Cioffi v S.M. Foods, Inc.
2015 NY Slip Op 32938(U)
July 6, 2015
Supreme Court, Westchester County
Docket Number: 55391/2011
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART
---x
FREDERICK M. CIOFFI and ELISABETTA CIOFFI,

Plaintiffs,

-against-

S.M. FOODS, INC., GFI BOSTON, LLC, ATLANTA FOODS INTERNATIONAL, RUSSELL McCALL'S INC., RUSSELL McCALL'S INC. d/b/a SHEILA MARIE FOODS, SHEILA MARIE IMPORTS, DOUG JAY, RYDER TRUCK RENTAL, INC., PLM TRAILER LEASING and DANIEL E. BURKE,

Defendants.
---x
S.M. FOODS, INC., GFI BOSTON, LLC, PLM TRAILER LEASING and DANIEL BURKE,

Third-Party Plaintiffs,

-against-

VILLAGE OF TUCKAHOE and VINCENT PINTO,

Third-Party Defendants.
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DECISION & ORDER

Index No. 55391/2011

Motion Seq. #40, 41, 42

LEFKOWITZ, J.

The following papers were read on the motion (sequence #40) by Defendants Russell McCalls Inc. d/b/a Atlanta Foods International and Doug Jay (the "Atlanta defendants) for an order granting reargument and renewal of the prior order of this court dated April 14, 2015.

Notice of Motion dated May 15, 2015
Affirmation in Support
Exhibits A-L
Affirmation in Opposition

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Exhibits A-F
Quinlan Letter
Affirmation in Reply K-2, L-2

The following papers were read on the cross-motion (sequence #41) by plaintiffs for an order granting renewal and reargument of the prior order of this court dated April 14, 2015; directing the Atlanta defendants and defendant Ryder Truck Rental, Inc. to produce Fuel Tax filings and granting a negative inference against adverse parties that do not produce Fuel Tax Filings.

Notice of Cross-Motion dated June 5, 2015
Affirmation in Partial Opposition to Motion and in Support of Cross-Motion
Exhibits A-D
Quinlan letter
Exhibits A-C

The following papers were read on the motion (sequence #42) by plaintiffs for an order granting an open commission, compelling the production of documents and/or an order of preclusion and related relief.

Order to Show Cause
Affirmation in Support -Affidavits
Exhibits A-U
Affirmation in Support Re Fuel Tax Filings
Exhibits A-D
Memorandum of Law
Affirmation in Opposition -Exhibits A-G
Affirmation in Opposition - Exhibits A - K

Upon the foregoing papers these motions are determined as follows:

A motion for leave to renew "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" (CPLR 2221 [e] [2]). Here, the Atlanta defendants and plaintiffs failed to assert any new facts or a change in the law in support of the present motions for leave to renew. Accordingly, the court deems the present motions (sequence #40 &41) to be motions for leave to reargue (*Blackwell v Mikevin Mgt. III, LLC*, 88 AD3d 836 [2d Dept 2011]; *Nicoletti v City of New York*, 77 AD3d 715 [2d Dept 2010]); *Navarette v Alexiades*, 50 AD3d 873 [2d Dept 2008]; *McCorvey v Schoulder*, 273 AD2d 207 [2d Dept 2000]).

A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound

discretion of the court (*Weiss v Fire Extinguisher Svcs. Co.* 83 AD3d 822, 823 [2d Dept 2011]; *McGill v Goldman*, 261 AD2d 593, 594 [1999]; *William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 26 [1st Dept 1992], *lv denied* [1992], *lv dismissed* 80 NY2d 1005 [1993]). On a motion seeking leave to reargue, a party must establish that "the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision" (*Carrillo v PM Realty Group*, 16 AD3d 611 [2d Dept 2005]; *see* CPLR 2221 [d]; *Weiss v Fire Extinguisher Svcs. Co.* 83 AD3d at 823; *Ickes v Buist*, 68 AD3d 823 [2d Dept 2009]; *E.W. Howell Co. v S.A.F. LaSala Corp.*, 36 AD3d 653, 654 [2d Dept 2007]). A motion to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided. The court finds that neither the Atlanta defendants or plaintiffs demonstrate that the court overlooked or misapprehended matters of fact or law in determining the prior motions resulting in the Decision and Order dated April 14, 2015. Further, it is clear that the Atlanta defendants essentially seek to reargue issues which were addressed in the prior Order of this Court dated October 20, 2014 which the Atlanta defendants did not timely seek to reargue and have not appealed. Lastly, plaintiffs' cross-motion was untimely. Accordingly, motion sequence # 40 and 41 seeking to renew and reargue the April 14, 2015 Decision and Order of this Court are denied in all respects.

In plaintiffs' most recent motion (sequence #42), plaintiff seeks an open commission, to compel production of documents and related relief. CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Foster*, 74 AD3d at 1140; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

Plaintiffs' motion is granted to the limited extent as follows. While counsel for defendant Ryder asserts that Ryder was not responsible for fuel tax filings, consistent with this Court's prior decision, plaintiffs are entitled to either copies of all fuel tax filings for the years 2007 to 2009 for the subject tractor and trailer in Ryder's possession or an affidavit from a person of knowledge at Ryder stating that Ryder is not in possession of the requested filings and detailing the reason why. Moreover, as stipulated by the parties, plaintiffs are entitled to take the deposition of Richard Canty. All other items of discovery plaintiffs seek are neither material or relevant or the demands are overly broad and burdensome.

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With respect to those branches of plaintiffs' motion seeking an adverse inference or preclusion, defendants contend that they have fully complied with plaintiffs' discovery demands and possess no further documents responsive to plaintiffs' demands. After years of proceedings, having produced thousands of documents and responded to numerous motions, defendants cannot be compelled to produce that which they do not have. However, it would be prejudicial to plaintiffs to allow defendants to introduce any document that has not been previously produced. Therefore, plaintiffs' motion is granted to the limited extent that defendants shall be precluded from introducing into evidence at trial or otherwise, any document which has not been produced as of August 6, 2015. The branches of plaintiffs' motion which seek an adverse inference and preclusion of testimony are denied.

In light of the foregoing, it is:

ORDERED that the Atlanta defendants' motion and plaintiffs' motion to reargue the Decision and Order of this Court April 14, 2015 (motion sequence#40 and 41) are denied in their entirety; and it is further,

ORDERED that the motion by plaintiffs seeking an open commission, to compel and preclude and related relief (motion sequence #42) is granted to the limited extent that (1) on or before July 22, 2015, defendant Ryder shall produce to plaintiffs copies of all fuel tax filings for the years 2007 to 2009 for the subject tractor and trailer in its possession or an affidavit from a person of knowledge at Ryder stating that Ryder is not in possession of the requested filings and detailing the reason why; and (2) on July 22, 2015, the deposition of Richard Canty shall be held; and defendants shall be precluded from introducing into evidence at trial or otherwise, any document which has not been produced as of August 6, 2015; and (3) and in all other respects plaintiffs' motion is denied; and it is further

ORDERED that the parties are directed to appear in the Compliance Part, Room 800, on August 7, 2015, at 9:30 A.M., at which time the matter will be certified as trial ready and plaintiffs shall be directed to file a Note of Issue; [1] and it is further,

ORDERED that plaintiffs are directed to serve all parties in this matter with a copy of this order with notice of entry within seven (7) days of entry.

Dated: White Plains, New York
July 6, 2015

HON. JOAN B. LEFKOWITZ, J.S.C.

[1] At the oral argument on this motion, the parties agreed that further non-party depositions pursuant to prior Court Order shall be completed on August 4 and 5, 2015.