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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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WESTCHESTER MEDICAL CENTER, a/a/o THERESA CARRISCO, THE NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS a/a/o MARIA CLAVIJO,

Plaintiff,

-against-

LIBERTY MUTUAL INSURANCE COMPANY,

Defendants.

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TRIAL PART: 45

INDEX NO.:018949/09

MOTION DATE:7-6-10
SUBMIT DATE:9-22-10
SEQ. NUMBER - 003

MOTION DATE: 7-19-10
SUBMIT DATE: 9-22-10
SEQ. NUMBER - 004

The following papers have been read on this motion:

Notice of Motion, dated 7-6-10 1
Order to Show Cause, dated 7-19-10.....2
Affirmation in Opposition, dated 7-28-10.....3
Reply Affirmation, dated 8-31-10.....4
Affirmation in Opposition, dated 8-28-10.....5
Reply Affirmation, dated 9-22-10.....6

Upon the foregoing papers it is ordered that the motion by plaintiff New York Hospital (NYH) to hold defendant in contempt of Court for its failure to obey an Information Subpoena requiring it to produce certain information incident to collection of a judgment obtained against it and for ancillary relief, is granted as indicated in this order. The cross motion by defendant to vacate the judgment pursuant to CPLR §5015, to renew its motion for summary judgement and to reargue the court's decision dated March 18, 2010, (Prior Decision) is denied.

The Court finds that the defendant has failed to obey lawful process, and that its conduct has actually defeated, impaired, impeded and prejudiced the rights of the plaintiff (Judiciary Law § 770).

The defendant may purge itself of the contempt by responding to the plaintiff's information subpoena with 10 days after service of a copy of this decision and order upon defendant's counsel.

A copy of this order, with notice of entry thereof, must be served on the contemnor pursuant to CPLR 311(a)(1), excepting service under the Business Corporation Law.

Should the contemnor not purge the contempt under the terms set forth herein, the Court fines it $50.

In addition, upon such failure to appear and purge the contempt, and upon an affidavit from plaintiff's counsel attesting to proper service of this order and the failure to appear and purge the contempt thereunder, the Court will award reasonable counsel fees against the contemnor upon an affidavit of services rendered made necessary by the contempt, which may include the making of this present motion and any additional services made necessary by the failure to purge under this order. As no actual damages have been caused by the contempt for which the plaintiff may seek separate damages, such fees and disbursements are not available. *Cf., Saffra v Rockwood Park Jewish Ctr.*, 249 AD2d 480 (1998); *see also Barclay's Bank v Hughes,* 306 AD2d 406 (2003).

The Court shall retain jurisdiction of this matter until the contemnor has purged itself of its contempt, or to award fees as set forth above upon a failure to so purge. *Thomas Riglioni v. Chambers Ford Tractor Sales, Inc.*, 304 AD2d 807 (2d Dept. 2003).

Defendant's motion (i) for leave to reargue this Court's Prior Decision pursuant to CPLR §2221 (d), (ii) to renew pursuant to CPLR §2221(e) and (iii) to vacate the judgement herein pursuant to an unspecified section of CPLR §5015 is denied. The procedural events, facts and contentions of the parties are set forth in the Court's Prior Decision which granted plaintiff's motion for summary judgement and denied defendant's cross motion based essentially on the failure of defendant to submit sufficient admissible evidence to support its contentions that plaintiff had sued the wrong party and that the benefits of plaintiff's assignor had been exhausted.

In the present motion, defendant contends that the Court improperly granted judgment because the defendant is the wrong party and the benefits had been exhausted. The same arguments made on the prior submission. Since defendant has not addressed any reasons why the judgement should be vacated pursuant to CPLR §5015 any relief available under that section is denied.

A 1999 amendment to CPLR 2221 addresses the rules for making a motion to reargue or a motion to renew and describes the differences. Paragraph (f) of CPLR 2221 permits the movant to combine in one motion both a reargument and renewal request, but adds the requirement that the movant "identify separately and support separately each item of relief sought". David Siegel, Esq. suggests the most practical method of dealing with this requirement is by separately labeling each segment of the motion and referring to the separate segments in any accompanying memorandum. See, *Siegel's Practice Review, No. 86, August 1999 p. 2.* See also, *Aloe, Revamping Motions to Reargue or Renew, NYLJ, October 1, 1999 p. 1.* The Court is directed to decide the combined motion as if separately

made and to address each separately. Here although defendant has not separated or delineated its arguments with respect to reargument and renewal each of which is governed by its own discrete rules the court will rule on the merits of the motion.

A motion to reargue must be made within 30 days of the service of notice of entry of the decision. Defendant does not dispute that service was made on April 21, 2010 and the motion was made in July 2010 more than 30 days later, hence the motion to reargue should be denied for that reason alone. CPLR §2221(d)(3).

A motion to reargue is designed to afford a party an opportunity to establish that the Court overlooked or misapprehended the relevant facts or misapplied principles of law. It is not a vehicle to permit a party to argue again the very questions previously decided *Foley v. Roche*, 68 AD2d 558 (1st Dept. 1979); see also *Frisenda v. X Large Enterprises Inc.*, 280 AD2d 514 (2d Dept.2001) and *Rodney v. New York Pyrotechnic Products Co., Inc.*, 112 AD2d 410 (2nd Dept. 1985) or to offer an unsuccessful party successive opportunities to present arguments not previously advanced. *Giovanniello v. Carolina Wholesale Office Mach. Co., Inc.*, 29 AD3d 737 (2d Dept. 2006).

A motion to renew must be based on new facts not offered in the prior motion that would change the prior determination. Renewal should be denied in the absence of a reasonable justification for not submitting the additional facts upon the original application *Ellner v. Schwed*, 48 AD3d 739 (2d Dept. 2008). CPLR 2221(e) see, *Foley v. Roche, supra, Kwang Bok Yi v. Ahn,* 278 AD2d 372 (2nd Dept. 2000) and *Wavecrest Apartments Corp.* v. *Jarmain*, 183 AD2d 711 (2nd Dept. 1991). A motion for leave to renew is not a second

chance freely given to parties who have not exercised due diligence in making their first factual presentation *Renna v. Gullo*, 19 AD3d 472 (2d Dept. 2005).

Examples of what constitutes reasonable justification include the locating of a witness, *Szentmiklosy v. County Neon Sign Corp.*, 276 AD2d 406 (1st Dept. 2000); *Tesa v. NYCTA*, 184 AD2d 421 (1st Dept. 1992) or the appearance of a further medical report from the defendant, *Puntino v. Chin*, 288 AD2d 202 (2nd Dept. 2001). Provided supporting facts are offered, law office failure can be accepted as an excuse as to why the additional facts were not submitted on the original application but mere neglect is not an acceptable excuse. *Morrison v. Rosenberg*, 278 AD2d 392 (2nd Dept. 2000); *Cole-Hatchard v. Grand Union*, 270 AD2d 447 (2nd Dept. 2000).

Renewal may also be granted in rare instances, in the interest of justice upon facts which were known to the movant at the time of the original motion in order to avoid substantive unfairness. *See Tishman Construction Corp v. City of New York*, 280 AD2d 374 (1st Dept. 2001). See also *Ramos v. Dekhtyar*, 301 AD2d 428 (1st Dept. 2003) granting renewal where an unsworn affirmation of a chiropractor was initially inadvertently submitted and later resubmitted in affidavit form, and *Mejia v. Nanni,* 307 AD2d 870 (1st Dept. 2003), granting renewal because the newly submitted evidence was overwhelming and not contradicted. In *Ortiz v. Tusa*, 300 AD2d 288 (2nd Dept. 2002) renewal was denied where no justification was offered for failing to submit chiropractic affidavits on the original motion. Even a motion to renew dismissal of a cause of action pursuant to CPLR §3211 (a)(7) on the basis of newly discovered evidence is permissible, notwithstanding that such

a motion is addressed to the pleadings. *Blume v. A & R Fuels, Inc.*, 32 AD3d 811 (2d Dept. 2006).

With respect to reargument, in the present case, the defendant fails to direct the Court to any facts disclosed on the original motion which the court may have overlooked or to legal issues or principles that the Court may have overlooked or misapprehended. To the extent that defendant suggests that an incorrect legal result was reached, the Court chooses to adopt the legal conclusions previously made. Although it is contended that the Court erred in reaching its legal conclusions the Court is not directed to any incorrect conclusion that was based on the evidence previously submitted. Nor is the Court directed to any evidence previously submitted which the Court overlooked. Hence the motion for reargument is denied.

Submitted in support of renewal is a new and slightly more detailed affidavit of Mr. Korn however no explanation is offered as to why this information was not previously offered. Also submitted are a Helmsman Service Agreement, an affidavit of an account manager, an affidavit of a claims manager and copies of cancelled checks, none of which were previously submitted with the prior motion. Also lacking is any explanation as to why the foregoing was not submitted on the prior motion.

Although defendant's motion also seeks to quash the information subpoena issued by plaintiff to defendant no reason is given for that request. The Court has reviewed the information subpoena which consists of only three questions and finds that question one is appropriate but that questions two and three are improper and these questions are stricken.

Based on the foregoing the plaintiff's motion for contempt is granted and defendant's motion is denied.

This shall constitute the Decision and Order of this Court.

Submit judgment on notice.

ENTER

DATED: October 5, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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