

**Federated Retail Holdings, Inc. v Weatherly 39th St.,
LLC**

2012 NY Slip Op 33332(U)

January 18, 2012

Supreme Court, New York County

Docket Number: 604104/06

Judge: Bernard J. Fried

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 604104/2006
 FEDERATED RETAIL
 vs
 WEATHERLEY 39TH STREET, LLC
 Sequence Number : 008
 REARGUMENT/RECONSIDERATION

E-FILE

PART 60

INDEX NO. 604104/06

MOTION DATE _____

MOTION SEQ. NO. 008

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

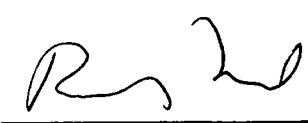
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

Dated: 1/18/2012


 _____, J.S.C.
HON. BERNARD J. FRIED

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

-----x

FEDERATED RETAIL HOLDINGS, INC.
and LORD & TAYLOR LLC,

Plaintiffs,

Index No.: 604104/06

-against-

WEATHERLY 39TH STREET, LLC, successor
in interest to John S. Weatherly and
Thomas A. Weatherly, Jr., d/b/a
Weatherly Realty,

Defendant.

-----x

FOR PLAINTIFFS:

Loeb & Loeb LLP
345 Park Avenue
New York, New York 10154

FOR DEFENDANT:

Wilk Auslander LLP
675 Third Avenue
New York, New York 10017

FRIED, J.:

Defendant WEATHERLY 39th Street (“Weatherly”) moves for leave to reargue and
renew my decision of April 11, 2011.

The motion for renewal is on the “basis of an affidavit submitted by [plaintiff’s]
expert, R. Craig Sutherland, [after my decision] in a[nother] case....in which he completely

undermines his expert opinion given here” (Notice of Motion). Renewal is also sought on the ground that “Macy[] conceded, following completion of briefing, that Weatherly was not protected by a \$400 million ‘tower’ of insurance as Macy’s papers represented”. (Notice of Motion).

A motion for leave to renew requires “new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination.” C.P.L.R. § 2221(e)(2). Because this affidavit, was not in existence at the time of the original decision, the motion for leave to renew is granted. However, upon renewal, the motion to renew is denied, since regardless of how the Sutherland affidavit is viewed (and as to this the parties sharply dispute its significance and meaning), it would not change my prior decision. In my prior decision I noted that “[b]oth sides have provided conflicting affidavits from alleged experts who opine as to the legal implications of the policies in question”(pp. 7-8), and then went on to resolve the legal issue presented without reference to the expert affidavits. They were simply superfluous to my decision.

The second ground seeking leave to renew, relating to the alleged conversation between counsel, is that Weatherly “tried to bring [the] misrepresentation to the Court’s attention but was unable to do so” (Notice of Motion). There was nothing to prevent Weatherly from timely bringing this alleged conversation to my attention before the decision was issued. This, alone, is sufficient basis to deny this prong of the motion for leave to

renew. However, the original motion (#005), which resulted in the April 11, 2011 Order sought a “declaration as to whether [Federated] have adequately cured the default found by the First Department (the ‘Self-Insured Retention Default’) and whether [Weatherly] is entitled to terminate the subject lease based upon the termination notice it purported to serve....on November 30, 2010” (Notice of Motion, Seq. No. 005). In the April 11, 2011 Order, I stated “the issue for resolution is whether a self-insured retention may be removed retroactively from an existing insurance policy by endorsement” (p. 4), since the Appellate Division, in its reversal, held that the self-insured retentions did not cure the breach of the lease provision. While the Schwartz affidavit, dated January 13, 201, filed with the original motion (#005) did refer to “a comprehensive tower of coverage providing in excess of \$400 million dollars of liability coverage”, this was not relevant to my April 11th Order. Thus, even if leave to renew were granted, there would be no basis to grant the motion for renewal.

A motion for leave to reargue may be made “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.” C.P.L.R. § 2221(d). Such a motion “may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.” William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22, 27 (1st Dept. 1992) (internal citations omitted). Since defendant here has not made such a showing, its motion

for leave to reargue is denied.

Accordingly, it is

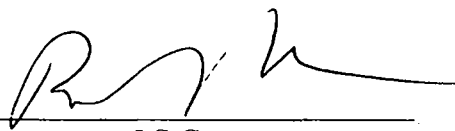
ORDERED that the motion for leave to renew is denied; and it is

further

ORDERED that the motion for leave to reargue is denied.

DATED: 1/18/2012

ENTER:



A handwritten signature in black ink, appearing to read 'Bernard J. Fried', is written over a horizontal line.

J.S.C.

HON. BERNARD J. FRIED