SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

MD

----------x **TRIAL TERM PART: 45**

ANDRE H. SAAD, M.D.,

INDEX NO.:14515/08

Plaintiff,

MOTION DATE:3-25-11
SUBMIT DATE:4-1-11
SEQ. NUMBER - 003

-against-

PROVIDENCE WASHINGTON INSURANCE COMPANY,

Defendant.

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The following papers have been read on this motion:

Order to Show Cause, dated 3-14-11..... 1
Affirmation in Opposition, dated 3-31-11.....2

Defendant's motion (i) to renew this Court's decision dated October 25, 2010, (Prior Decision) pursuant to CPLR §2221(e), (ii) to amend its answer to assert the affirmative defenses of laches and estoppel and (iii) for summary judgment based on said proposed affirmative defenses is denied. Any requests by plaintiff for affirmative relief are denied because plaintiff did not make a cross motion for affirmative relief. CPLR §2215; *New York State Division of Human Rights v. Oceanside Cove II Apt. Corp.*, 39 AD3d 608 (2d Dept. 2007).

The procedural events, facts and contentions of the parties are set forth in the Court's Prior Decision which denied the motion of defendant for the same requested relief.

The basis for this motion is that on the original motion, defendant submitted a denial of coverage letter dated November 12, that was referred to by this Court in the Prior Decision. In fact, the denial of coverage letter was dated November 18 and while yielding the same result and based on the same underlying facts contained somewhat different language to explain the denial. Significantly, defendant does not contend that the facts upon which the two letters were premised are any different, and there has been no submission of any affidavit by the claims specialist putative author of the two letters, this application being supported entirely by an affirmation of an attorney who does not purport to have any actual knowledge of the circumstances surrounding the creation and mailing of the two letters. It is well settled that an attorney's affirmation that is not based on personal knowledge or supported by documentary evidence is of no probative value. *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 152 (2d Dept. 2006); *Sampson v. Delaney*, 34 AD3d 349 (1st Dept. 2006); *cf Davey v. Dolan*, 46 AD3d 854 (2d Dept. 2007). Here, defendant's attorney does not profess to possess personal knowledge of any facts asserted and has not employed her affirmation as a vehicle to refer to other competent evidence. Hence, her recounting of the facts is without probative value.

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.

The primary basis for renewal is the submission of the November 18 denial of coverage letter as a substitute for the November 12 letter. This letter has not been considered because as noted above, the sole support for its proffer and sole source of the events and circumstances concerning its existence comes from defendant's attorney who is lacking in any knowledge concerning the letter's creation and issuance. But, in any event, a consideration of the new letter does not alter the result. The disclaimer is based on the contention that plaintiff was not covered under the defendant's policy because plaintiff was neither an executive officer nor a partner. This contention is based on statements made by plaintiff and his father to defendant's investigative representative. Defendant has failed on this motion to offer any new facts but rather submits that the new letter makes a better argument for disclaiming.

In sum both letters are premised on the same factual conclusion that plaintiff was not an officer of the insured corporation. That this reason might have been stated differently, does not alter the result. The issue of plaintiff's status in relation to the insured was covered at length in the Prior Decision and the discussion would apply equally to the later dated letter.

To the extent that it might be deemed from this motion that the Court erred in (i) denying leave to amend the answer, and (ii) determining that there were issues of fact which mitigate against summary judgment, the Court chooses to adhere to its original determinations which found that the propsed amendment is palpably insufficient. Notably absent from this motion are any new facts or legal arguments that might cause the Court to reevaluate its decisions.

Plaintiff's request for sanctions has not been made by way of cross motion, hence, there is no basis upon which affirmative relief in the form of sanctions should be granted.

In sum, the Court's reasons for the Prior Decision remain the same, the new letter, even if considered, does not alter the result and this motion is denied.

This shall constitute the Decision and Order of this Court

ENTER

DATED: April 5, 2011

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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