

**Advanced Technique Fireworks v IMR Test Labs,
Inc.**

2015 NY Slip Op 32088(U)

May 22, 2015

Supreme Court, New York County

Docket Number: 112913/11

Judge: Kathryn E. Freed

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5/29/15
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 2

Index Number : 112913/2011
ADVANCED TECHNIQUE FIREWORKS
vs.
IMR TEST LABS, INC.
SEQUENCE NUMBER : 010
RENEWAL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 010

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


**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

FILED
MAY 29 2015
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
MAY 29 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: 5-22-15
MAY 22 2015


HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

- 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

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2**

-----X
ADVANCED TECHNIQUE FIREWORKS,

Plaintiff,

-against-

DECISION AND ORDER
Index No.: 112913/11
Mot. Seq. No. 010

IMR TEST LABS, and
JAMES FOSTER and SHERRY FOSTER
individually,

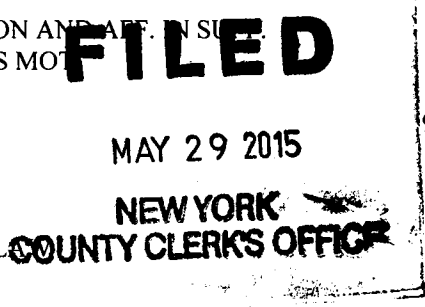
Defendants.

-----X
HON. KATHRYN E. FREED, J.S.C. :

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

MOT. SEQ. 010

PAPERS	NUMBERED
PLTF'S NOT. OF MOT. AND KORBYLO AFF. IN SUPP.	1,2 (Exs. A-H)
CREADORE AFF. IN SUPP.	3 (Exs. A-C)
MEMO. OF LAW IN SUPP.	4
DEF. IMR'S NOT. OF CROSS MOTION AND AFF. IN SUPP.	5,6 (Ex. A)
MEMO. OF LAW IN OPP. TO PLTF'S MOT.	7
PLTF'S REPLY AFF.	8 (Ex. A)
PLTF'S REPLY AFF.	9 (Exs. 1-12)
AMENDED NOT. OF MOT.	10
PLTF'S REPLY MEMO. OF LAW	11
DEFENDANT'S REPLY AFF.	12 (Exs. A-O)
DEFENDANT'S REPLY MEMO. OF LAW	13



UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action alleging claims for, inter alia, breach of contract, plaintiff Advanced Technique Fireworks, Inc. ("ATF") moves, pursuant to CPLR 2221, to vacate in its entirety the order of this

Court (York, J.), entered July 24, 2014, which imposed costs, sanctions, and attorneys' fees pursuant to 22 NYCRR 130-1.1 and referred the matter of attorneys' fees to a Special Referee. In the alternative, ATF seeks renewal and reargument of the order and, upon renewal and reargument, vacatur of that portion of the order which granted financial sanctions against it. Further, ATF seeks the alternative relief of designating May 18, 2012 or June 14, 2012 as the time at which it sought to discontinue its action against defendant IMR Test Labs, Inc. ("IMR") so that the Special Referee cannot consider any attorneys' fees incurred by IMR after either of those dates.

IMR cross moves for reargument of the July 24, 2014 order on the ground that it contained incorrect factual statements.

After hearing oral argument and reviewing the parties' motion papers and the relevant statutes and case law, the motion and cross motion are **denied**.

FACTUAL AND PROCEDURAL BACKGROUND:

In 2011, ATF commenced this action alleging that defendants IMR, Sherry Foster, and her husband, James Foster, failed to pay \$22,702 for fireworks which they ordered from it. IMR moved for summary judgment, asserting that Ms. Foster ordered the fireworks for use by she and her husband, exclusively. IMR asserted that, if it had been involved in the purchase at all, it was because Ms. Foster, an IMR employee, emailed ATF about the purchase from her work computer. In support of the motion, Steve Ruoff, the former owner of IMR, denied his company's involvement in any transaction with ATF. By order entered January 25, 2013, this Court (York, J.) granted IMR's motion and dismissed the complaint against it.

Subsequently, however, by order dated February 4, 2013, this Court (York, J.), entered a

default judgment against IMR on all of ATF's claims except fraud and declined to enter a default against the Fosters.

IMR therefore, moved to renew and reargue that February 4, 2013 order of this Court (York, J.), to the extent that it granted a default against IMR. Pursuant to that motion, in an order filed May 29, 2013, the Court (York, J.), noted that ATF supported IMR's application for a default but ATF also requested again that defaults be granted against the Fosters. This order vacated the February 4, 2013 default judgment against IMR, finding that it had been rendered inadvertently. The Court (York, J.) declined to enter a default against the Fosters, stating that AFT would have to move for that relief by a motion to renew.

By order entered May 30, 2013, this Court (York, J.) denied ATF's subsequent motion to renew and reargue the Court's granting of IMR's motion for summary judgment.

ATF subsequently moved to dismiss IMR's counter claims, which the Court (York, J.) had not dismissed, 1) for sanctions against ATF pursuant to Uniform Rule 130-1.1 for bringing a frivolous claim against IMR even though IMR had never done any business with it; and 2) for punitive damages against ATF, holding that New York did not recognize such claims. Ex. A To Korbylo Aff. In Supp. of ATF's Motion. ATF's motion was granted by order of this Court (York, J.) entered May 19, 2014. *Id.*

By order entered July 24, 2014, this Court (York, J.), relying on *Sakow v Columbia Bagel*, 6 Misc3d 939 (Sup Ct New York County 2004), modified its May 19, 2014 order to the extent of granting IMR's cross motion seeking costs and reasonable attorneys' fees pursuant to 22 NYCRR 130-1.1. Ex. B To Korbylo Aff. In Supp. Of ATF's Motion. The Court reasoned that ATF failed to discontinue its claim against IMR despite the fact that Ms. Foster, who had "ordered the fireworks

on [IMR's] company stationery", had submitted an affidavit attesting to the fact that IMR had no role in the transaction between the Fosters and ATF. *Id.* Additionally, this Court noted that, although ATF had always required the Fosters to produce a license before purchasing fireworks, and it knew that IMR had no such license, it nevertheless proceeded with its action demanding payment by IMR.

This Court also imposed an additional sanction of \$2,000 against ATF, reasoning that this amount was appropriate because ATF's current principal "took over under extremely difficult circumstances," i.e., following the death of her husband, but that her husband, the original principal, should have discontinued ATF's action against IMR "when it became abundantly clear that the claim against IMR was invalid." *Id.*

On August 14, 2014, ATF filed a notice of appeal from the order of July 24, 2014. Ex. H To Korbylo Aff. In Supp. Of ATF's Mot. The notice of appeal sought a stay of all proceedings in this matter pending the outcome of the appeal. *Id.*

ATF now moves,¹ pursuant to CPLR 2221, for renewal and reargument of the Court's July 24, 2014 order. Initially, it seeks to vacate the order in its entirety. In the alternative, ATF seeks to vacate that portion of the order imposing costs, sanctions and attorneys' fees against it. Should this Court refuse to grant the foregoing relief, then ATF seeks the further alternative relief of having this Court designate May 18 or June 14, 2012 as the date on which it sought to discontinue its action against IMR so that the Special Referee does not consider attorneys' fees incurred by IMR following those dates.

IMR cross-moves to reargue the July 24, 2014 order on the ground that the Court mistakenly stated therein that Ms. Foster ordered the fireworks from ATF on IMR letterhead. It further asserts

¹The relief sought is pursuant to an amended notice of motion dated October 3, 2014.

that the Court erred in stating that ATF discontinued its claims against IMR.

THE PARTIES' CONTENTIONS:

In support of its motion to renew, ATF attempts to introduce correspondence suggesting that it attempted to discontinue its claims against IMR in May and June of 2012.

In support of its motion to reargue, ATF's president, Ruth Korbylo, argues that the Court overlooked the fact that ATF tried to discontinue the action against IMR in May and June of 2012, long before it obtained Ms. Foster's affidavit in September of 2012, submitted in support of IMR's motion for summary judgment, attesting to the fact that IMR had no role in the sale of the fireworks. Exs. C, D, and E To Korbylo Aff. In Supp. Of ATF's Mot. ATF asserts that, had IMR agreed to countersign a stipulation of discontinuance without prejudice in May or June of 2012 (Ex. E To Korbylo Aff. In Supp. Of ATF's Mot.), the case would have concluded at that time and never would have proceeded to the point at which sanctions had to be imposed against ATF for frivolous conduct.

Relying on *Richardson v Pascarella*, 15 Misc3d 1143(A) (Sup Ct Onondaga County 2007), ATF asserts that the Court erred by awarding IMR relief on its counterclaim against ATF alleging a cause of action arising from 22 NYCRR 130.1-1.

In support of IMR's cross motion, Ms. Foster submits an affidavit in which she represents that she did not order the fireworks on IMR letterhead. Rather, she insists that, because she lives in a rural area and her home does not have internet service, she used her work computer to communicate with ATF *after* she placed the order with the company.

LEGAL CONCLUSIONS:

Renewal and Reargument Standard

A motion for leave to renew, pursuant to CPLR 2221(e), “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. It is within this Court’s discretion to determine whether to grant a motion for renewal. *See Lawman v Gap, Inc.*, 38 AD3d 852, 852-53 (2d Dept 2007). The granting of 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.” *Matter of Beiny*, 132 A.D.2d 190, 219 (1st Dept. 1987), *lv. dismissed* 71 N.Y.2d 994 (1988).

A motion for leave to reargue, pursuant to CPLR 2221(d), “shall be based upon matters of fact allegedly overlooked or misapprehended by the court in determining the proper motion.” Such motion “is addressed to the sound discretion of the court.” *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22 (1st Dept.1992), *lv dismissed*, 80 N.Y.2d 1005 (1992), *rearg denied* 81 N.Y.2d 782 (1993). Reargument is not designed or intended to afford the unsuccessful party successive opportunities to reargue issues previously decided (*see Pro Brokerage v. Home Ins. Co.*, 99 A.D.2d 971 [1st Dept. 1984]), or to present arguments different from those originally asserted. *See Foley v. Roche*, 68 A.D.2d 558; *William P.Pahl Equip. Corp. v. Kassis*, 182 A.D.2d *supra* at 24; *Amato v. Lord & Taylor, Inc.*, 10 A.D.3d 374 (2d Dept. 2004). On reargument, the court’s attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked. *See Macklowe v. Browning School*, 80 A.D.2d 790 (1st Dept. 1981). Professor David Siegel

succinctly instructed that a motion to reargue “is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind.” Siegel, NY Prac § 254, at 449 (5th ed 2011).

Denial of the Motion and Cross Motion On Procedural Grounds

Initially, ATF’s motion for renewal and reargument must be denied on procedural grounds. ATF’s motion is deficient because it fails to include a copy of IMR’s underlying cross motion for sanctions pursuant to 22 NYCRR 130-1.1 and ATF’s opposition thereto. *See* CPLR 2214(c); *Biscone v JetBlue Airways Corp.*, 103 AD3d 158 (2d Dept 2012), *appeal dismissed* 20 NY3d 1084 (2013). CPLR 2214 (c) provides, in pertinent part, that “[t]he moving party shall furnish...all other papers not already in the possession of the court necessary to the consideration of the questions involved.” The court does not retain motion papers after it decides a motion “and should not be compelled to retrieve the clerk’s file in connection with its consideration of subsequent motions.” *Sheedy v Pataki*, 236 AD2d 92, 97 (3d Dept 1997), *lv denied* 91 NY2d 805 (1998). The movant is responsible for assembling complete papers documenting the procedural history of the motion and providing a proper foundation for the relief requested (*See Fernald v Vinci*, 13 AD3d 333 [2d Dept 2003]), and a court may refuse to consider improperly submitted papers. *See Wells Fargo Home Mtge., Inc. v Mercer*, 35 AD3d 728 (2d Dept 2006).

IMR’s cross motion must also be denied on procedural grounds since it, too, did not annex the underlying motion papers to its application.

Denial of ATF’s Motion for Renewal on the Merits

ATF maintains that it is entitled to renewal “in the interests of justice” based on letters it

wrote to IMR in May and June of 2012 offering to discontinue the action against the latter without prejudice. Korbylo Aff. In Supp. Of ATF's Mot., at pars. 16, 17. Although ATF "respectfully requests" that this Court grant it leave to consider these letters "as part of this motion" (*Id.*), ATF fails to set forth any explanation why the letters were not submitted in connection with IMR's underlying cross motion for sanctions. Given ATF's failure to provide a valid excuse for this omission, its motion for renewal must be denied. See CPLR 2221(e)(3); *Matter of Beiny, supra* at 219.

Denial of ATF's Motion for Reargument on the Merits

ATF's motion for reargument is also denied on substantive grounds. In asserting that it is entitled to reargument, ATF asserts that:

What this Court overlooked is the fact that the plaintiff had tried to discontinue the case long before [IMR] procured [Ms. Foster's September, 2012 affidavit attesting to the fact that IMR had no involvement in the transaction between her and ATF], and IMR refused to agree to discontinue it. The sole reason this case progressed beyond May 2012 was IMR's refusal to agree to discontinue it.

Korbylo Aff. In Supp. Of ATF's Mot., at par. 2.

Ms. Korbylo asserts that, although she "tried to discontinue the case", she could not do so because "IMR refused to let it happen" (*Id.*, at par. 5). However, this contention is clearly without merit. It is academic that, had ATF wished to discontinue its action against IMR without prejudice, it could have done so without the consent of IMR. There is no authority supporting ATF's argument that it was unable to file a stipulation of discontinuance without a countersignature by IMR. CPLR 2104 simply requires that a stipulation be "subscribed" by the party to be bound by it. Here, that

would have been ATF, the party discontinuing its claims. Thus, ATF could have executed a stipulation of discontinuance without prejudice and filed it with the court without IMR's signature. In light of the foregoing, ATF's contention that IMR "unnecessarily protract[ed] the case . . . by refusing to agree to allow [it] to discontinue the case against IMR" (*Id.*, at par. 6) is specious.

ATF further asserts that it attempted to discontinue its claims against IMR in May and June of 2012, "long before [it] received any information that would lead it to reasonably believe [that] the claims being asserted against IMR were arguably invalid." Korbylo Aff. In Supp. Of ATF's Mot., at par. 8. However, it simultaneously asserts that it "determined in May 2012 that it may not have sufficient proof as against IMR" (*Id.*, at par. 6). Since these contentions are contradictory, they do not warrant the granting of reargument.

As noted above, ATF relies on *Richardson v Pascarella*, *supra*, in support of its motion for reargument. ATF correctly notes that, in *Richardson*, the court held that a party may not plead costs and sanctions pursuant to 22 NYCRR 130.1-1 and CPLR 8303-a as a distinct cause of action, as IMR did here. However, what ATF overlooks is that this Court *dismissed* IMR's counterclaim seeking this relief (Ex. A to Korbylo Aff. In Supp. Of ATF's Mot.) and subsequently granted a cross motion by IMR seeking such sanctions. Ex. B to Korbylo Aff. In Supp. Of ATF's Mot. Precisely what relief was sought by IMR's cross motion cannot be discerned by this Court given ATF's failure to supply the underlying motion papers with the instant motion. Nevertheless, given that the relief was not granted as part of a discrete cause of action seeking such sanctions, ATF's reliance on *Richardson* is misplaced.

ATF's argument regarding this Court's reliance on *Sakow v Columbia Bagel, Inc.*, *supra*, in awarding costs and sanctions to IMR is, at best, puzzling. In *Sakow*, this Court (Lippmann, J.)

stated, inter alia, that “[u]nder 22 NYCRR 130-1.1, the court has discretion to award sanctions for frivolous conduct.” 6 Misc3d, *supra* at 942. In support of its motion, ATF initially argues that “*Sakow* is not only distinguishable, it is not applicable to the facts here.” ATF’s Memo. Of Law In Supp., at 10. Curiously, however, ATF then asserts that “*Sakow* could not be more applicable to the facts of this case.” *Id.*, at 11. Given the patent inconsistency of ATF’s argument, this Court must deem it without merit.

In a contention which begs credulity, ATR maintains that it is entitled to reargument because “[t]he principal of ATF died suddenly, and most disturbingly, IMR went forward with his deposition, despite knowing that the principal had died. ; see Decision of July 18, 2012, denying IMR’s motion to dismiss.” (Korbylo Aff. In Supp. Of ATF’s Mot., at par. 36). In addition to the inherent oddity of this argument, i.e., how one can depose a dead person, ATF fails to annex any decision of this Court dated July 18, 2012 to its papers. Although ATF’s attorney asserts that “IMR held and conducted the deposition of ATF knowing in advance that ATF’s owner had died and was not available” (Creadore Aff., at par. 27) and failed to allow ATF “additional time * * * to designate a suitable replacement” (*Id.*, at par. 28), he neither submits any documentation relating to the purported facts he addresses nor explains why the situation regarding the deposition of ATF’s witness should excuse ATF for what Justice York determined to be its frivolous conduct in refusing to discontinue its claims against IMR.

Nor should ATF’s alternative request for relief be granted. ATF maintains that, since it attempted to discontinue its claims against IMR in May and June of 2014 without prejudice, it should not be responsible for attorneys’ fees beyond that time. However, as discussed above, ATF did not discontinue its claims against IMR in May or June of 2012, although it could have done so without

the need for IMR to sign the stipulation of discontinuance. *See* CPLR 2104.

Denial of ATF's Motion For A Stay

Although ATF seeks a stay of all proceedings before the Special Referee pending the outcome of its appeal from the order of July 24, 2014, it did not seek this relief in its notice of motion or in the “wherefore” clause of its motion. “Even though [ATF’s] notice of motion and ‘wherefore’ clause did not formally and specifically request [a stay pursuant to CPLR 2201 or 5519 (c)], (*see* CPLR 2214[a]; *Arriaga v Laub Co.*, 233 AD2d 244, 245 [1st Dept 1996]), a court may grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party (citations omitted).” *Frankel v Stavsky*, 40 AD3d 918, 918-919 (2d Dept 2007). Here, such relief is not warranted by the facts, since a Special Referee conducted a hearing regarding the amount of the attorneys’ fees to be awarded to IMR on September 2 and 3, 2014, for which ATF was present. Thus, the instant case not only fails to fall within the exception set forth in *Frankel*, but the stay must also be denied since the application for the same is moot.

Denial of IMR's Cross Motion for Reargument on the Merits

As noted above, IMR’s cross motion is denied on procedural grounds since it failed to annex its underlying motion papers to its application. However, this failure warrants the denial of the motion on substantive grounds as well, since this Court cannot, without the affidavit submitted by Ms. Foster in connection with IMR’s underlying cross motion for sanctions, determine whether the July 24, 2014 order correctly determined, based on evidence submitted by Ms. Foster, whether the

fireworks were ordered on IMR letterhead.

IMR further asserts that it is entitled to reargument of that branch of the July 24, 2014 order which erroneously held that ATF discontinued its claims against IMR, since IMR was actually granted a dismissal of ATF's claims against it. IMR asserts that reargument should be granted because it is unclear "whether this error was harmless, or if it impacted [this] Court's decision to limit the sanctions award to \$2,000," and that it "seeks an amended decision that corrects this error to the extent it impacted the awarded sanctions." IMR's Memo. Of Law In Supp. Of Its Cross Motion. Given the speculative nature of this argument, however, IMR has not established that this Court misapprehended or overlooked matters of fact or law in rendering its July 24, 2014 order. *See* CPLR 2221.

This Court need not address the remainder of the parties' contentions, as they are without merit or raised for the first time in reply papers.

In light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Advanced Technique Fireworks, Inc. is denied in all respects; and it is further,

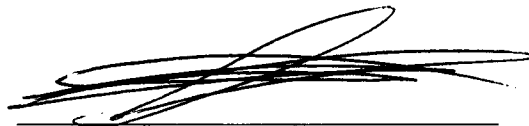
ORDERED that the cross motion by defendant IMR Test Labs is denied in all respects; and it is further,

ORDERED that the parties are hereby ordered to appear for a settlement conference at 80 Centre Street, Room 280, on June 10, 2015 at 2:30 p.m.; and it is further,

ORDERED that this constitutes the decision and order of the Court.

Dated: May 22, 2015

ENTER:



HON. KATHRYN E. FREED, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**

FILED
MAY 29 2015
NEW YORK
COUNTY CLERK'S OFFICE