

**Ripperger v Clifton Park Food Corp.**

2010 NY Slip Op 30096(U)

January 20, 2010

Supreme Court, Green County

Docket Number: 08/0653

Judge: Joseph C. Teresi

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SUPREME COURT  
STATE OF NEW YORK COUNTY OF GREENE

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MARILYN RIPPERGER and  
FRANCIS J. RIPPERGER, JR.,  
her husband,

Plaintiffs,

**DECISION and ORDER**  
**INDEX NO. 08-0653**  
**RJI NO. 19-08-3898**

-against-

CLIFTON PARK FOOD CORP.,

Defendant.

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Supreme Court Greene County All Purpose Term, January 8, 2010  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

Defendant’s prior summary judgment motion was denied by this Court’s Decision and Order, dated October 30, 2009, because it was untimely made pursuant to CPLR 3212(a). Defendant now moves to reargue and renew such motion. Defendant claims that this Court overlooked “facts distinguishing [its prior untimely motion] from Coty v. County of Clinton [42 AD3d 612 [3d Dept. 2007]]” and misapprehended the date its prior motion was “made”. Defendant also introduced new facts relative to when its prior motion was “made”. Because this

Court's prior decision did not overlook or misapprehend any fact or law, Defendant's motion to reargue is denied. Likewise, because the new facts submitted by Defendant are irrelevant, its motion to renew is also denied.

As a preliminary matter, Defendant's motion failed to conform with the requirements of CPLR § 2214(c) and is defective because the papers from the underlying motion it seeks to renew and reargue are not fully attached. (Lower Main Street, LLC v. Thomas Re & Partners, NYLJ, 4/5/2005, p. 19. col. 3 [Sup Ct Nassau County 2005] cited by David D. Siegel, *Supp Practice Commentary*, McKinney's C2221:7; Sheedy v. Pataki, 236 AD2d 92, 97 [3d Dept. 1998]). On its prior motion, Defendant submitted to the Court a Notice of Motion, dated September 16, 2009 which replaced its earlier defective Notice of Motion, dated September 15, 2009. On this record, however, Defendant submits only its defective September 15, 2009 Notice of Motion, but not its September 16, 2009 Notice of Motion. A copy of such document is part of this Court's file and is being considered herein because it is determinative of when Defendant's prior motion was "made".

CPLR §2221(d) states that: "[a] motion for leave to reargue: (1) shall be identified specifically as such; (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and (3) shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." (Loris v. S & W Realty Corp., 16 AD3d 729 [3d Dept. 2005]; Gibbs v. Harp, 46 AD3d 1010 [3d Dept. 2007]). It is uncontested that Defendant's motion was properly identified and timely made.

First, this Court did not misapprehend when Defendant "made" its motion. "A motion on

notice is made when a notice of the motion... is served.” (CPLR §2211). Here, although Defendant served its initial Notice of Motion on September 15, 2009, such notice was defective. Without court intervention, Defendant cured its earlier defect on September 16, 2009 by cancelling its defective Notice of Motion and serving a new Notice of Motion. Because notice of Defendant’s motion was not served until September 16, 2009, such date constitutes the date the motion was “made”. (CPLR §2211). As such, this Court did not previously misapprehend any facts in finding that Defendant’s motion was made on September 16, 2009.

Second, Defendant incorrectly claims that this Court overlooked the facts that distinguish its late summary judgment motion from the untimely summary judgment motion that was denied in Coty. Defendant claims that because this Court did not disapprove of the parties’ alleged oral stipulation to allow Defendant to make its summary judgment motion by September 15, 2009, it thereby approved the parties’ alleged agreement. Defendant’s equating this Court’s “non disapproval” with “approval” is both unwarranted and logically fallacious. Nor does Coty stand for the proposition that a court may approve a stipulation extending the CPLR §3212(a) date without finding “good cause” for the extension. Defendant offered no evidence that this Court’s “non-disapproval” of the parties’ alleged stipulation was based upon “good cause shown”. Accordingly, Defendant failed to demonstrate that this Court overlooked any facts that distinguish this case from Coty.

Accordingly, Lewis’ motion to reargue is denied.

Turning next to Defendant’s motion for leave to renew, CPLR §2221(e) states that a “motion for leave to renew: (1) shall be identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination... and (3)

shall contain reasonable justification for the failure to present such facts on the prior motion.”

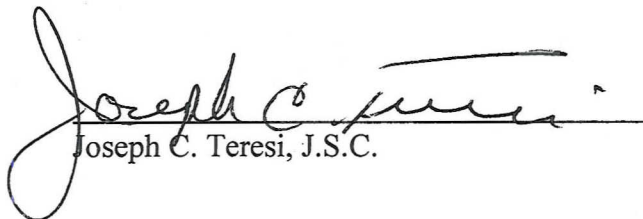
Here, Defendant failed to demonstrate its “new facts” would change this Court’s prior determination. On this motion, Defendant introduced new proof that it served its defective September 15, 2009 Notice of Motion on such date. Such service was not at issue on the prior motion, nor is it at issue here. Rather, such proof is irrelevant because Defendant did not serve its actual notice of motion until September 16, 2009. Moreover, even assuming that Defendant made its motion on September 15, 2009, it was still untimely. The oral stipulation Defendant relies upon to extend the CPLR §3212(a) motion date to September 15, 2009 was not enforceable. (CPLR §2104; Gonyea v. Avis Rent A Car System, Inc., 82 AD2d 1011 [3d Dept. 1981][lack of a stenographic record precludes the finding of an enforceable “open court” oral stipulation]; Zenteno v. Geils, 17 AD3d 457 [2d Dept. 2005]). Because Defendant’s time to serve its summary judgment motion pursuant to CPLR §3212(a) had expired prior to September 15, 2009, its new proof that it made its motion on that date is irrelevant.

Accordingly, Defendant’s motion to renew is denied.

This Decision and Order is being returned to the attorneys for Plaintiffs. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: January 20, 2010  
Albany, New York

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated December 10, 2009, Affidavit of Armen Nazarian, dated December 10, 2009, with attached Exhibits "1" - "8".
2. Affidavit of John P. Kingsley, dated December 18, 2009.
3. Notice of Motion dated September 16, 2009 with letter of Armen J. Nazarian, dated September 16, 2009.