

Culpepper v City of New York
2014 NY Slip Op 32626(U)
September 22, 2014
Supreme Court, Bronx County
Docket Number: 21962/13
Judge: Larry S. Schachner
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of July 16, 2013 under index number 20988/12. Plaintiff argues that the court overlooked exhibits originally filed with the affidavits and other papers submitted in support of the underlying application and seeks only to reargue that portion of the court's December 13, 2013 decision which dismissed the complaint as against defendant City for failure to attach the proposed amended notice of claim or the amended complaint. The City opposes the motion.

Plaintiff was given leave to renew this motion for reargument and renewal, as per the order of this court dated March 19, 2014, upon submission of a copy of the exhibits referenced in the prior submitted motion and cross motion.

A motion for renewal "shall be based upon 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; and shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR 2221 (e) (2), (3).

Plaintiff's application for renewal is denied as plaintiff has failed to present any change in the law that would change the prior determination, or, to present any new facts not offered on the underlying motion along with a reasonable justification for the failure to provide those facts in the first instance. Although plaintiff's counsel provides a history of the multiple changes of counsel for plaintiff as an excuse for not having moved to amend the notice of claim in the first action under index number 20988/12, this is an insufficient ground for renewal. Renewal is sparingly granted and is not to be used as a second chance freely given to parties who have not exercised due diligence in making their original motion. *Henry v Peguero*, 72 AD3d 600, 602 (1st Dept 2010) (citation omitted).

A motion to reargue "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...” CPLR 2221 (d) (2). Further, a motion to reargue must be based on the submitted papers upon which the original decision was made. *Phillips v Village of Oriskany*, 57 AD2d 110 (4th Dept 1977) (citation omitted). It is axiomatic that the movant has the initial burden of providing the court with the basis in which it seeks relief, together with supporting, procedural and relevant documents in the matter. *See* CPLR 2214 (c); *see also*, *Rosenman et al. v Edelman*, 165 AD2d 533 (1st Dept 1991).

With respect to plaintiff’s application for reargument, plaintiff’s underlying cross motion under this index number sought leave to amend the notice of claim which was previously found defective in this court’s decision and order of July 16, 2013 under index number 20988/12. Plaintiff’s cross motion was denied as plaintiff failed to attach both the proposed amended notice of claim or the amended complaint. In addition, the court noted that any application to the court regarding the July 16, 2013 decision must be made under index number 20988/12.

Plaintiff contends that the submissions of the proposed amended notice of claim and amended complaint were attached to the reply papers and were overlooked by the court as well as the fact that plaintiff, in his reply, had withdrawn that portion of his motion seeking to amend the complaint.

Notwithstanding plaintiff’s contentions, plaintiff has failed to demonstrate that the court misapplied the law or failed to consider any relevant fact in making its July 16, 2013 decision. In the underlying cross motion, plaintiff was seeking to amend the notice of claim and the complaint, and such proposed amended documents, which were the basis for plaintiff’s relief, were not included in the initial moving papers: “[T]he function of a reply is to address

arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion.” *Dannasch v Bifulco*, 184 AD2d 415, 417 (1st Dept 1992) (citations omitted). In addition, “a movant may not remedy a fundamental deficiency in the moving papers by submitting evidentiary material with the reply.” *Trizechahn, Inc. v Timbil Chiller Maintenance Corp.*, 92 AD3d 409 (1st Dept 2012) (internal quotation marks omitted) (citation omitted). Moreover, even if the court were to consider the proposed amended notice of claim submitted with the reply papers, the relief was not requested under the proper index number.

Accordingly, plaintiff’s motion to renew and reargue is denied in its entirety.

This constitutes the decision and order of the court.



LARRY S. SCHWACHNER, J.S.C.

Dated: September 22, 2014