SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

AHMED DRIR,
Plaintiff,
-against-
U-9 RESTAURANT ASSOCIATES, INC. d/b/a KNICKERBOCKER BAR & GRILL and UNIWAY PARTNERS, L.P.,
Defendants.

INDEX NO. 156070/2015
MOTION DATE 06/27/2018
MOTION SEQ. NO 002
MOTION CAL. NO

U-9 RESTAURANT ASSOCIATES, INC. d/b/a KNICKERBOCKER BAR & GRILL and UNIWAY PARTNERS, L.P.,
Third-Party Plaintiffs,
-against-
EXL AIR CONDITIONING & HEATING CORP.,
Third-Party Defendant.

U-9 RESTAURANT ASSOCIATES, INC. d/b/a KNICKERBOCKER BAR & GRILL and UNIWAY PARTNERS, L.P.,
Second Third-Party Plaintiffs,
-against-
AHMED DRIR and LYES BENERAB d/b/a EXL AC AND REFRIGERATION COMPANY and EXL AC REFRIGERATION COMPANY ,
Second Third-Party Defendant.

The following papers, numbered 1 to 5 were read on this motion to renew/reargue.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants/Third-Party Plaintiffs U-9 Restaurant Associates, Inc. d/b/a Knickerbocker Bar & Grill and Uniway Partners, L.P.'s (hereinafter the "Moving Defendants") motion to reargue/renew this court's February 8, 2018 Decision and Order pursuant to CPLR 2221(d) and (e), and upon reargument and/or renewal, deny Plaintiff's motion to sever the Main Action from the two Third-Party Actions, is denied.

Plaintiff was allegedly injured on June 23, 2013 when he came into contact with a pot of boiling water while working to repair a refrigerator unit inside Defendant Knickerbocker Bar & Grill, located at 33 University Place, New York, New York 10003. Plaintiff was working on behalf of Third-Party Defendant EXL AC Refrigeration Company, a company that he partly owns. Plaintiff commenced this action on June 16, 2015 seeking to recover damages for injuries sustained from the hot water (the "Main Action").

Defendants commenced two Third-Party Actions on May 17, 2016: one against Defendant EXL Air Conditioning & Heating Corp.; and the second against the Plaintiff and Third-Party Defendants Lyes Benerab and EXL AC Refrigeration Company.

Third-Party Defendants EXL Air Conditioning & Heating Corp. and EXL AC and Refrigeration Company (together "EXL") are insured by CastlePoint National Insurance Company ("CastlePoint"). CastlePoint went into liquidation on April 1, 2017. All cases pending in New York State where CastlePoint is obligated to indemnify or defend a party were stayed (Moving Papers Ex. 2, Ex. A). However, the automatic stay was imposed for one-hundred and eighty (180) days, and expired on December 26, 2017 (*Id*).

Plaintiff moved to sever this action on July 26, 2017 (NYCSEF Docket No.: 31). The Moving Defendants opposed the motion on September 18, 2017 (*Id* at 41). Following adjournments, oral argument before this court was on February 7, 2018.

This court granted Plaintiff's motion to sever the Main Action from the two Third-Party Actions on February 8, 2018. This court held that the Main Action should be severed for the Plaintiff to avoid prejudice and undue hardship since discovery in the Main Action was completed, and an automatic stay was in place with any action (including both Third-Party Actions) requiring indemnification or defense from CastlePoint (Moving Papers Ex. 4). Plaintiff filed the note of issue in the Main Action on April 27, 2018.

The Moving Defendants now move pursuant to CPLR §2221(d) and (e) to reargue/renew this court's February 8, 2018 Decision and Order that granted Plaintiff's motion to sever the Main Action from the two Third-Party Actions, and upon reargument, deny Plaintiff's motion. Defendants contend that this court erred in severing the Main Action because at the time of this court's Decision and Order, the automatic stay on actions involving Castlepoint expired. The automatic stay in actions involving Castlepoint expired on December 26, 2017. In support of renewal, the Moving Defendants annexes a document from the State Liquidation Bureau demonstrating that the automatic stay expired on December 26, 2017, and providing the excuse for failure to include this document in their initial opposition papers due to the fact that it did not yet exist (*Id* at Ex. 6).

Plaintiff opposes the motion contending that the Moving Defendants failed to alert the court that the automatic stay had expired when oral arguments were heard, and in any event, this court should deny the motion to prevent further prejudice to the Plaintiff since the Main Action is on the trial calendar while the two Third-Party Actions remain in the discovery phase.

CPLR §2221(d) states that a motion for leave to reargue (i) shall be identified specifically as such, (ii) 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 (iii) shall be made within thirty (30) days after service of a copy of the order determining the prior motion and written notice of its entry.

The court has discretion to grant a motion to reargue upon a showing that it "overlooked or misapprehended any relevant facts, or misapplied any controlling principle of law" (Kent v 534 East 11th Street, 80 AD3d 106, 912 NYS2d 2 [1st Dept. 2010]). Reargument is not intended to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted (Kent, *supra*). The movant cannot merely restate previous arguments (*Id*).

A motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR §2221[e][2]) and that the application "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR §2221[e][3]). A motion for leave to renew is addressed to the sound discretion of the court (Hamlet At Willow Creek Development Co., LLC v Northeast Land Development Corp., 64 AD3d 85, 878 NYS2d 97 [2nd Dept. 2009]), and "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (Renna v Gullo, 19 AD3d 472, 797 NYS2d 115 [2nd Dept. 2005] *citing* Rubinstein v Goldman, 225 AD2d 328, 638 NYS2d 469 [1st Dept. 1996]). "Renewal is granted sparingly ... ; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (Henry v Peguero, 72 AD3d 600, 900 NYS2d 49 [1st Dept. 2010] *citing* Matter of Weinberg, 132 AD2d 190, 522 NYS2d 511 [1987], lv dismissed 71 NY2d 994, 524 NE2d 879, 529 NYS2d 277 [1988]). A motion for leave to renew must be based on additional material facts existing at the time the prior motion was made, but the material facts were not known to the party seeking leave to renew (Nassau County v Metropolitan Transp. Authority, 99 AD3d 617, 953 NYS2d 183 [1st Dept. 2012] *citing* Foley v Roche, 68 AD2d 558, 418 NYS2d 588 [1st Dept. 1979]).

Here, the Moving Defendants' motion to reargue/renew is essentially a motion to renew since they failed to point out any fact or law the court overlooked or misapprehended at the time of the motion since the Moving Defendants' opposition papers in the underlying motion did not highlight that the automatic stay would expire on December 26, 2017. The motion to renew is essentially based on the fact that the automatic stay expired before the court issued its Decision and Order. Based on the documents that the Moving Defendants annexed, the motion to renew is warranted. However, upon renewal, the court adheres to its earlier determination.

As pointed out by the Plaintiff, severance under the circumstances promotes judicial economy. Discovery in the Main Action is complete and is already on the trial calendar. Therefore, to rejoin the Main Action with the two Third-Party Actions would unduly delay the trial in the Main Action, resulting in prejudice to the Plaintiff. The court notes that discovery in the two Third-Party Actions is incomplete, thereby increasing the delay of the trial in the Main Action. This reason was an additional basis for severing the Main Action from the two Third-Party Actions, and the fact that the automatic stay has expired, does not alter this result.

Under such circumstances, the prejudice to the Plaintiff in being required to await the conclusion of lengthy and complex discovery process in the two Third-Party Actions, before obtaining any remedy, outweighs any potential inconvenience to the Moving Defendants (Golden v Moscowitz, 194 AD2d 385, 598 NYS2d 522 [1st Dept 1993]). Therefore, since granting the severance pursuant to CPLR §603 prevents any prejudice to plaintiff stemming from the delay occasioned by the further discovery proceedings and trial of the third-party actions, severance of the third-party actions remains warranted.

Accordingly, it is ORDERED, that Defendants/Third-Party Plaintiffs U-9 Restaurant Associates, Inc. d/b/a Knickerbocker Bar & Grill and Uniway Partners, L.P.'s motion to reargue/renew this court's February 8, 2018 Decision and Order pursuant to CPLR 2221(d) and (e), and upon reargument and/or renewal, deny Plaintiff's motion to sever the Main Action from the two Third-Party Actions, is denied

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: August 6, 2018

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE