

**Wunderlich v Liberty Meadows, LLC**

2020 NY Slip Op 34580(U)

November 17, 2020

Supreme Court, Suffolk County

Docket Number: Index No.: 611937/2016

Judge: William G. Ford

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This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

**INDEX NO.: 611937/2016**

**SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 38 - SUFFOLK COUNTY**

**PRESENT:**

**Motion Submit Date: 10/08/20  
Mot Seq 008 - Mot D**

**HON. WILLIAM G. FORD  
JUSTICE OF THE SUPREME COURT**

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**ALAN WUNDERLICH,**

**Plaintiff,**

**-against-**

**LIBERTY MEADOWS, LLC, DEMETRIUS  
TSUNIS & ENRICO SCARDA,**

**Defendants**

**THE HOWARD O. WUNDERLICH  
REVOCABLE LIVING TRUST, THE  
ADELINE E. WUNDERLICH REVOCABLE  
LIVING TRUST & ADELINE E.  
WUNDERLICH,**

**Nominal Defendants.**

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**PLAINTIFF'S COUNSEL:**

**Law Offices of James A. Prestiano PC  
1581 Franklin Avenue  
Garden City, New York 11530**

**DEFENDANT'S COUNSEL:**

**Esseks Hefter Angel DiTalia Pasca LLP  
108 E. Main Street, PO Box 279  
Riverhead, New York 11901**

In this electronically filed action, concerning defendants' motion pursuant to CPLR 2221 to renew or reargue this Court's prior determination conditionally granting plaintiff's motion to strike their answer as sanction for failure to provide demanded pretrial discovery; the Court considered: NYSCEF Docs. Nos. 185 – 203; and upon due deliberation and full consideration of the same; it is

**ORDERED** that defendants' motion to reargue pursuant to CPLR 2221(d) is **denied** as follows; and it is further

**ORDERED** that defendants' motion to renew pursuant to CPLR 2221(e) is **granted** as follows; and it is further

**ORDERED** that movants' counsel is hereby directed to serve a copy of this decision and order with notice of entry via electronic filing and electronic mail upon plaintiff's counsel; and it is further

**ORDERED** that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required.

The parties and their counsel are presumed knowledgeable and in possession of all the salient and material facts and circumstances underlying the parties' dispute and litigation having been most recently recited in the decision and order of this Court dated June 2, 2020.

### **Reargument**

Pertaining to defendants' application, the Second Department has made clear that motions for reargument are "addressed to the sound discretion of the court" and properly lie "on a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision" (*Vaccariello v Meineke Car Care Ctr., Inc.*, 136 AD3d 890, 892 [2d Dept 2016]). A motion for leave to reargue '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' (*Ahmed v Pannone*, 116 AD3d 802, 805 [2d Dept 2014]). The motion "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" (*Rodriguez v Gutierrez*, 138 AD3d 964, 966 [2d Dept 2016]).

Here, plaintiff-movant has failed to sustain the requisite burden of demonstrating that the court overlooked or misapprehended the relevant the facts or misapplied any controlling principle of law (*see*, CPLR 2212[d]; *Saccomagno v City of New York*, 29 AD3d 979, 814 NYS2d 880 [2d Dept 2006]; *Foley v Roche, supra*). Accordingly, that aspect of the pending motion for leave to reargue dismissal of plaintiff's action for failure to timely substitute an estate representative into these proceedings is thereby **denied**.

### **Renewal**

A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Elder v. Elder*, 21 AD3d 1055; *see Matter of Allstate Ins. Co. v. Liberty Mut. Ins.*, 58 AD3d 727). It must be based upon new facts, not offered on the original application, "that would change the prior determination" (CPLR 2221[e][2]; *see Matter of Korman v. Bellmore Pub. Schools*, 62 AD3d 882, 884). The new or additional facts must have either not been known to the party seeking renewal or may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the original motion (*see Cole-Hatchard v. Grand Union*, 270 AD2d 447). However, in either instance, a "reasonable justification" for the failure to present such facts on the original motion must be presented (CPLR 2221 [e][3]). The determination of what constitutes a "reasonable justification" is within the Supreme Court's discretion (*Heaven v. McGowan*, 40 AD3d 583, 586; *Dervisevic v Dervisevic*, 89 AD3d 785, 786-87 [2d Dept 2011]).

In this Court's prior decision and order, plaintiff's motion to strike defendants' answer for willful and contumacious failure to provide demanded document discovery was granted, in large part, based upon the then uncontroverted assertion by movant's counsel that much of the

demanded documents, particularly, the contract of sale for the subject condominium unit dubbed "Unit 30" by the parties and its associated closing file, had still remained unproduced despite due demand by plaintiff. As a result, this Court directed defendants to conduct a diligent search for documents responsive to plaintiff's outstanding document demands and so indicate the results of same by sworn affidavit, as well as to produce responsive documents to plaintiff's counsel. The failure of either directive was stated to result in the self-execution of a conditional order striking defendants' answer to plaintiff's complaint in this matter.

Since then, defendants have moved pursuant to the applicable sections of CPLR 2221 seeking to either renew or reargue this Court's determination. Arguing in support of that application for those branches of relief, defense counsel makes a few points, the first of which appears most compelling. First, counsel claims that responsive documentation, namely the contract of sale and associated closing file for Unit 30, was sent to plaintiff's counsel in January 2020, some approximate 5 months before this Court rendered decision on the prior motion. Despite this fact, neither party brought the development to the Court's attention until after issuance of the court's order. Any objective observer passingly familiar with the decision would learn that the Court's determination was made in part in reliance on plaintiff's representation that such documentation, obviously relevant and crucial to the prosecution of the matter, had remained unproduced. Defense counsel further explains that the January 2020 production was mailed to plaintiff's address on file which was no longer accurate. In this way, defendant makes an application to renew the Court's prior decision. That application is granted. To the extent that the Court sought to sanction defendant for willful and contumacious failure to provide document discovery, particularly the paper file concerning that alleged "sham" conveyance of Unit 30 by defendants to non-parties, that predicate was either inaccurate or nonexistent at the time of the Court's writing. Therefore, that determination is now rescinded.

Next, defendants emphasize that they have sought to comply with the Court's directive in having supplied plaintiff with 3 affidavits from the individual defendants conveying that despite the conduct of diligent searches, additional documents responsive to plaintiff's demands have not been located. In response, plaintiff casts doubt on the veracity of those sworn representations, arguing it unlikely that cancelled checks for rent and other closing costs would not have been reduced to writing or otherwise substantiated in paper form. Plaintiff might be proven correct before a finder of fact sometime in the distant future. However, at present, the dispute before this Court concerns discovery and the issue of relevance, materiality and likelihood of producing evidence to the plaintiff meeting those two standards. Doubt or disagreement with what has not been produced does not necessarily equate to proof of stonewalling or the withholding of evidence. It could very well be the case that plaintiff might be entitled to an inference before the fact finder at a later date, provided the adequate record is made in support of plaintiff's contentions, but that date is not now, nor has plaintiff made such a sufficient record.

Lastly, plaintiff's remedy if he feels defendants' responses are deficient is to follow up. At this point, it appears plaintiff might have exhausted all leads and avenues, having received sworn testimony both at deposition and by affidavit. However, if plaintiff has identities of non-parties, other devices and remedies still are available, and plaintiff would be well served availing himself of those methods and modes of obtaining discovery.

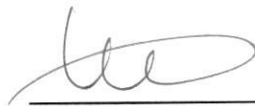
To this Court's mind, the matter is now closed. Having seen sufficient evidence that defendants did not willfully or contumaciously refuse to provide demanded discovery as presently argued, on reargument this Court **grants** defendants' motion to the extent that the self-executing discovery sanction calling for the striking of defendants' answer is hereby **vacated and recalled**.

Counsel are further **directed** to complete the remaining balance of pretrial disclosure in a prompt fashion and to file a proposed order certifying discovery in this matter as complete **no later than 60 days** from service of this decision and order with notice of entry.

Any other remaining point, argument or contention raised in the parties' motion papers not explicitly referenced here has been determined to lack merit and the same is **denied**.

The foregoing constitutes the decision and order of this Court.

Dated: November 17, 2020  
Riverhead, New York



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**WILLIAM G. FORD, J.S.C.**

\_\_\_\_ FINAL DISPOSITION

X  NON-FINAL DISPOSITION