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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KAREN RIBARO HOPPER,

Plaintiff,

-against-

MICHAEL LEOGRANDE, KIM LEOGRANDE, ROBERT PINTUCCI, FERN PINTUCCI, JERRY DABROWSKI and ELIZABETH DABROWSKI

Defendants.

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TRIAL TERM PART 45

INDEX NO.: 004261/10

MOTION DATE:11-15-10
SUBMIT DATE: 11-15-10
SEQ. NUMBER - 003
& 004

The following papers have been read on this motion:

Notice of Motion, dated 9-27-10.....1
Notice of Cross Motion, dated 11-4-10.....2
Affirmation in Opposition, dated 11-10-10.....3

Motion of the Pintucci defendants to renew this Court's decision dated May 24, 2010, (Prior Decision) pursuant to CPLR §2221(e) is granted. Upon such renewal, the Court adheres to its original decision. To the extent that the motion may be deemed a motion to reargue, the Prior Decision pursuant to CPLR §2221(d) it is denied. The procedural events, facts and contentions of the parties are set forth in the Court's Prior Decision which granted the motion of plaintiffs for a preliminary injunction against the parking of vehicles or

obstructing the right of way shard by the parties. After the Prior Decision was issued, the Court conducted a hearing on the motion of plaintiffs for contempt based on a violation of the Court's temporary restraining order dated March 16, 2010. At that hearing, the Court heard sworn testimony, considered exhibits and issued a decision and order from the bench on September 24, 2010 which found the moving defendants here to be in contempt for having violated the March 16, 2010 order and ordered them to pay $1,500 to the plaintiffs to defray their legal fees on the contempt request.

Although the plaintiffs were directed to submit a judgment and order for the Court's signature that submission has not yet occurred.

On this motion the Pintucci defendants seek a cancellation of the preliminary injunction based on the testimony adduced at the September contempt hearing.

Plaintiffs have cross moved to punish the Pintucci defendants for contempt based on their alleged violation of the mandates of the Prior Decision. A hearing is necessary for the Court to decide the cross motion.

On their motion, the Pintuccis allege in substance that there should be no preliminary injunction because, (i) there has been no instance of an emergency vehicle being unable to attain access (ii) plaintiff testified that she was able to go in and out on the easement area (iii) there is sufficient space for service vehicles, (iv) the Pintuccis had always parked the way that plaintiffs are now complaining about, (v) guests of the plaintiffs had also parked in the easement area, (vi) parking on the main road is inconvenient and also a hardship on Fern Pintucci who is approved for handicapped parking and (vii) their infant granddaughter who lives with them, has severe asthma.

None of the foregoing arguments are supported by any facts or other evidence and the movants have failed to disclose why they are not able to park on their own property rather than in the easement area. Hence, the Court rejects the contentions of the defendants as a basis for altering its preliminary injunction or in any way amending the Prior Decision.

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.

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).

Here, the motion to renew has been granted because the new facts relied upon namely the evidence given at the contempt hearing did not exist until after the Prior Decision was rendered. However, such new evidence does not persuade the Court to alter the Prior Decision.

The plain fact is that there is a written recorded declaration of easement which governs the conduct of the homeowners which the movants here wish to adjust in order to satisfy their own conveniences. At the hearing, upon which the movants rely, it became apparent that there is ample space on the properties of the parties so as to permit compliance. It should not be a requirement for the enforcement of the rights of the plaintiffs that there should first occur some catastrophic event.

With respect to reargument, in the present case, the plaintiff 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. Hence, reargument is not applicable.

In sum, the Court has considered the new evidence submitted but the Court's reasons for the Prior Decision granting the preliminary injunction remain the same and the motion is denied.

Plaintiff's motion to punish the Pintucci defendants for contempt based on their failure to comply with the Prior Decision requires a hearing in order for the Court to determine whether its order has been violated and if so, what the penalty shall be.

Plaintiff and the Pintucci defendants shall appear for a hearing at 9:30 a.m. on Tuesday, January 11, 2011 in Part 45 of this Court located on the second floor of 100 Supreme Court Drive, Mineola, NY 11501 (tel: 516-571-2714).

The parties may, on mutual consent and with the Court's permission adjourn the date of this hearing.

Pursuant to the Prior Decision this Court issued a preliminary injunction enjoining the contempt defendants from obstructing the right of way which is the subject of this action.

It is assumed that plaintiff seeks a finding of civil contempt pursuant to Judiciary Law §753 which permits the Court to impose a fine plus costs and expenses to the plaintiff. In addition, civil contempt can be punished by a spell in prison. See Judiciary Law §773 and 774. If the foregoing remedies are not adequate, the Court has the inherent power to fashion its own remedies based on the nature and circumstances of the rights which are violated.

The purpose of the remedy of civil contempt is the vindication of the rights of a private party to a litigation pursuant to a judicial mandate and the penalty imposed is intended to compensate the party injured by the non-compliance for the loss of the benefits of the Court's order. *McCormick v. Axelrod*, 50 NY2d 574, 583 (1983).

To sustain a finding of civil contempt, a court must find that the alleged contemnor violated a lawful order of the court, clearly expressing an unequivocal mandate, of which that party had knowledge, and that as a result of the violation a right of a party to the litigation was prejudiced. It is not necessary that the disobedience be deliberate or willful: rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes or prejudices the rights of a party. *Inc. Village of Plandome Manor v. Ioannou*, 54 AD3d 365 (2d Dept. 2008), internal citations omitted. *McCain v. Dinkins*, 84 NY2d 216, (1994) Jud. Law §753.

On this motion, defendants deny that they have parked vehicles in the right of way and dispute the assertion of the plaintiffs that the vehicles depicted in the plaintiffs' papers are theirs.

A hearing is necessary to determine if my order or orders have been violated whether intentionally or unintentionally and if so, what the punishment should be.

Based on the above, the application for contempt is adjourned until the hearing date noted above or to such other date that may be agreed upon by the parties with the consent of the Court.

Although they are permitted to attend and participate, the Dabrowski and Leogrande defendants are not required to appear at the foregoing hearing.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: November 30, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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