

**UMS Solutions, Inc. v Biosound Esaote, Inc.**

2015 NY Slip Op 32641(U)

January 23, 2015

Supreme Court, Westchester County

Docket Number: 11590/10

Judge: Alan D. Scheinkman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED  
ON January 27 2015  
WESTCHESTER  
COUNTY CLERK

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
COMMERCIAL DIVISION**

**FILED**

JAN 22 2015

TIMOTHY G. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

**Present: HON. ALAN D. SCHEINKMAN  
Justice.**

-----X  
UMS SOLUTIONS, INC. d/b/a UNIVERSAL  
ULTRASOUND and UNIVERSAL MEDICAL SYSTEMS,  
INC.,

Plaintiffs,

-against-

BIOSOUND ESAOTE, INC., JEFF FISHEL, MICHAEL  
COLLINS, KEVIN GOUVIN, DR. PAUL BRAZZELL,  
VETEL DIAGNOSTICS, INC. and BOOTHROYD  
IMAGING SOLUTIONS, INC. d/b/a CANADA  
BOOTHROYD IMAGING SOLUTIONS (BIS), ESAOTE  
CANADA, BOOTHROYD IMAGING SOLUTIONS,  
CANADIAN VETERINARY IMAGING INC., and BIS,  
INC.,

Defendants.

-----X

Index No. 11590/10  
Motion Date: 12/19/2014  
SEQ # 20

**DECISION & ORDER**

Scheinkman, J:

Plaintiffs UMS Solutions, Inc. and Universal Medical Systems, Inc. ("Plaintiffs" or "UMS") move to reargue or renew the motion previously made by Defendants Vetel Diagnostics ("Vetel"), Jeff Fishel ("Fishel") and Michael Collins ("Collins") for sanctions against Plaintiffs for spoliation of evidence. The said motion (Seq. No. 6) was determined by a Decision and Order of this Court entered October 9, 2012. The motion to reargue/renew is opposed by Vetel, who is the only one of the three original movants still in the case.

Shortly after this Court issued the Decision and Order of October 9, 2012, Fishel died. As a consequence, this case was stayed from October 18, 2012 (when Fishel died) until August 14, 2014, when this Court issued a Decision and Order which, among other things, provided for the substitution of Fishel's personal representatives and for the vacating of the stay. The claims by Plaintiffs against Fishel and Collins, as

well as the claims by Fishel and Collins against Plaintiffs, were discontinued.

Hence, well over two years after issuing the Decision and Order of October 9, 2012, the Court is asked by Plaintiffs to revisit it.

A. *Reargument*

CPLR Rule 2221(d) provides, in relevant part, 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.<sup>1</sup>

It is well settled law that a motion for reargument is “not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided” (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; *Marine Natl. Bank v National City Bank*, 59 NY 67, 73 (1974); *American Trading v Fish*, 87 Misc 2d 193 [Sup Ct, NY County 1975]).

Plaintiffs’ principal contentions in support of reargument are that the Court should not have viewed the testimony of Hunter Hill as being credible, that the police incident report submitted by Hill should have raised questions as to whether Peter Brunelli spoliated the Florida Hard Drive, and the striking of Plaintiffs’ pleading was too severe a sanction as Vetel did not show that its ability to prove any claim or defense was fatally compromised.

All of these contentions and arguments were thoroughly considered and evaluated in the October 9, 2012 Decision and Order. All Plaintiff has shown is that Plaintiff does not agree with the Court’s analysis.

Accordingly, the branch of the motion that seeks reargument is denied.

B. *Renewal*

CPLR 2221(e) provides that a motion for leave to renew: (1) shall be identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has

---

<sup>1</sup>Herein, the Notice of Motion was served by mail on September 9, 2014. While that date is obviously nearly two years after the entry of the October 9, 2012 Decision and Order, Vetel does not set forth when, if ever, notice of entry of the October 9, 2012 Decision and Order was served. Nor does Vetel argue that the motion is untimely. Hence, the Court will proceed on the assumption that the motion was timely made.

been a change in the law that would change the prior determination; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion.

It is settled that an application for leave to renew a motion must be predicated on new matters not available prior to the court's decision (*Matter of Ahmad v Purcell*, 82 AD2d 802 [2d Dept 1981]) "or which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court. Renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application" (*Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]; see also *American Trading v Fish*, 87 Misc 2d 193 [Sup Ct, NY County 1975]; *Ecco High Frequency Corp. v Amtorg Trading Corp.*, 81 NYS2d 897 [Sup Ct, NY County 1948], *affd* 274 App Div 982 [1st Dept 1948]; *Patterson v Town of Hempstead*, 104 AD2d 975, 976 [2d Dept 1984]).

Here, the only basis offered for renewal is the "final" report from the Jupiter, Florida Police Department issued on June 13, 2011. In that report, Officer Lindsey Alise Canonico states that the complaint made by Hill regarding theft of items from his apartment is "unfounded at this time" because the officer "currently do[es] not have sufficient evidence to show that a theft of personal property occurred." Plaintiff contends that Hill and Vetel attempted to keep this "final" report from Plaintiffs and the Court. Plaintiff also contends that the Court's conclusion that Brunelli spoliated the Florida Hard Drive is belied by the "final" police report.

The Court disagrees.

First, Plaintiffs' application is fatally deficient for failure to offer a valid excuse for not submitting the "final" police report on the original motion.

As discussed in the October 9, 2012 Decision and Order, the incident involving Brunelli at Hill's Florida home occurred on or about April 15, 2011. Hill addressed it in his affidavit of September 27, 2011 and submitted the police incident report dated May 4, 2011. Brunelli, in his opposition affidavit of May 17, 2012, provided his counter-version of the April 15, 2011 events and specifically referenced the police incident report submitted by Hill.

While it is true that Hill could have supplied the larger police report, including the "final" report of June 13, 2011, as part of his September 27, 2011 affidavit, it is also true that Brunelli could have supplied the larger police report, including the "final" report of June 13, 2011 as part of his May 17, 2012 opposition affidavit.

Though Plaintiffs assail Vetel's counsel and Hill for not providing the June 13, 2011 "final" report, there is no evidence that either Vetel's counsel or Hill was aware that there was more to the police report than the few pages submitted with Hill's affidavit. There is no evidence that either Vetel's counsel or Hill requisitioned the entire

police file or had copies of the June 13, 2011 report in their possession.

The Court views the Jupiter Florida police report in this matter as documents equally available to all parties. There is no indication that the Florida police viewed the file as confidential, exempt from public disclosure, or available only to the complainant.

At the time of the underlying motion, Plaintiffs were represented by able counsel, specifically Peter G. Goodman, Esq. of Hartman & Kraven LLP. No explanation has been provided as to why Plaintiffs did not obtain, or attempt to obtain, the fuller police file.

Nor does the "final" report have the exonerating impact ascribed to it by Plaintiffs' present counsel. The only "new" information added by Officer Canonico on June 13, 2011 was her report of her conversation, on June 9, 2011, with Hill's landlord, Robert J. Runnels.

In her recounting of the conversation with Runnels of June 9, 2011, Runnels is reported as stating that he allowed Brunelli inside Hill's room so that Brunelli could collect his medical equipment, that Runnels was present the entire time that Brunelli was collecting the property, and that at no time was Brunelli left alone

This statement is consistent with the incident report of May 4, 2011 in which Officer Marsha Lowenstein reported that she was present while Brunelli removed items. She stated that during this time "Reynolds [*sic*] stood by and watched in the room. Reynolds [*sic*] stated his son was staying in the room and had several items in it so he made sure Brunelli didn't take his items."

The statement given by Runnels to Officer Canonico on June 9, 2011 directly contradicts, in material respects, the statement given by Runnels to Officer Joseph Richard Hammill on April 15, 2011, as reflected in a report of Officer Hammill of April 20, 2011, which is part of Plaintiffs' present submission. According to Officer Hammill:

Runnels said, on 4-15-11 Peter Brunelli [*sic*] and a Jupiter Police Officer arrived to his residence to have Brunelli [*sic*] retrieve Hill's property. Brunelli [*sic*] had a list of property to get. Runnels unlocked the residence and allowed Brunelli [*sic*] to inside to retrieve belongs. Brunelli [*sic*] grabbed a computer hard drive. Runnels advised Brunelli [*sic*] that the hard drive belongs to his son and to put it down. Brunelli [*sic*] put the hard drive down. Brunelli [*sic*] began going through Runnels' personal property, Runnels told Brunelli [*sic*] to please not touch his property. Runnels did not watch

over Brunelli [*sic*] the entire time and can not state exactly [what] was taken by Brunelli [*sic*]).

While the oral versions given by Runnels to the police are at variance, the written statement he gave on June 8, 2011 is very circumspect. It states, in material part, only that the police checked every item picked up by Brunelli from a list provided by him as his property (without elaboration as to what was on the list) and that Brunelli was not left unattended.

The Court concludes that the conflicting statements on file with the Jupiter Police Department, while perhaps warranting their decision not to pursue criminal charges, do not warrant granting renewal.

### **CONCLUSION**

The Court has considered the following papers in connection with these motions:

- 1) Notice of Motion dated September 5, 2014; Affirmation of Leonard Benowich, Esq. dated September 5, 2014; Affidavit of Peter Brunelli, sworn to September 5, 2014, together with the exhibits annexed thereto, all submitted with proof of due service;
- 2) Plaintiffs' Memorandum of Law dated September 5, 2014, submitted with proof of due service;
- 3) Affirmation of Jessica J. Kastner, Esq. dated November 19, 2014, together with the exhibits annexed thereto, submitted with proof of due service;
- 4) Memorandum of Law of Defendant Vetel Diagnostics, Inc. dated November 19, 2014, submitted with proof of due service;
- 5) Affirmation of Leonard Benowich, Esq. dated December 4, 2014, submitted with proof of due service;
- 6) Plaintiffs' Reply Memorandum of Law dated December 4, 2014, submitted with proof of due service;
- 7) Affirmation of Jessica J. Kastner, Esq. dated December 12, 2014, submitted with proof of due service; and
- 8) Sur-Reply Affirmation of Leonard Benowich, Esq. dated December 18, 2014.

Accordingly, for the reasons stated and based upon the papers aforesaid, it is hereby

ORDERED that the motion by Plaintiffs UMS Solutions, Inc. and Universal Medical Systems, Inc. which seeks reargument and/or renewal of the prior motion by Defendant Vetel Diagnostics, Inc. to impose sanctions for spoliation of evidence, which motion was determined by a Decision and Order entered October 9, 2014, is denied in all respects.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
January 23, 2015

ENTER:



---

ALAN D. SCHEINKMAN  
Justice of the Supreme Court

APPEARANCES:

BENOWICH LAW, LLP  
By: Leonard Benowich, Esq.  
Attorneys for Plaintiffs  
1025 Westchester Avenue  
White Plains, New York 10604

THE DORF LAW FIRM LLP  
By: Jessica J. Kastner, Esq.  
Attorneys for Defendant Vetel Diagnostics, Inc.  
555 Theodore Fremd Avenue  
Rye, New York 10580