

**Cherpelis v W. 46th Group, Inc.**

2009 NY Slip Op 32317(U)

October 5, 2009

Supreme Court, New York County

Docket Number: 106196/08

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 106196/2008  
**CHERPELIS, STEPHEN**  
 VS.  
**W. 46TH GROUP, INC.**  
 SEQUENCE NUMBER : 003  
 REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

is this motion to/for renew/reargue

PAPERS NUMBERED

1, 2

3

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion to renew/reargue by plaintiff is denied in accordance with the attached memorandum decision.

**FILED**

OCT 08 2009

COUNTY CLERK'S OFFICE  
NEW YORK

HON. DORIS LING-COHAN

Dated: 10/5/09

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

-----x  
STEPHEN CHERPELIS,  
Plaintiff,

Index No.: 106196/08

-against-

DECISION AND ORDER

W. 46<sup>TH</sup> GROUP, INC. d/b/a BULL RUN  
RESTAURANT, CONSTANTINE IOANNOU  
and CELE IOANNOU,  
Defendants.

Motion Seq. No.: 003

-----x  
DORIS LING-COHAN, J.:

Plaintiff moves pursuant to CPLR 2221, for leave to renew and reargue the decision of this court dated February 27, 2009, in which defendants' motion for summary judgment was granted and the complaint dismissed.

At the outset, the court notes that plaintiff-movant has failed to follow the proper procedure when moving to renew and reargue a prior court decision. CPLR 2221(f) provides in relevant part: " A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought...."; see also *Giardina v. Parkview Court Homeowners' Ass'n, Inc.*, 284 AD2d 953 (4<sup>th</sup> Dept 2001); *Estate of Ancell*, 191 Misc 2d 252 (Sur Court, Westchester County 2002). Here, although seeking combined relief, plaintiff failed to separately identify the relief sought and provide separate support as required.

Moreover, plaintiff failed to move by order to show cause as required. See *Mayor v. Mayfair Rlty. Corp*, NYLJ, Nov. 7, 1997, at 26, col 2 (Sup Ct, New York County); *Park West Village*

[\* 3 ]  
Assocs. v. Slepian, NYLJ, Feb. 21, 1996, at 28, col 5 (Civ Ct, New York County); Altieri, Kushner, Miuccio and Frind, P.C. v. Reliance Ins. Co. of New York, NYLJ, August 5, 1993, at 23, col 1 (Civ Ct, New York County).

Further, with respect to plaintiff's request for renewal, there is no basis for renewal as movant failed to assert "new facts not offered on the prior motion that would change the prior determination or...demonstrate that there has been a change in the law that would change the prior determination". See CPLR §2221(e).

With respect to reargument, CPLR 2221 (d) (2) permits a party to move for leave to reargue a decision of a court upon a showing that the court misapprehended the law in rendering its initial decision.

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and 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. Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted [internal citations and quotation marks omitted]".

*William P. Pahl Equipment Corp. v. Kassis*, 182 AD2d 22, 27 (1<sup>st</sup> Dept 1992).

Here, the gravamen of plaintiff's argument is that the court misapprehended the settlement made between the parties in a prior action ("2003 litigation"), asserting that plaintiff's entitlement to an accounting was limited, by the release, to the period from the date of the complaint in the prior action (May 7,

2003), to and including the date of the settlement in open court, April 25, 2007. In support of this contention, plaintiff has quoted the allocution on the record as follows:

"The Court has been advised that in consideration of the retroactive claims as a shareholder, the defendants have agreed to offer Mr. Cherpelis \$130,000.00 in full satisfaction of **any and all claims pertaining to his interest from the inception of his relationship up through until today going forward** [emphasis added]."

However, plaintiff's argument is unavailing. As indicated above, and in the earlier decision, when plaintiff entered into the stipulation of settlement of the 2003 litigation, in open court, he released his claims as a shareholder up through that day, April 25, 2007, and going forward.

Both the 2003 litigation and the within action, seek an accounting of the income and profits of W. 46<sup>th</sup> Street Group, Inc., as well as money damages. Moreover and significantly, subsequent to the settlement of the 2003 litigation on the record, plaintiff executed a written general release in such case, dated July 23, 2008, which discharged the corporate defendant and Constantine Ioannou for all causes of action set forth in the 2003 litigation, specifically, from the "beginning of the world...to the date of the release". Consequently, plaintiff's claims in the within lawsuit (which include a demand for an accounting and money damages equal to his share of the profits from **March 15, 2001 through the date of the complaint, May 1, 2008**), are barred by the *general release in the 2003 lawsuit, executed on July 23, 2008, after the commencement of the*

**this lawsuit.** While the court notes that the July 23, 2008 release refers to the causes of action set forth in the 2003 litigation and fails to specifically address the claims asserted by plaintiff in this case, since the within claims seemingly mirror the claims asserted in the 2003 litigation, namely an accounting and money damages for lost profits, the court deems such release as a bar to the claims asserted herein.<sup>1</sup>

Plaintiff has presented no other new arguments that would warrant a reversal of the court's previous determination. All of plaintiff's other arguments are mere reiterations of his earlier position, which the court found unavailing.

Based on the foregoing, it is hereby

ORDERED t Both the 2003 litigation and the within action, seek an accounting of the income and profits of W. 46<sup>th</sup> Street Group, Inc., as well as money damages. hat plaintiff's motion for leave to renew and reargue is denied; and it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy upon plaintiff with notice of entry.

Dated: 10/5/09

**FILED**  
OCT 08 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

  
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Doris Ling-Cohan, J.S.C.

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<sup>1</sup> The court notes, however, that the February 27, 2009 dismissal of this case, may not bar plaintiff from commencing a new lawsuit, for any potential claims which may have accrued **after** the general release date of **July 23, 2008**, if appropriate.