

Peerless Importers, Inc. v Cornerstone Sys. Inc.

2010 NY Slip Op 30607(U)

March 18, 2010

Supreme Court, New York County

Docket Number: 113810/2007

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 : 113810/2007

PEERLESS IMPORTERS

vs

CORNERSTONE SYSTEMS

Sequence Number : 003

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for reargue

PAPERS NUMBERED

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

1, 2

Answering Affidavits — Exhibits _____

3

Replying Affidavits _____

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *by plaintiff to, inter alia,*
reargue, is denied in accordance with the
attached memorandum decision.

FILED

MAR 24 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: _____

3/18/10

JUSTICE DORIS LING-COHAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

-----X
PEERLESS IMPORTERS, INC., now known as
EMPIRE MERCHANTS, LLC,

Plaintiff,

-against-

CORNERSTONE SYSTEMS INC.,

Index No. 113810/07

Motion Seq.: 003.

FILED

MAR 24 2010
Defendant

DORIS LING-COHAN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff's motion which seeks "an order for leave to reargue in support of plaintiff's motion for summary judgment and in support of plaintiff's motion to dismiss defendant's answer, upon the ground the [c]ourt did not address all issues raised in plaintiff's summary judgment motion and defendant's refusal to answer plaintiff's notice to produce was willful, contumacious and in bad faith and thus grounds to dismiss its answer to plaintiff's complaint" is denied for the following reasons.¹

In support of its motion to reargue, plaintiff failed to follow the proper procedures for making an application for reargument, pursuant to CPLR §2221. Notably, plaintiff failed to move by order to show cause, addressed to this Court, and did not include

¹ The court notes that this case was transferred to the Civil Court of the City of New York, by order dated January 5, 2010; however, unbeknownst to this court, such order has yet to be processed. The court will issue a separate order to effectuate such prior transfer.

copies of all of the papers previously submitted on plaintiff's prior motion as required. See *People v Jenkins*, 39 AD2d 924, 925 (2d Dept 1972); *Rubin v Dondysh*, 147 Misc 2d 221, 222 (Civ Ct, Queens County 1990), rearg denied 147 Misc 2d 221 (Civ Ct, Queens County 1990), app dismissed 193 Misc 2d 657 (App Term 2d Dept 1991); *Wekar v. City of New York*, NYLJ, Feb. 29, 2000, at 26 col 3 (Sup Ct, New York County); *Mayor v. Mayfair Rlty. Corp*, NYLJ, Nov. 7, 1997, at 26, col 2 (Sup Ct, New York County). See *Wekar v. City of New York*, NYLJ, Feb. 29, 2000, at 26 col 3 (Sup Ct, New York County); *Mayor v. Mayfair Rlty. Corp*, NYLJ, Nov. 7, 1997, at 26, col 2 (Sup Ct, New York County).

Moreover, to succeed on a motion for leave to reargue pursuant to CPLR § 2221, movant must show "that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision". *William P. Pahl Equipment Corp. v. Kassis*, 182 AD2d 22, 27 (1st Dep't 1992), leave to appeal dismissed in part, denied in part 80 NY2d 1005, reargument denied 81 NY2d 782 (1993) (citing *Schneider v. Solowey*, 141 AD2d 813 (1988)). Here, plaintiff failed to establish that this Court overlooked or misapprehended any matters of fact or law in rendering its decision dated January 5, 2010, which denied both plaintiff and defendant's motions for summary judgment, to warrant that this Court grant reargument. See CPLR §2221(d)(2).

Further, to the extent that plaintiff seeks to dismiss defendant's answer, for the failure to respond to discovery and in particular to plaintiff's notice to produce, plaintiff failed to supply an affirmation of good faith as required, warranting a denial of the discovery related relief. See 22 NYCRR §202.7.

Additionally, at the last discovery compliance conference held before this court on March 27, 2009, subsequent to the March 23, 2009 filing of the note of issue, there was no indication by the parties in the "so ordered" stipulation, that plaintiff had yet to receive a response to its notice to produce; thus, in accordance with this Part's rules, the issue as to a response to plaintiff's notice to produce is deemed waived.

Additionally, it is undisputed that the discovery plaintiff seeks, namely a response to its notice to produce, was in fact responded to approximately 11 months ago. Even if such response by defendant is considered to be untimely, plaintiff fails to detail any prejudice for such arguably late disclosure; nor does plaintiff seek or specify any additional discovery it would need as a result of such allegedly late disclosure.

The drastic sanction of striking pleadings is justified only when the moving party shows conclusively that the failure to disclose

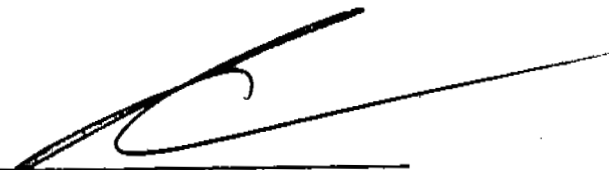
[* 5]
was wilful, contumacious or in bad faith. See Christian v. City of New York, 269 A.D.2d 135, 137 (2000). Plaintiff failed to meet this burden.

For the foregoing reasons, it is

ORDERED that plaintiff's motion to reargue and to dismiss is denied in its entirety; and it is further

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

Dated: March 18, 2010


Hon. Doris Ling-Cohan, J.S.C.

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MAR 24 2010
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