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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LISA FALCONE, as surviving spouse and Administratrix of the goods, chattels and credits which were STEVEN FALCONE, deceased, LISA FALCONE, as mother and natural guardian of infant plaintiff ERICA FALCONE and LISA FALCONE, individually,

INDEX NO.: 1773/08

Plaintiff,

MOTION DATE:3-29-11
SUBMIT DATE:3-29-11
SEQ. NUMBER - 008

-against-

GEORGE KARAGIANNIS, M.D., JAMES T. LANIOTIS, M.D., and THE MEDICAL ASSOCIATES,

Defendants.

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The following papers have been read on this motion:

Order to Show Cause, dated 3-8-11.....1
Affirmation in Opposition, dated 3-21-11.....2
Reply Affirmation, dated 3-28-11.....3

Defendants' motion to renew this Court's decisions dated June 24, 2010 (denying spoilation motion), August 16, 2010, (denying expert examination before trial request) and December 16, 2010 (to strike and reargue/renew), (Prior Decisions) pursuant to CPLR

§2221(e) is granted to the limited extent that (i) defendants shall be permitted to conduct an examination before trial of plaintiff's expert, Dr. Charles V. Wetli, (Wetli) and in connection therewith, may compel production of all of his records and materials obtained, produced or created by him in connection with the autopsy conducted by him of the plaintiff's decedent, Steven Falcone, and (ii) the trial of this action shall be stayed until September 1, 2011, in order to allow such examination before trial to take place. In the event the parties are not able to conduct such examinations in the State of New York because of the witness' absence from this State, then it may take place in whatever state Wetli may be found and in accordance with the rules and laws of such state. Upon request of defendants on notice, this Court will issue an appropriate commission or authorization asking any state in which jurisdiction over Wetli may be obtained, to require him to appear, attend and give evidence with respect to the matters set forth above. The cost of conducting the examination before trial, including Wetli's fee, shall be borne by defendants.

The procedural events, facts and contentions of the parties are set forth in the Court's Prior Decisions which granted additional discovery to defendants to be obtained from Wetli and a laboratory employed by him to process materials obtained from the autopsy but which denied their request to conduct a deposition of Wetli.

This dispute centers upon an autopsy conducted upon decedent by Wetli before suit was commenced. Wetli is an independent contractor hired by plaintiff who in turn employed McClain Laboratories LLC (the Lab) of Smithtown, New York, to prepare autopsy materials for his examination. The fact of the autopsy was disclosed at plaintiff's deposition and the autopsy report was thereafter provided to defendants. Subsequently, defendants moved to

dismiss the action on the improbable theory that conducting an autopsy prior to the action constituted spoilation of evidence. That motion was denied at oral argument, as was a request (by separate motion) to depose Wetli, on the authority of *Kooper v. Kooper*, 74 AD3d 6 (2d Dept. 2010) and *Stoianoff v. Kauver*, NYLJ, March 2, 2010 at 28, Col. 1 (Sup. Ct. Westchester County, Scheinkman, J.), however, defendants were granted access to all materials created by and in the possession of Wetli regarding the autopsy (Decision and Order dated August 16, 2010).

Dr. Wetli confirmed that there were 10 pathology slides created from the autopsy, however, it was later (September 2010) learned that there were an additional 30 slides created as well as other documents that were not made known at the time of the Prior Decisions. Another motion was made for renewal of the Prior Decisions that resulted in a decision at oral argument which directed further disclosure from the Lab (Decision and Order dated December 16, 2010). That decision and its sequelae resulted in a disclosure in January, 2011, from the Lab, of photographs and the information that everything, including the numerous specimens found in the submitted photographs had been returned to Wetli. This would appear to include 10 paraffin blocks, 30 unstained slides and the invoice. Following such revelation, this motion, which is premised on the above described recent evidence was made.

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).

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. Hence, reargument is not applicable. Renewal is premised upon the newly obtained evidence of additional autopsy items that was not previously disclosed.

Both Wetli and the Lab are independent contractors over whom the plaintiff exercises no control over methods and means of performance, hence there is no basis for a finding of spoilation of evidence by plaintiff. However, it is this lack of control by plaintiff that has apparently led to what defendants aptly characterize as piecemeal disclosure of fragments of evidence. The deposition of Wetli is ordered here for a variety of reasons.

Although Wetli is not a party to the action by his participation, as a hired expert he has involved himself in this action. *Cf Troy Sand & Gravel Company Inc., v. Town of Nassau*, 80 AD3d 199 (3d Dept. 2010).

The information sought to be obtained from him cannot be obtained from any other sources. Certainly, the events recounted in the submissions, reveal that efforts to provide complete discovery by other means have been unavailing.

Special circumstances are present here because the cause of decedent's death is a significant issue and the manner, means and methods of conducting the autopsy and examining the results are peculiarly within Wetli's knowledge and not available through other sources. Finally, in fairness and justice, the integrity and reliability of the discovery process depends upon there being complete and adequate disclosure of that which is ordered and with no lingering doubts about the facts. In this instance, events have made clear that an examination of Wetli is the best way to accomplish such goals.

Renewal is granted and the trial is stayed until September 1, 2011, in order to provide an opportunity to defendants to conduct a deposition of Wetli.

Defendant shall serve a subpoena upon request a commission or make use of any statute similar to CPLR §3119 (eff.1/1/11) within 20 days from the date of this Decision and Order and shall request a deposition date no later than June 30, 2011. Failure to comply with the foregoing shall be deemed a waiver of the right to take Wetli's deposition unless the failure to do so is through not fault of defendants.

The fees and expenses of the examination, including Wetli's fee if any shall be paid by defendants except that if defendants prevail in this action, than they may ask the trial court to assess such costs or disbursements against the plaintiff.

The Court makes no ruling with respect to the claim by defendants that Wetli or the Lab violated any applicable regulations or rules and if so, whether such violation should preclude any evidence presented by them. Those issues are respectfully referred to the trial court. The Court makes no determinations as to the admissibility by either party of any evidence or on any other issues related to the conduct of the trial, all of which are referred to the trial court.

Based on the foregoing, renewal is granted to the extent that defendants may conduct an oral deposition of Wetli with respect to the autopsy of the decedent, wherever jurisdiction over him may be found or consented and discovery and inspection of any and all documents, material or things except that Wetli shall no be required to express any opinions. In all other respects, the motion is denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: April 4, 2011

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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