

**Krackeler Scientific, Inc. v Ordway Research Inst.,
Inc.**

2011 NY Slip Op 33215(U)

December 16, 2011

Supreme Court, Albany County

Docket Number: 1391-11

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

KRACKELER SCIENTIFIC, INC.,

Plaintiff,

-against-

ORDWAY RESEARCH INSTITUTE, INC. and
RICHARD C. LIEBICH,

Defendants.

DECISION and ORDER
INDEX NO. 1391-11
RJI NO. 01-11-103779

Supreme Court Albany County All Purpose Term, October 28, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Plaintiff commenced this action, in part, against Richard C. Liebich (hereinafter “Liebich”), the prior Chairman of Ordway Research Institute, Inc.’s (hereinafter “Ordway”)¹

¹ As previously stated in this Court’s June 22, 2011 Decision and Order, Plaintiff’s causes of action against Ordway are stayed by its April 28, 2011 filing of a Chapter 11 Bankruptcy Petition. Such stay, however, “ does not apply to [the] nonbankrupt defendant” Liebich. (Torre v Fay’s Inc., 259 AD2d 896, 897 [3d Dept 1999]; Merrill Lynch, Pierce, Fenner & Smith, Inc. v Oxford Venture Partners, LLC, 13 AD3d 89 [1st Dept 2004]; Rosenbaum v Dane & Murphy, Inc., 189 AD2d 760 [2d Dept 1993].)

Board of Directors. By Decision and Order, dated June 22, 2011 (hereinafter “Decision and Order”), this Court granted Liebich’s pre-answer motion to dismiss. Plaintiff now moves to reargue and renew its opposition to such motion. Liebich opposes the motion. Because Plaintiff failed to demonstrate its entitlement to renew or reargue, its motion is denied.

CPLR §2221(d) states that: “[a] motion for leave to reargue: (1) shall be identified specifically as such; (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and (3) shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.”

While Plaintiff timely filed and specifically identified its reargue motion, it failed to establish that this Court “overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law.” (Dambrowski v Dambrowski, 8 A.D.3d 913, 915 [3d Dept 2004]; CPLR 2221[d][2]; Ellsworth v Town of Malta, 16 AD3d 948 [3d Dept 2005].)

First, Plaintiff incorrectly relies on EBC I, Inc. v Goldman Sachs & Co (5 NY3d 11 [2005]) to claim that the Decision and Order applied the wrong standard to its motion to dismiss. Such argument relies on an analysis of CPLR §3211(a)(7), and wholly ignores the correct CPLR §3211(a)(11) burden shifting analysis. (Martin v Columbia Greene Humane Soc., Inc., 17 AD3d 839 [3d Dept. 2005]; Rabushka v Marks, 229 AD2d 899 [3d Dept 1996]). Plaintiff also wrongly interprets its Amended Verified Complaint’s allegations. This Court recognized that the Amended Verified Complaint constituted an affidavit. (CPLR §105[u]). However, because its substantive allegations concerning Liebich’s alleged fraud were made “on information and belief” it wholly failed to provide any “evidentiary proof” as required under CPLR §3211(a)(11).

(Bova v Vinciguerra, 139 AD2d 797 [3d Dept. 1988]; Wood v Nourse, 124 AD2d 1020 [4th Dept. 1986]).

Accordingly, Plaintiff's motion to reargue is denied.

Considering next Plaintiff's motion to renew, "[t]o be entitled to renewal, plaintiff [i]s required to come forward with newly discovered evidence that would change the earlier determinations, as well as reasonable justification for not providing it earlier." (M & R Ginsburg, LLC v Orange Canyon Dev. Co., LLC, 84 AD3d 1470, 1472 [3d Dept 2011]; CPLR 2221[e]). If no "reasonable excuse as to why [the new] information was not submitted in opposition to the original... motion" is provided, renewal must be denied. (JPMorgan Chase Bank, N.A. v Malarkey, 65 AD3d 718, 720 [3d Dept 2009]; Abele Tractor & Equipment Co., Inc. v RJ Valente, Inc., 79 AD3d 1331 [3d Dept 2010]; 2 North Street Corp. v Getty Saugerties Corp., 68 AD3d 1392 [3d Dept 2009]).

On this record, Plaintiff's excuse is inadequate. As its only excuse, Plaintiff states that: "[t]he reason that [its] new evidence was not provided to the Court in opposition to [Liebich's] initial motion to dismiss is that to a large extent it was not available and did not exist at that time." Plaintiff does not specify which evidence it refers to by its "to a large extent" statement or which specific facts were previously unavailable. Such excuse is wholly insufficient to reasonably justify Plaintiff's failure to previously proffer a Charitable Leadership Foundation (hereinafter "CLF") website printout, a New York State Department of State printout, Ordway's Voluntary Petition or Ordway's undated Statement of Financial Affairs. Plaintiff simply offers no proof that any of these documents were unavailable to oppose Liebich's previous motion. Similarly unavailing is Plaintiff's attorney's hearsay account of Ordway's financial director's

statements. These statements constitute blatant hearsay, are inadmissible and of no evidentiary value on this motion.

Plaintiff also failed to justify its conclusory excuse as it related to facts contained in documents filed in Ordway's bankruptcy proceeding. Plaintiff did not explain what facts, contained in a document dated July 8, 2011 and three additional documents filed July 1, 13 and August 3, 2011, were unavailable or did not exist to oppose Liebich's prior motion.

Additionally, even if Plaintiff provided a reasonable excuse, the facts contained in such documents do not change the prior determination. The document dated July 8, 2011 and the documents filed July 1 and 13, 2011 do not discuss Liebich at all, never even mentioning his name. While these documents clearly establish Ordway's financial problems, they do not provide any "evidentiary proof showing a fair likelihood that [Plaintiff] will be able to prove that [Liebich] was grossly negligent or intended to cause the [Plaintiff] harm." (Rabushka v. Marks, 229 AD2d 899, 900 [3d Dept. 1996]; Martin v. Columbia Greene Humane Soc., Inc., 17 AD3d 839, 842 [3d Dept. 2005]). Although the document Plaintiff submitted "Filed August 3, 2011" explains Liebich's numerous leadership positions in both Ordway and its creditors, the allegations made therein do not establish that Liebich was either "grossly negligent or intended to cause [Plaintiff any] harm." (Id.) Moreover, such document's allegation that Ordway's transactions were not "arms length" is wholly conclusory. As such, Plaintiff offered no new "evidence that would change the earlier determination." (M & R Ginsburg, LLC v Orange Canyon Dev. Co., LLC, *supra*).

Accordingly, Plaintiff's motion to renew is denied.

This Decision and Order is being returned to the attorney for Liebich. A copy of this

Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: December 16, 2011
Albany, New York



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated August 3, 2011; Affirmation of Daniel M. Sleasman, dated August 3, 2011, with attached Exhibits 1-9 and unattached unnumbered exhibits (original motion papers).
2. Affirmation of Julia Green Sewruk, dated October 21, 2011, with attached Exhibits A-F.