

**Levitz v Morgan Fuel & Heating Co., Inc.**

2019 NY Slip Op 32449(U)

August 16, 2019

Supreme Court, New York County

Docket Number: 150665/2018

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM**

*Justice*

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**INDEX NO. 150665/2018**

LONNY LEVITZ, JENNIFER WALTHER

**MOTION DATE N/A, N/A**

Plaintiff,

**MOTION SEQ. NO. 003 004**

- v -

MORGAN FUEL & HEATING CO., INC., D/B/A BOTTINI  
FUEL,

**DECISION + ORDER ON  
MOTION**

Defendant.

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LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 69, 70, 71, 89

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 63, 64, 65, 66, 67, 68, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88

were read on this motion to/for AMEND CAPTION/PLEADINGS

Upon the foregoing documents, it is ordered that motion sequence numbers 003 and 004 are consolidated for disposition and decided as follows.

Plaintiffs move (seq. no. 003) to reargue and, assertedly, to renew, defendant's motion to change venue of this action from Supreme Court, New York County, to Supreme Court, Greene County, which motion was granted by decision and order of the undersigned dated March 27, 2019 (the "Transfer Order"), and e-filed March 29, 2019 (NYSCEF Doc. No. 46). In addition to that real-time method of entry and distribution, defendant served, through e-filing, notice of entry of the Transfer Order on April 5, 2019 (NYSCEF Doc. No. 47). Plaintiffs' instant motion to reargue was not served/filed until May 10, 2019 – more than 30 days after any of the foregoing

dates, rendering the motion to reargue untimely (CPLR 2221[d][3]). Thus, the motion for reargument is denied for that reason alone.

Wholly distinct of the foregoing procedural reason for denial of reargument, the court finds that no substantive grounds have been proffered to support reargument. A motion for reargument must show that the court overlooked or misapprehended matters of fact or law in determining the underlying motion (CPLR 2221[d][2]). Reargument is not appropriate for presenting new arguments not raised in the underlying motion practice or to rehash arguments previously raised and considered in the underlying motion practice (*Foley v Roche*, 68 AD2d 558 [1<sup>st</sup> Dept 1979]). Plaintiffs' motion for reargument fails to adhere to that dictate.

Plaintiffs' attempt to distinguish *Lloyd v National Propane Corp.* (271 AD2d 202 [1<sup>st</sup> Dept 2000]), treated in the Transfer Order, is unavailing, because that First Department decision, like the Transfer Order, engaged the very same analysis; to wit, an examination of the locus of relevant events and of witnesses. Moreover, the Transfer Order relied on additional First Department authority, such as *Katz v Goodyear Tire & Rubber Co.* (116 AD2d 506 [1<sup>st</sup> Dept 1986]), which similarly examined the locus of relevant events and of witnesses.

Plaintiffs submit on this motion for reargument an affidavit of plaintiff Lonny Levitz, informing that plaintiffs' Greene County basement has changed by way of renovation since the oil spill that is a factual backdrop of the action. However, apart from the fact that such information is newly presented, and thus, not appropriate on a motion for reargument, it ignores other underpinnings of the Transfer Order, such as the locus of witnesses and events. Moreover, plaintiffs' changing of circumstances that possess evidentiary relevance to their alleged claims cannot justly form the basis for vacatur of the Transfer Order.

For all the foregoing procedural and substantive reasons, the motion for reargument is denied.

Plaintiffs resort to an increasingly common practice of tacking on the rubric “renewal” to their motion for reconsideration.<sup>1</sup> This is not a motion for renewal, because a motion for renewal can only be predicated upon newly procured evidence that was either unavailable at the time of the underlying motion practice or not presented at that time due to some reasonable justification (*see*, CPLR 2221[e][2]; *Burgos v City of N.Y.*, 294 AD2d 177 [1<sup>st</sup> Dept 2002]). The newly filed Lonny Levitz affidavit falls into neither category. Distinct of that, the Transfer Order’s consideration of a possible site inspection – the sole focus of that affidavit – is not the only factor considered in the Transfer Order.

Thus, that prong of plaintiffs’ motion characterized as “renewal” is denied.

Plaintiffs have moved (seq. no. 004) for leave to serve and file a supplemental summons and amended complaint. In view of the disposition above, denying reargument and renewal of the prior motion practice resulting in the Transfer Order, this motion (seq. no. 004) is denied without prejudice to making that motion in Supreme Court, Greene County, where this action has been transferred to.

Accordingly, it is

ORDERED that plaintiffs’ motion for reargument and renewal is denied in its entirety; and it is further

ORDERED that plaintiffs’ motion for leave to serve and file a supplemental summons and amended complaint is denied without prejudice to making that motion in Supreme Court, Greene County, where this action is venued; and it is further

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<sup>1</sup> The practical advantage of tacking on the “renewal” rubric to any CPLR 2221 motion is, of course, to avoid the 30-day reargument deadline which, as observed, has expired in this case.

ORDERED that the appearance date of August 22, 2019, previously calendared by the clerk in connection with the motions disposed of hereinabove, is canceled.

This shall constitute the decision and order of the court.

ENTER:

*Louis L. Nock*

<u>8/16/2019</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/>	REFERENCE