At the term of the Supreme Court of the State of New York, held in and for the County of Dutchess, at 10 Market Street, Poughkeepsie, 12601 on October 8, 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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BRIANNA O. ROSAS

Plaintiff

Index No.: 2020-53115

-against-

JAMES F. PETKOVICH

Defendant

DECISION AND ORDER
(Motion Sequences 2 & 3)

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Greenwald, J.

The following papers numbered 1-3 were considered by the Court in deciding Plaintiff's Notice of Motion:

Papers	Numbered
Plaintiff's Motion to Reargue (Motion Sequence 2) /Affirmation of Keith Rinaldi, Esq./Exhibits 1-9	1
Affirmation of Kimberly Hunt Lee, Esq., in Opposition	2
Plaintiff's Reply Affirmation of Keith Rinaldi, Esq.	3
Notice of Motion (Motion Sequence 3) /Affirmation of Keith Rinaldi, Esq./Exhibits 1-3	4

RELEVANT BACKGROUND

By Decision and Order (Greenwald, J.) dated April 12, 2021, Defendant's Motion to Dismiss Plaintiff's Complaint pursuant to CPLR §3211(a)(5) and (a)(7) was granted in its favor. Plaintiff files the instant motion to reargue, stating that the Court overlooked relevant facts and misapprehended the controlling law in its decision, and as such the motion to dismiss should not have been granted.

Plaintiff asserts that the Amended Complaint was timely served and did not require leave of the Court, thus the Court's perception of the amended complaint being tainted should be

dissipated, by this fact and as Plaintiff has submitted proof of service to the Court for service of the original complaint and service of the amended complaint. Notably, such affidavits were submitted to the Court after the date of the decision and order. It is also noted that Plaintiff, has additionally filed a motion on or about June 29, 2021, requesting that the Court consider these affidavits, as proof and timely submitted nunc pro tunc. (See Motion Sequence 3). Plaintiff states that its failure to submit to the Court was due to law office failure. Plaintiff also argues that its complaint, even if inartful, demonstrated that Plaintiff's claim was for negligence not for an intentional tort, thus the statute of limitation has not expired, so there is no basis for dismissal. Plaintiff declares that the amended complaint cured any shortcomings of the original complaint. Plaintiff reargues its position, and made new arguments, stating that the controlling law is in its favor, and that the Court relied on cases distinguishable from the instant matter, legally and factually but does not author any arguments that said law was inapplicable to the instant matter.

In opposition, Defendant argues that Plaintiff offers new facts and new evidence that were not submitted or considered on the prior motion and should not be considered in this motion for leave to reargue. Defendant argues that Plaintiff's attempt to recharacterize the allegations as negligent is wholly to expand the statute of limitations in the amended complaint which is improper. Defendant contends that the amended complaint was insufficient and devoid of merit, as Plaintiff's claim were for an intentional tort, not negligence. Defendant asserts that this is not a motion to reargue but Plaintiff's attempt to reargue the issues the Court has already denied, and assert new arguments that were not made in the previous opposition.

Plaintiff in reply, again seeks to recharacterize its papers in response to Defendant's argument. In reply, Plaintiff now asserts that the Court should address this as motion to renew as well as a motion to reargue, so that the new facts that should not be addressed in a motion to reargue should be considered. Plaintiff states that Defendant did not raise the issue about the amended complaint or service of these complaints prior to this motion to reargue, therefore it should be ignored, and for the reasons previously stated, the court should grant Plaintiff's motion to reargue and renew and reverse its prior decision, dismissing the Plaintiff's complaint.

DISCUSSION

It is well settled that 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. It is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. In the same manner, an application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made but were not then known to the party seeking leave to renew, and, therefore, not made known to the court. Failure to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law is a basis for denial. Renewal should also be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application. *See,* Foley v Roche, 68 A.D.2d 558, 567-8 (1st Dept. 1979) and McGill v Goldman, 261 A.D.2d 593, 594 (2nd Dept. 1999).

In the instant application, Plaintiff has failed to demonstrate that the Court overlooked or misapprehended the relevant facts or controlling law. Plaintiff fails to see the unfairness it seeks to perpetuate in continually changing its legal theory after Defendant responds to its papers. The tainted appearance the Court was referring to was in regard to this principle. It appeared that Plaintiff's amended pleadings were an attempt to abate the Defendant's motion. However, since the amendments did not make a significant change in the nature of the action, the Court considered Defendant's motion in the same regard to the amended pleadings. *See,* Sholom & Zuckerbrot Realty Corp. v Coldwell Banker Commercial Group, Inc., 138 Misc. 2d 799, 801 (Sup. Ct. 1988). Plaintiff's use of the word negligent in the amended pleadings did not change the character of the facts or claims, and Plaintiff did not demonstrate a cause of action under negligence. *See,* Potter v Zucker Hillside Hosp., 176 A.D. 3d 884, 885 (2nd Dept. 2019).

Plaintiff asserts new facts, arguments and evidence that were not made in opposition to the motion to dismiss in the present application. Even the argument to now consider this application, a motion to renew, is not based on facts that were not available to Plaintiff, but it is Plaintiff's successive attempt to present different arguments from that which was originally presented. The only basis Plaintiff gives for not submitting the affidavits of service is law office failure. While Plaintiff asserts that the Court did not refer to the many cases the parties presented, Plaintiff has failed to demonstrate that the law relied on was in error. The four cases which Plaintiff cites and believes controls, support the Court's decision, not Plaintiff. The issue had always been whether Plaintiff's claims were substantively for an intentional tort or negligence. The cases the Court relied on explained the difference. When the facts have demonstrated assault and/or battery, an

intentional tort, it is not uncommon for a party to allege negligence, hoping to be entitled to a longer statute of limitations. Once an intentional offensive contact has been established, as here the slamming of the door, and even when the injuries are inflicted inadvertantyly – the actor is liable for assault and/or battery not negligence. *See.* Borrerro v Haks Group, Inc., 165 A.D. 3d 1216, 1217-18 (2nd Dept. 2018); *see also*, Mazzaferro v Albany Motel Enterprises, Inc., 127 A,D. 2d 374, 376 (3rd Dept. 1987). As the court reviewed the substance of the pleadings, in its discretion, determined that Plaintiff's claim does not state of cause of action in negligence. It is clear that the timing of Plaintiff's filing puts the issue outside the statute of limitations for the intentional tort and is most likely the basis for the amended pleadings. Nonetheless, Plaintiff's instant application does not demonstrate that the Court overlooked facts that were in evidence, misapplied the law or that the new facts and evidence were not available to Plaintiff when the previous motion was filed. Instead, Plaintiff uses this application as a means to relitigate the issues already determined. Based on the foregoing, Plaintiff's motion to reargue is **denied.** In light of the Plaintiff's complaint being dismissed, and the denial of the instant motion, Plaintiff's motion requesting the filing of the affidavits of service in the related matter as nunc pro tunc is deemed moot.

Accordingly, it is hereby,

ORDERED, that Plaintiff's Motion to Reargue (Motion Sequence 2) is denied; and it is further

ORDERED, that Plaintiff's Motion (Motion Sequence 3) to allow the nunc pro tunc filing of affidavits of service in the instant matter is deemed moot.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this Court.

Dated: October 8 2021
Poughkeepsie, New York

ENTER:

Hon. Hal B. Greenwald, J.S.C.

CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to the Honorable Hal B. Greenwald's Chambers, please do not submit any copies. Please submit only the original papers.

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