects in the replacement baler, therefore all of the claims sounding in negligence are dismissed. Lasser v. Northrup Grumman Corp, 55 A.D.3d 561, 865 N.Y.S.2d 301; Perez v. Cassone Leasing Inc., 40 A.D.3d 946, 837 N.Y.S.2d 215. No adequate proof to the contrary was submitted. Accordingly, that branch of the motion seeking summary judgment dismissing the negligence cause of action is granted."

The first sentence of the quote broadly dismisses all negligence claims, but is then, as more indicative of the court's intent, qualified by the very next sentence which indicates the dismissal is only as to the branch of the motion that sought dismissal of the negligence claims. Only Richner, Westbury and Herald moved for such relief and the directive applied only to the motions interposed. Thus, the order only applied to the negligence claims whose dismissal was sought by the motions before the court.

Accordingly, in so far as the respective motions and cross-motion seek reargument, those branches of each of said applications are denied.

So Ordered.

A.J.S.C.

Dated: September 18, 2009

ENTERED

SEP 28 2009

NASSAU COUNTY

COUNTY CLERK'S OFFICE