Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE FREDERICK D.R. SAMPSON IAS TERM, PART 31
Justice

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CHRISTINE LYNCH-DENNIS,

Plaintiff,

Index No: 12213/10
Motion Date: 12/10/12
Motion Cal. No: 65
Motion Seq. No: 4

-against-

SUPER DEAL STORES, INC., ROCKAWAY REALTY ASSOCIATES, L.P. MILLAR ELEVATOR, SERVICE COMPANY, D L REALTY LLD, and SCHINDLER ELEVATOR CORPORATION,

Defendants.

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The following papers numbered 1 to 12 read on this motion for an order pursuant to CPLR § 2221 seeking leave to renew/reargue the denial of summary judgment to defendant SUPER DEAL STORES, INC..

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Answering Affidavits-Exhibits.....	6 - 10
Reply.....	11 - 12

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

A motion to reargue allows a party to establish that the court "overlooked or misapprehended the relevant facts" or "misapplied any controlling principle of law," in determining the prior motion. See, Cruz v. Masada Auto Sales, Ltd., 41 A.D.3d 417 (2nd Dept. 2007); Collins v. Stone, 8 A.D.3d 321 (2nd Dept. 2004); Delgrosso v. 1325 Ltd. Partnership, 306 A.D.2d 241 (2nd Dept. 2003). "The motion does not offer an unsuccessful party successive opportunities to present arguments not previously advanced (citations omitted)." Pryor v. Commonwealth Land Title Ins. Co., 17 A.D.3d 434 (2nd Dept. 2005); Amato v. Lord & Taylor, Inc., 10 A.D.3d 374 (2nd Dept. 2004). It is also not an opportunity for an unsuccessful party to present arguments not originally presented. Giovanniello

v. Carolina Wholesale Office Mach. Co., Inc., 29 A.D.3d 737 (2nd Dept. 2006); Pryor v. Commonwealth Land Title Ins. Co., 17 A.D.3d 434 (2nd Dept. 2005). Amato v. Lord & Taylor, Inc., 10 A.D.3d 374 (2nd Dept. 2004). It is within the court's discretion to grant leave to reargue when it appears that the court may have "overlooked certain facts and misapplied the law in its initial order." Dunitz v J.L.M. Consulting Corp., 22 A.D.3d 455, 456 (2nd Dept. 2005); Marini v Lombardo, 17 A.D.3d 545 (2nd Dept. 2005); CPLR 2221.

Likewise, a motion for leave to renew, pursuant to CPLR 2221(e), "shall be based upon new facts not offered on the prior motion that could change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination," and it "shall contain reasonable justification for the failure to present such facts on the prior motion." A motion for leave to renew is granted sparingly, and only in cases where there exists a valid excuse for failing to submit additional facts on the original application. See, Sun Whan Lee v. Doe, 57 A.D.3d 651 (2nd Dept. 2008); Osborne v. Evans, 47 A.D.3d 904 (2nd Dept. 2008); Veitsman v. G & M Ambulette Service, Inc., 35 A.D.3d 848 (2nd Dept. 2006); Albanese v. Hametz, 4 A.D.3d 379 (2nd Dept. 2004). "[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." Lardo v. Rivlab Transp. Corp., 46 A.D.3d 759 (2nd Dept. 2007); see, Henry v. Peguero, 72 A.D.3d 600 (1st Dept. 2010); Leyberman v. Leyberman, 43 A.D.3d 925 (2nd Dept. 2007); Renna v. Gullo, 19 A.D.3d 472 (2nd Dept. 2005); Elder v. Elder, 21 A.D.3d 1055 (2nd Dept. 2005); O'Dell v. Caswell, 12 A.D.3d 492 (2nd Dept. 2004).

Here, the Court finds no basis upon which to grant that branch of the motion to reargue, as plaintiff failed to establish a misapprehension of the facts or the law by this Court. Moreover, plaintiff has not met the criteria discussed above for leave to renew. Consequently, as the Court finds that neither renewal nor reargument are warranted, the motion is denied in its entirety.

Dated: March 25, 2013

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J.S.C.

The following papers numbered 1 to 53 read on three separate motions by (1) defendant Super Deal Stores, Inc. (Super Deal Stores) for an award of summary judgment dismissing the complaint and cross-claims against it; (2) defendant DL Realty, LLC. (DL Realty)for summary judgment dismissing the plaintiff's second amended complaint and cross claims against it together with a cross motion by defendant Millar Elevator Service Company (Millar Elevator)for summary judgment on its cross claims for contractual indemnification against DL Realty; and (3)defendant Rockaway Realty Associates (Rockaway Realty)for summary judgment dismissing the plaintiff's second amended complaint and cross claims against it. These motions are

consolidated for consideration and determination in this single decision and order.

	Papers Numbered
Notices of Motion-Affidavits-Exhibits.....	1-4; 11-17; 39-41
Notice of Cross Motion-Affidavits-Exhibit.....	28-30
Answering Affidavits-Exhibits.....	5-8; 18-22; 31-36; 42-48
Reply Affidavits.....	9-10; 23-27; 37-38; 49-53

Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff, on December 12, 2009, as a result of falling while ascending the escalator leading to the premises of defendant Super Deal Stores, located on the second floor in the Five Towns Shopping Center at 253-01 Rockaway Boulevard, in Rosedale, Queens, New York. The premises where the accident occurred was owned by defendant Rockaway Realty and leased to defendant DL Realty, which held a prime lease that had been assigned to it by nonparty R&I Realty. On the date of the accident, defendant Super Deal Stores occupied the subject premises as a sub-lessor. The plaintiff claims that the accident occurred when the subject escalator suddenly jerked back and forth and abruptly stopped, causing her to be propelled forward and sustain various injuries to her neck and back. The escalator at issue was allegedly serviced by defendant Millar Elevator and/or defendant Schindler Elevator Corporation (Schindler Elevator) on various occasions.

The plaintiff's second amended verified complaint, dated September 14, 2011, on which summary judgment is sought herein, asserts six causes of action alleging, inter alia, that the defendants (not including Schindler Elevator) were negligent in the operation and repair of the escalator and in failing to warn of a dangerous condition. Although the relief sought is made in connection with the second amended complaint, a supplemental summons and a third amended complaint adding defendant Schindler Elevator Corporation as an additional party, was filed in this action on February 21, 2012.

Where, as here, "an amended complaint has been served, it supercedes the original complaint and becomes the only complaint in

the case" (*Samide v. Roman Catholic Diocese of Brooklyn*, 194 Misc.2d 561 [2003]; see, *St. Lawrence Explosives Corp. v. Law Bros. Contr. Corp.*, 170 AD2d 957 [1991]). As a result, the motions and cross motion for summary judgment on the claims and cross-claims asserted in the second amended complaint are rendered moot by the filing and service of the third amended complaint. Thus, a substantive discussion of the issues raised on these motions would be academic. Accordingly, the motions and cross motion are in all respects denied.

Dated: October 3, 2012

J.S.C.