

**Commissioners of the New York State Ins. Fund v
New Generation Auto Care LLC**

2019 NY Slip Op 33317(U)

November 6, 2019

Supreme Court, New York County

Docket Number: 151185/2017

Judge: Kathryn E. Freed

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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. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 151185/2017

COMMISSIONERS OF THE NEW YORK STATE
INSURANCE FUND, AS ASSIGNEE OF JOHN POST,
ASSIGNOR,

MOTION SEQ. NO. 002

Plaintiff,

- v -

DECISION AND ORDER

NEW GENERATION AUTO CARE LLC and WEBSTER
FOOD MART INC,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48,
49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 69, 70, 71

were read on this motion to/for

RENEW/REARGUE/RESETTLE/RECONSIDER

In this action seeking reimbursement of workers' compensation benefits paid to John Post
("Post"), plaintiff Commissioners of the New York State Insurance Fund ("NYSIF"), as assignee
of Post, moves, pursuant to CPLR 2221, to renew and reargue a prior motion by defendant
Webster Food Mart Inc. ("Webster") to strike the complaint against it (motion sequence 001)
(Docs. 9, 44). By order entered April 9, 2019 ("the 4/9/19 order"), this Court dismissed the
complaint against Webster given NYSIF's failure to comply with discovery demands (Docs. 39).
Webster and defendant New Generation Auto Care LLC ("New Generation") (collectively
"defendants") oppose the instant motion, and New Generation cross-moves for dismissal of the
complaint against it (Docs. 59-66). NYSIF opposes New Generation's cross-motion (Doc. 69).
After oral argument and a review of the parties' papers and the relevant statutes and caselaw, the
motions are decided as follows.

FACTUAL AND PROCEDURAL HISTORY

In February 2014, Post was injured at his place of employment and was provided workers' compensation coverage by NYSIF (Doc. 1). Following Post's failure to commence an action against defendants, his causes of action against them were assigned to NYSIF pursuant to Workers' Compensation Law § 29 (2) (Doc. 1). NYSIF then commenced this action against defendants by filing a summons and verified complaint seeking a judgment to recover monies paid to Post (Doc. 1). Webster answered and served NYSIF with a demand for a bill of particulars and combined discovery demands (Docs. 6, 15). Together with its answer, New Generation served NYSIF with a demand for a bill of particulars, combined discovery demands and a notice for examination before trial (Doc. 8). In July 2017, Webster moved to strike the complaint against it given NYSIF's failure to comply with its discovery demands (motion sequence 001) ("the underlying motion") (Doc. 9), which this Court granted in the 4/9/19 order (Doc. 39).

In its motion to renew and reargue, NYSIF argues, *inter alia*, that this Court overlooked certain matters of fact and law because it failed to consider that (1) NYSIF responded to, and attempted to comply with, Webster's discovery demands; and (2) a party assignee may not be sanctioned for an assignor's failure to provide discovery, since the assignor was not within the assignee's control (Doc. 45). An attorney affirmation in support of NYSIF's motion affirms that, during a June 2018 telephone conversation with NYSIF's counsel, Post agreed to provide authorizations releasing records to NYSIF and that, when he failed to return the signed authorizations, NYSIF served Post with a subpoena compelling him, *inter alia*, to produce the requested authorizations (Doc. 45 at 3). NYSIF claims that "[t]hese events were not described in

the previous motion because they occurred after [it submitted its] October 13, 2017 affirmation in opposition” (Doc. 45 at 3).

Defendants oppose the motion, arguing, *inter alia*, that NYSIF’s proffered new facts could have been raised during an appearance on the underlying motion on April 2, 2019, and therefore are not the proper subject of a motion to reargue (Docs. 60, 66). Moreover, assert defendants, NYSIF’s failure to raise legal theories in the underlying motion prevents it from raising them on a motion to reargue. Webster also claims that the motion to renew should be denied insofar as NYSIF’s attempts to obtain discovery from Post were made before the April 2, 2019 appearance and could have been addressed at such time (Doc. 66).

New Generation cross-moves for dismissal of the complaint against it arguing, *inter alia*, that it is entitled to the same relief granted to Webster because NYSIF has also failed to respond to its demand for a bill of particulars and combined discovery demands (Doc. 60).

LEGAL CONCLUSION:

“A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision” (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1992] [internal quotation marks and citation omitted], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992]; *see* CPLR 2221 [d] [2]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). It is well settled that “[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided ... or to present arguments different from those originally asserted” (*Matter of*

Setters v Al Props. & Devs. (USA) Corp., 139 AD3d 492, 492 [1st Dept 2016] [internal quotation marks and citation omitted]).

On a motion to renew, a movant must demonstrate that there are “new facts not offered on the prior motion that would change the prior determination or . . . [that] there has been a change in the law that would change the prior determination” and there must be a “reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221 [e] [2], [3]; *see Ezzard v One E. Riv. Place Realty Co., LLC*, 137 AD3d 648, 649 [1st Dept 2016]).

Here, NYSIF contends that the 4/9/19 order overlooked facts establishing its compliance with various demands by Webster and, thus, incorrectly held that NYSIF failed “to provide *any* discovery to [Webster]” [emphasis added] (Doc. 39). Given that this Court was technically incorrect in finding that NYSIF failed to provide Webster with any discovery, it grants reargument but adheres to its original determination insofar as NYSIF nevertheless fails to establish substantial compliance with Webster’s demands. NYSIF argues that the only outstanding discovery was within Post’s control, that NYSIF lacks control over Post, and that this Court cannot sanction it for failing to provide such discovery. However, NYSIF failed to advance this specific theory of law in the underlying motion and it is thus not the proper subject of a motion to reargue (*see DeSoignies v Cornasesk House Tenants’ Corp.*, 21 AD3d 715, 718 [1st Dept 2005]; *Frisenda v X Large Enters.*, 280 AD2d 514, 515 [2d Dept 2001]).

NYSIF claims that Post agreed to sign the authorizations on June 5, 2018 and he was served with a subpoena for, *inter alia*, medical and employment records and HIPAA authorizations on February 22, 2019 (Doc. 45 at 3). These efforts were made prior to the parties’ court appearance on April 2, 2019 regarding the underlying motion, and NYSIF failed to raise these arguments at that juncture. Since NYSIF failed to argue that it was zealously pursuing the

discovery which was the subject of the underlying motion, it fails to demonstrate how this Court overlooked these alleged efforts (*see* CPLR 2221 [d] [2]; *see Mazinov v Rella*, 79 AD3d 979, 979 [2d Dept 2010]).

NYSIF's motion to renew is also denied. NYSIF fails to present a reasonable justification for its failure to inform this Court, during the parties' appearance on April 2, 2019, about its efforts to obtain discovery from Post; therefore, these "new facts" cannot serve as a basis for granting renewal (*see* CPLR 2221 [e] [3]; *Rowe v NYCPD*, 85 AD3d 1001, 1003 [2d Dept 2011]; *Prime Income Asset. Mgt., Inc. v American Real Estate Holdings L.P.*, 82 AD3d 550, 551-552 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]).

With respect to New Generation's cross-motion, that entity served NYSIF with a demand for a bill of particulars and discovery demands in April 2017 (Doc. 62). New Generation maintains that responses to its demands are still outstanding (Doc. 60). NYSIF's responses to New Generation's combined demands, annexed to its affirmation in opposition to the cross-motion and in further support of its motion to reargue, establish that it failed to comply with many of these demands (Doc. 69-70). However, since the facts about NYSIF's additional efforts to obtain authorizations from Post are properly raised in opposition to the cross-motion, lending credence to NYSIF's argument in response to the cross-motion that the discovery sought is outside of its control, New Generation's cross-motion is hereby denied (*see Cap Rents Supply, LLC v Durante*, 167 AD3d 700, 702 [2d Dept 2018]; *Ayala v Lincoln Med. & Mental Health Ctr.*, 92 AD3d 542, 542 [1st Dept 2012]; *Commerce and Indus. Ins. Co. v Entertainment Services, Inc.*, 2009 NY Slip Op 30876 [U] [Sup Ct, New York County, 2009]).

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the branch of the motion by plaintiff Commissioners of the State of the New York State Insurance Fund's ("NYSIF"), as assignee of John Post, assignor, seeking reargument of defendant Webster Food Mart Inc.'s motion to dismiss the complaint (motion sequence 001) is granted and, upon reargument, this Court adheres to its prior decision; and it is further

ORDERED that the branch of the motion by plaintiff Commissioners of the State of the New York State Insurance Fund's ("NYSIF"), as assignee of John Post, assignor, seeking renewal of defendant Webster Food Mart Inc.'s motion to dismiss the complaint against it (motion sequence 001) is denied; and it is further

ORDERED that the claims against defendant Webster Food Mart Inc. are hereby severed and dismissed, and the Clerk is directed to amend the caption to reflect the dismissal and to enter judgment accordingly; and it is further


ORDERED that defendant New Generation Auto Care LLC's cross-motion, pursuant to CPLR 3126, to strike the complaint and dismiss this case against it is denied; and it is further

ORDERED that, within 20 days after entry of this order, counsel for Webster Food Mart Inc. shall serve a copy of this order, with notice of entry, upon all parties, on the Trial Support Clerk located in the General Clerk's Office (Room 119), and on the County Clerk (Room 141B), by e filing protocol; and it is further

ORDERED that counsel are directed to appear for a previously scheduled preliminary conference in Room 280, 80 Centre Street, on November 26, 2020, at 2:15 PM; and it is further

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

11/6/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE