SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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PHYLLIS A. RECINE, STEVEN M. DEL VECCHIO and DEL VECCHIO & RECINE, LLP

Plaintiffs,

-against-

AMY MARGOLIS,

Defendant.

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SCAN

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 14
Index No.: 020327/08
Motion Seq. No.: 03

DECISION AND ORDER

Papers Read on this Motion:

Plaintiffs' Notice of Motion	03
Defendant's Affirmation	xx
Plaintiffs' Affidavit	xx

Relief Requested:

The Plaintiffs move for an order granting the following relief: [1] an order pursuant to CPLR §2221[d] granting leave to reargue this Court's August 13, 2009 Decision and Order, and upon such reargument granting the Plaintiffs' motion for summary judgment on the issue of liability and denying the Defendant's motion for summary judgment. (Sequence #003).

Factual and Procedural Background:

The Plaintiffs herein previously represented the Defendant in a matrimonial matter during the period of September 2006 through August of 2007. In August of 2007, Ms. Margolis, discharged the Plaintiffs and retained alternative matrimonial counsel. Subsequently, a fee dispute arose between the Plaintiffs and the Defendant, in response to which the Plaintiffs filed a Request for Fee Arbitration on September 20, 2007. In connection thereto, the Defendant hired the firm of Stern, Adler and DeRossi, LLP to represent her interests. Accordingly, by letter dated October 3, 2007, Stern, Adler and DeRossi

informed the Office of Court Administration of their representation of Ms. Margolis and that she was not consenting to arbitrate the fee dispute. Notwithstanding the foregoing, the fee arbitration was assigned to a panel and a hearing was scheduled to take place on March 3, 2008.

In the *interim*, on or about January 11, 2008, Stern, Adler and DeRossi commenced a legal malpractice action on behalf of Ms. Margolis and against the named Plaintiffs herein[1].

On March 3, 2008, the day the arbitration was scheduled to take place, Ms. Margolis, through her attorneys, moved by order to show cause (within the context of the legal malpractice action) to obtain a temporary injunction staying the fee hearing. Their application for a temporary restricting order was granted. On the return date of that application, neither Ms. Margolis nor her counsel appeared and the temporary restraining order expired. Thereafter, and by order dated April 9, 2008, the application was formally denied based upon the failure of the movant to provide an affidavit attesting that the moving papers were served on all parties. The fee arbitration hearing ultimately convened on April 10, 2008, at which time the Plaintiffs were awarded $39,548.14 plus interest, which award was thereafter confirmed on May 9, 2008.

The Plaintiffs subsequently commenced the within action against Ms. Margolis sounding in malicious prosecution and abuse of process and moved for summary judgment thereon as to the issue of liability. Simultaneously, the Defendant cross-moved for, *inter alia*, an order granting summary judgment dismissing the Plaintiffs' complaint.

By Decision and Order of this Court dated August 13, 2009, this Court denied the Plaintiffs' motion for summary judgment as to the issue of liability and granted the Defendant's cross-motion for

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[1] On July 3, 2008, counsel representing the Plaintiffs in the legal malpractice action moved for dismissal thereof. By order dated July 25, 2008, the Honorable Roy S. Mahon granted the application, which was unopposed by counsel for Ms. Margolis.

summary judgment dismissing the Plaintiffs' complaint. The Plaintiffs' instant application seeking reargument of said Decision and Order thereafter ensued.

Plaintiff's Application

In support of the instant application, the Plaintiffs initially argue that additional discovery is required so that they may ascertain "what information Defendant provided to her attorneys" (*see* Racine Affidavit in Support at ¶¶7, 8). Plaintiffs assert that there was "no information in the record with respect to what Defendant told counsel and how the decision to sue for malpractice was reached" (*id.* at ¶9).

The Plaintiffs additionally assert that the presumption of probable cause for the commencement of the legal malpractice action, created by issuance of the temporary restraining order, was sufficiently rebutted by the affidavit of Steven M. Del Vichy, which "sets forth with great specificity facts sufficient to overcome the effect of the temporary restraining order" (*id.* at ¶¶16, 17, 18).

In addition to the foregoing, the Plaintiffs further contend that this Court improperly concluded that the damages alleged to have been sustained were *only* those incidental to defending a law suit (*id.* at ¶¶19, 20).

Finally, the Plaintiffs contend that this Court improperly relied upon the case of *Weidlich v Weidlich*, 177 Misc. 246 (NY Sup. 1941) for the proposition that an individual's reliance upon the advice of counsel to commence an action is sufficient to demonstrate probable cause for having done so (*id.* at ¶¶9, 10, 11; *see also* Recine Affidavit in Reply at ¶¶11, 14). The Plaintiffs contend in reaching it's conclusion, the *Weidlich* Court was addressing law in jurisdictions other than New York and that the court did not cite any New York authority for the proposition espoused (*see* Recine Affidavit in Support at ¶¶10, 11; *see also* Recine Affidavit in Reply at ¶¶11, 14).

It is well settled that "[m]otions for reargument are addressed to the sound discretion of the trial

court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law and mistakenly arrived at its earlier decision." (*Viola v City of New York*, 13 AD3d 439 [2d Dept 2004]; *Carrillo v PM Realty Group*, 16 AD3d 611[2d Dept 2005]; *McNeil v Dixon*, 9 AD3d 481[2d Dept 2004]). A motion to reargue is not to afford an unsuccessful party with additional opportunities to reargue issues previously decided, or to set forth arguments which differ in substance from those originally articulated (*McGill v Goldman*, 261 AD2d 593 [2d Dept 1999]; *Woody's Lumber Co., Inc. v Jayram Realty Corp.*, 30 AD3d 590 [2d Dept 2006]; *Gellert & Rodner v Gem Community Mgt.*, 20 AD3d 388 [2d Dept 2005]).

Decision:

Initially, and with respect to the Plaintiffs' argument that additional discovery is now required, same is insufficient to grant reargument (*id.*). In opposing the cross-motion interposed by the Defendant, the Plaintiffs never at any time argued that said application should have been denied to complete additional discovery pursuant to CPLR §3212[f]. Moreover, in opposing the Defendant's cross-application, the Plaintiffs specifically stated that "there are no issues of fact for this court to decide, there are only issues of law" (*see* Del Vecchio Affidavit in Opposition and Reply dated June 5, 2009 annexed as Exh. B to Affirmation in Opposition to Plaintiffs' Motion to Reargue).

As to Plaintiffs argument that they sufficiently rebutted the presumption of probable cause, same is equally unavailing. Upon a review of the affidavit authored by Mr. Del Vecchio, he states that "the restraining order referred to was obtained ex parte, based upon false representations of a meritorious claim" (*see* Del Vecchio Affidavit in Opposition and Reply dated June 5, 2009 at ¶26, annexed as Exh. B to Affirmation in Opposition to Plaintiffs' Motion to Reargue). However, said assertions are conclusory and, contrary to the Plaintiffs' argument, fail to inform this Court with any specificity as to

which representations were indeed false.

Additionally, the damages sustained by the Plaintiffs which included "injury to their reputation, embarrassment, loss of time, loss of income, anxiety, mental distress, mental suffering, expenses incurred in the defense of the action, and being required to report said action to its insurance carrier thereby becoming a permanent part of Plaintiffs' records" are clearly those incidental to defending the legal malpractice action (*Engel v CBS, Inc.*, 93 NY2d 195 [1999]). Moreover, the temporary restraining order issued within the context thereof clearly did not substantially interfere with the Plaintiffs' property rights, as same only delayed the fee arbitration award until April 10, 2009 (*id.*).

Finally, with respect to the Plaintiffs' contention that this Court inappropriately relied upon the *Weidlich* decision, the Court has carefully reviewed said decision. Upon such review, it is clear that *Weidlich* Court rested upon other New York authority in acknowledging that an individual's reliance upon the advice of counsel is sufficient evidence of probable cause to commence an action (*Weidlich v Weidlich*, 177 Misc 246 at 252).

Based upon the foregoing, the Plaintiff's instant application made pursuant to CPLR §2221[d]which seeks leave to reargue the decision of this Court dated August 13, 2009 is hereby **DENIED**.

This constitutes the Decision and Order of the Court.

DATED: December 8, 2009
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.
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