

**Iacovacci v Brevet Holdings, LLC**

2021 NY Slip Op 31706(U)

May 17, 2021

Supreme Court, New York County

Docket Number: 158735/2016

Judge: Alexander M. Tisch

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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. ALEXANDER M. TISCH PART IAS MOTION 18EFM**

*Justice*

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PAUL IACOVACCI,

Plaintiff,

- v -

BREVET HOLDINGS, LLC, BREVET SHORT DURATION PARTNERS, LLC, BREVET SHORT DURATION HOLDINGS, LLC, BREVET CAPITAL PARTNERS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, BREVET CAPTIAL HOLDINGS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, DOUGLAS MONTICCIOLO, MARK CALLAHAN, JOHN TRIPP,

Defendants.

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INDEX NO. 158735/2016

MOTION DATE 03/12/2021

MOTION SEQ. NO. 032

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 032) 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1155, 1156, 1157, 1158, 1159, 1160

were read on this motion to/for SANCTIONS - RENEW & REARGUE

Upon the foregoing documents, plaintiff moves for leave to renew and reargue motion sequence no. 22 and the decision and order of this Court dated November 19, 2020 (NYSCEF Doc. No. 1128 [Order]).

At the outset, the Court agrees with defendants that plaintiff's memorandum of law does not comply with CPLR 2221(f) in that it fails to separately identify and separately support each item of the relief requested. The motion could be denied on that basis alone (see 140 W. 57th St. Bldg. LLC v Kate's Paperie LLC, 2013 WL 12341996, Index no. 107833-2011 [NY Sup Ct, New York County Aug. 9, 2013]). However, in response to defendants' opposition, plaintiff attempted to delineate the same in reply papers (see NYSCEF Doc. No. 1160 at 2-3), and the Court will use that as a guide to address the substantive merits of the motion.

As to the stated bases renewal in the reply papers (see id. at 3), the Court does not view those contentions as “new” “facts”— they appear to be well-known facts and/or are properly considered as arguments instead.

The only “new” “fact” that the Court can discern from the plaintiff’s submission are the Verizon statements demonstrating that plaintiff lost his phone around July of 2017. The record in the prior motion indicated that plaintiff lost his phone “sometime in 2017” (Order at 4, quoting NYSCEF Doc. No. 706).

The Court finds that there was no reasonable justification for not presenting this evidence in order to clarify the timing of when plaintiff’s phone was lost in 2017 (see CPLR 2221 [e][3]; Foley v Roche, 68 AD2d 558, 568 [1st Dept 1979] [“Renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application”]). However, even if considered, it would not “change the prior determination” (CPLR 2221 [e][2]). There is still no explanation as to what happened to that phone. Any good faith efforts to retrieve the data in 2020, three to four years after the phone(s) were lost or destroyed, do not appear to have a bearing on what happened at the time they were lost or destroyed in terms of his “culpability” (see Order at 4, citing VOOM HD Holdings LLC v EchoStar Satellite L.L.C., 93 AD3d 33, 45 [1st Dept 2012] [listing elements for spoliation sanctions]). Accordingly, the branch of the motion seeking renewal is denied.

“A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law” (McGill v Goldman, 261 AD2d 593, 594 [2d Dept 1999]). “Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once

again the very questions previously decided” (Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979]; see Anthony J. Carter, DDS, P.C. v Carter, 81 AD3d 819, 820 [2d Dept 2011]).

For ease of reference, the Court finds that items (i), (ii), (iv), and (v) in plaintiff’s reply memorandum of law (NYSCEF Doc. No. 1160 at 2-3) — generally concerning plaintiff’s efforts to retrieve the missing text messages from Verizon, the timing of the defendants’ 2018 discovery demands, and the fact that there has been substantial discovery in this matter — were not overlooked and properly addressed by this Court in granting the motion to the extent of imposing an adverse inference instruction.

The remaining claim plaintiff makes in support of reargument is that the Court overlooked or misapprehended that plaintiff “lost only a single mobile device after his duty to preserve arose and did not destroy any phones during that time” (id.). It is true that the Court found that “the earliest time” which “the parties could ‘reasonably anticipate[] litigation’” was October 14, 2016 (Order at 4, quoting VOOM HD Holdings LLC, 93 AD3d at 36). It is also true that the Court made it a point to separate the impact of the missing text messages as it relates, first, to plaintiff’s own allegations made in support of his claims in the complaint and, second, to defendants’ counterclaims. In this vein, the record demonstrated and the Court already found that plaintiff was grossly negligent in losing or accidentally destroying one phone during the time for which the parties could reasonably anticipate litigation, which was in 2017. The Court, still, finds no basis to disturb the relief awarded in the Order, to wit, imposing an adverse inference instruction, and declines plaintiff’s request in this motion to retract or vacate the same. Indeed, the purpose in permitting the parties to submit proposed instructions with 1-2 page letter briefs, if necessary, is to provide the Court with any arguments in support of, or in opposition to, the

proposed language as it relates to and/or is in conformity with the evidence presented in the record, and the resultant decision and Order of the Court.

Accordingly, the branch of the motion seeking leave to reargue is granted in part and, upon reargument, the Court adheres to its original determination.



5/17/2021  
DATE

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ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: