SCAN

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.: 20 & 21
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.

Plaintiff.

Index No.: 4604/2007

- against -

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

Defendants.

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

Plaintiff.

Index No.: 8056/2006

- 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.

RICHNER COMMUNICATIONS INC. and THE JEWISH STAR LLC. Plaintiffs

-against- **Index # 10263/07**

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

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	**X**
Answering Affidavits	**X**
Replying Affidavits	**X**

In several 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, the defendant, Westbury Paper Stock Corp moves (motion # 20) for summary judgment dismissing the complaint in action # 5 (Nassau Index #10263/2007) and to preclude that plaintiff's use of certain experts, or alternatively, to conduct a "Frye" hearing on the suitability of permitting said experts to testify at trial. The defendant Nanoia Recycling Equipment Inc. (defendant in all five actions)cross moves (motion #21) for an order granting it summary judgment in action #5 and precluding the plaintiff's use of its experts, or alternatively, conducting a "Frye" hearing.

Of note is the procedural posture of this case. Action #5 was joined with the other four actions by order dated January 7, 2009 (Lally, SCJ), without prejudice to the right of the trial justice to sever action #5 if a note of issue was not filed prior to the trial date set for the other four actions. In this regard, the court noted that notes of issue in each of the other four actions were filed in the summer of 2008. Action #5 was certified for trial on March 3, 2009 with a note of issue deadline of June 1, 2009 and any motion for summary judgment to be noticed within 60 days thereafter. A note of issue for action #5 was not filed until May 19, 2009.

Consequently, in the other four actions motions for summary relief were heard and

determined by this court's order of April 24, 2009. Thereafter, motions to reargue and reconsider that order were determined by this court's order of September 18, 2009. The court records indicate that the motions culminating in this court's order of September 18, 2009 were originally returnable on July 22, 2009 and that the instant applications were initially returnable on August 14, 2009. No explanation is given as to why all the motions could not have been considered at the same time. Nonetheless, motion # 20 appears to have been initiated within the time contemplated by the applicable certification order, while the cross motion (motion #21) appears to be brought beyond such time period. However, given that motion #21 is not substantively different from motion #20 the court will exercise its discretion to consider both motions and deem them timely. See Grande v Peteroy 39 AD2d 590, 833 NYS2d 615, Bressingham v Jamaica Hospital Med Ctr.17 AD3d 496, 793 NYS2d 176.

The court notes that movant participated in both the motions for summary judgment as well as the motions for reconsideration. Similarly, the cross movant had participated in the original motion for summary judgment as well as the motions for reconsideration. The present motions appear yet to be another attempt to revisit the prior determinations of the court. To the extent that goal may be the objective, and the applications might be viewed as applications for reargument of the prior motions, such relief is denied.

A degree of confusion has ensued for the court and its personnel in that the parties have included all five captions and the clerks have treated the actions particularly action #5 as if it had been consolidated without an amended caption. Moreover, the parties in their respective papers discuss the present motions in the context of the prior motions in the related actions. In particular, when the movant and cross movant speak of the plaintiff's expert it is apparent that they are addressing the experts of the plaintiff Richner, the subrogor in action #2, and the named defendant in actions #1 and #4.

The fifty page attorney's affidavit of t he movant attempts to revisit many of the same issue addressed in the prior motions or raises other issues that could have been raised in addressing the relief previously sought in the prior motions. Central to the determination of this motion is consideration of whether an issue of fact exists as to the causation of the fire. For example, apart form the argument related to the necessity of a potential Frye hearing, the defendant makes the following arguments: 1) The plaintiff's complaint fails to properly allege sufficient facts to invoke strict liability either on a theory of a design or manufacturing defect, 2) The plaintiff's breach of warranty claims are defective 3) the defendant Westbury was not a regular seller of baling presses, 4) the plaintiff impermissibly relied on circumstantial evidence to defeat the prior summary judgment motion, 5) Richner, not being an owner of the building, was not damaged by the fire, 6) the plaintiff has no right to claim a breach of contract. Lastly, the movant and cross movant seek to invalidate the court's previous consideration of certain experts of the plaintiff and, in this regard, claim that the plaintiff's experts opinions are flawed and are not accepted in the scientific community.

The nearly 70 page opposition papers attempt to refute the various arguments by the movant and cross movant. The plaintiff invokes the doctrine of law of the case; asserting that such arguments were previously addressed by the court or could have been addressed by the court

in the determination of the original motion for summary judgment or the re-argument thereof. The plaintiff then attempts a point by point rebuttal of each assertion of the movant and cross movant. By reply, the movant and cross movant reiterate all their prior assertions.

The court has construed the motion and cross motion as an attempt to re-argue since the object of the motion, in effect, is to negate the prior determinations of the court. The court is not confined to the characterization of the motion by the applicant and where appropriate may deem the motion as on one for reeargument. See Cherchio v Alley 111Ad2d 541, 489 NYS2d 413, Roy v National Grange Mut Ins Co. 85 Ad2d 832 446 NYS2d 423. Here, the motion and cross motion clearly seek to nullify the prior judicial determination that an issue of fact exists as to the causation of the fire in question. However denominated, the applicants cannot get a second bite at the apple and may neither rehash arguments previously considered nor submit proof or make arguments that could have been submitted in the first instance. See Mike v Riverbay Corp.57 AD3d 357, 867 NYS2d 447, Frisenda v X Large Enterprises, 280 AD2d 514, 720 NYS2d 187.

Whether asserted as "res judicata", "collateral estoppel , "law of the case", or "merger and bar" these various, but distinct doctrines, all falling within the penumbra of issue preclusion and are invoked to prevent both the needless repetition of relitigating the same issues as well as inconsistent judicial determinations. See Siegel New York Practice , 3rd Edition §442. In this instance, because the central issue; to wit, the causation of the fire, has been ruled to be an issue of fact, thereby leaving the final determination of such issue for the jury, the most applicable doctrine is law of the case- which prevents reconsideration of issues within in a case before a final judgment or verdict occurs. See McGrath v Gold 36 NY 2d 406, 369 NYS2d 62. In this instance, the court has determined that an issue of fact exists as to the cause of the fire.

The motion and cross motion are brought by parties who participated in the prior motions determining said issue and had the opportunity to address the assertions of the plaintiff's experts. The court did not accept their arguments then, and does not accept them as now enhanced . In this regard, it is significant to note that different standards of proof apply to motions for summary judgment as opposed to the burden of the plaintiff on trial. The fact that the court elected to consider proof that either was not sufficiently then challenged as to its acceptance in the scientific community, or accepted such testimony without a Frye hearing (where none appears to have been then requested), is of no moment. The acceptance of evidence to defeat a summary judgment motion that might be deemed incompetent or inadmissible at trial is not unprecedented; particularly where, as here, there is other testimony, although circumstantial in nature, which sufficiently raises an issue of fact as to the causation of the fire. See Phillips v Joseph Kantor & Co. 31 NY2d 307, 338 NYS2d 882, New York City Asbestos Litigation v A.O. Smith Water Products Co. 21 AD3d 320, 800 NYS2d 388, Kwi Bong Yi v JNJ Supply Corp. 274 AD2d 453, 711 NYS2d 906.

The determination of whether a witness has requisite qualifications to be deemed an expert by the court is generally a role reserved for the trial court. See 58 A N.Y. Juris 2nd Evidence and Witnesses §655. Notwithstanding the foregoing, the court is aware of instances where the issue of the qualifications of the proposed expert and the reliability of the anticipated

testimony has been entertained at earlier stages in the proceedings See e.g. Parker v Mobil Oil Corp. 7 NY3d 434, 824 NYS2d 584. However, the court is unaware of any case where the court has permitted such expert testimony to defeat a motion for summary judgment by determining an issue of fact exists and then is called upon to disqualify that same expert's proof ex post facto. Therefore, the best course in such situations is to deny that branch of the respective motions which seek a Frye hearing without prejudice to renew before the assigned trial justice since that standard for admissibility of evidence for summary judgment purpose may differ from that which the trial judge may deem admissible evidence at trial. See Wolf ex. Rel. Ginsberg v Bakert 9 Misc3d 1114, 808 NYS2d 921.

Accordingly, the motion and cross motion are both denied. The plaintiff is awarded motion costs pursuant to CPLR §§8106, 8202.

So ordered ,

12-3-09

DANIEL MARTIN, A.J.S.C.