

Matter of McKinniss v EcoHealth Alliance, Inc.
2024 NY Slip Op 35693(U)
February 5, 2024
Supreme Court, Rockland County
Docket Number: Index No. 034252/2022
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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IN RE SARS-CoV-2;

DECISION AND ORDER

KATHLEEN MCKINNISS, PROPOSED REPRESENTATIVE
OF THE ESTATE OF ROSEMARIE MCKINNISS, DECEASED;
CARIN ROSADO, individually; GERALDINE FINN, AS
EXECUTOR OF THE ESTATE OF JAMES FINN, DECEASED;
DAVID CADD00, EXECUTOR OF ESTATE OF PATRICIA
MARIE CADD00, DECEASED; MELANIE SMITH, EXECUTRIX
OF THE ESTATE OF ROBERT SENDZISCHEW, DECEASED;
KIMBERLY J. LEWIS, EXECUTRIX OF ESTATE OF ROBERT F.
LEWIS, DECEASED; LISA PETER, PROPOSED PREPRESENTATIVE
OF ESTATE OF PATRICIA A. CHISLETT, DECEASED; and
ROXANNE JONES, PROPOSED PREPRESENTATIVE OF
ESTATE OF DALE JONES, DECEASED.

Index # 034252/2022
(Motion #5)

Plaintiffs,

-against-

ECOHEALTH ALLIANCE, INC., PETER DASZAK, JANET
D. COTTINGHAM a/k/a JANET DASZAK, RALPH BARIC,
W. IAN LIPKIN, and JOHN AND JANE DOES 1-1000,

Defendants.

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Sherri L. Eisenpress, J.

The following papers, NYSCEF documents numbered 120-169, were considered in connection with Plaintiffs' Notice of Motion for an Order pursuant to CPLR § 2221(d) and (e), granting leave to reargue or, in the alternative, to renew this Court's Decision and Order entered September 15, 2023, which granted Defendants' motions to dismiss the Amended Complaint, and upon renewal and/or re-argument, for this Court to take Judicial Notice of evidence in the Amended Complaint.

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

Plaintiffs commenced an action by filing a Summons and a sixty-four (64) page Complaint with exhibits, on or about October 5, 2022. On or about January 4, 2023, Plaintiffs filed a one hundred twenty-five (125) page Amended Complaint. Plaintiffs' allege that "[a]fter Baric and Daszak successfully souped-up a bat virus that was harvested from a cave somewhere in China, they successfully created Covid 19 ("SARS-CoV-2") at the WIV¹ lab and negligently released the virus into the environment infecting Plaintiffs, proximately causing their injuries for which Defendants are 'strictly liable.'" Plaintiffs' Amended Complaint asserts thirteen causes of action against all defendants: (i) Negligence; (ii) Gross Negligence; (iii) Strict Liability; (iv) Negligent Failure to Warn; (v) Intentional Infliction of Emotional Distress; (vi) Negligent Infliction of Emotional Distress; (vii) Assault and Battery; (viii) Medical Monitoring and Fear of Contracting Illness; (ix) Civil Conspiracy; (x) Wrongful Death; (xi) Survival; (xii) Breach of Warranty; and (xiii) Punitive Damages. Defendants timely moved to dismiss the Amended Complaint pursuant to CPLR § 3211(a)(7). In a fifteen (15) page Decision and Order dated September 14, 2023, and entered September 15, 2023, which sets forth at length the reasons for its Decision, this Court granted Defendants' motions and dismissed the Amended Complaint in its entirety.

Plaintiffs timely move to renew the Court's Decision based upon government documents and medical literature not previously submitted to the Court but which Plaintiffs claim "became available to Plaintiffs while Defendants motion was *sub judice*." They claim that the new exhibits document a cover-up of the lab leak origin theory that adversely affected Plaintiffs care and treatment once infected. The motion to renew is opposed on the ground

¹ WIV refers to the Wuhan Institute of Virology in Wuhan China. In 2014, the National Institutes of Health ("NIH") issued EcoHealth Alliance a five-year award for the Project, *Understanding the Rise of Bat Coronavirus Emergency*. The Notice of Awards for each annual budget period from 2014-2019, included an allocation of funds for subcontract activity between EcoHealth and WIV, which had been approved by the NIH.

that (i) Plaintiffs fail to offer any excuse, let alone a reasonable one, for their failure to offer these articles and government documents on the prior motion as they existed before the motions were filed; and (ii) the additional documentation in no way alters the Court's analysis as set forth in its Decision and Order.

"A motion for leave to renew: (1) shall be identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR Sec. 2221(e). "While a court has discretion to entertain renewal based on facts known to the movant at the time of the original motion, the movant must set forth a reasonable justification for the failure to submit the information in the first instance." Bank of New York Mellon Trust Company, N.A. v. Talukder, 176 A.D.3d 772, 773, 111 N.Y.S.3d 94 (2d Dept. 2019). "When no reasonable justification is given for failing to present new facts on the prior motion, the Supreme Court lacks discretion to grant renewal." Zelouf International Corp., v. Rivercity, LLC, 123 A.D.3d 1116, 1 N.Y.S.3d 190 (2d Dept. 2014); Caronia v. Peluso, 170 N.Y.S.3d 75, 77, 96 N.Y.S.3d 75 (2d Dept. 2019). "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." Serviss v. Incorporated Village of Floral Park, 164 A.D.3d 512, 513, 82 N.Y.S.3d 495 (2d Dept. 2018).

In the instant matter, this Court denies Plaintiffs motion for leave to renew. The documents upon which Plaintiffs base their renewal motion consist of an article entitled "The Origins of the Covid-19 Global Pandemic Including the roles of the Chinese Community Party and the World Health Organization," dated June 12, 2020, by the House Foreign Affairs Committee Minority Staff Interim Report; an article authored by Defendant Ralph S. Baric,

from 2006, entitled "Synthetic Viral Genomics: Risks and Benefits for Science and Society; a "Fact Sheet: Activity at the Wuhan Institute of Virology," dated January 15, 2021 from the unidentified "Office of the Spokesperson;" and something entitled "Working Paper 26 May 2020: Critical analysis of Andersen et al. The proximal origin of SARS-CoV-2 by Jean-Paul Chretien & Dr. Greg Cutlip."

Because most of these documents pre-date the filing of the motions, Plaintiffs were required to offer an excuse for why they were not submitted in connection with the original opposition papers. They did not do so. The failure to offer any excuse in and of itself requires denial of motion for renewal. However, the Court notes that even if these documents were considered, they would not alter the Court's analysis of the motions in any way and the Court would nonetheless adhere to its original determination. As such, the motion to renew is denied in its entirety.

"Motions for reargument are addressed to the sound discretion of the court which decided the original motion and may be granted upon a showing that the court overlooked or misapprehended the fact or law or for some reasons mistakenly arrived at its earlier decision." Ito v. 324 East 9th Street Corp., 49 A.D.3d 816, 857 N.Y.S.2d 578, 579 (2d Dept. 2008); E.W. Howell Co., Inc. V. S.A.F La Sala Corp., 36 A.D.3d 653, 828 N.Y.S.2d 212 (2d Dept. 2007); Barnett v. Smith, 64 A.D.3d 669, 883 N.Y.S.2d 573, 574 (2d Dept. 2009). "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." McGill v. Goldman, 261 A.D.2d 593, 261 N.Y.S.2d 75, 76 (2d Dept. 1999). Thus, reargument "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." Rubinstein v. Goldman, 225 A.D.2d 328, 638 N.Y.S.2d 469 (1st Dept. 1996).

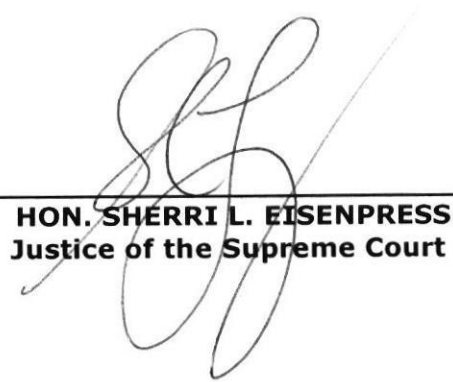
The Court also denies Plaintiffs' motion to reargue, as the Court did not misapprehend the law, or facts, as it pertains to the Defendants' motions to dismiss the various causes of action and finds that Plaintiffs seek merely to rehash the arguments already made in opposition to the motions to dismiss. With respect to the negligence-based causes of action, the Court found that Defendants did not owe a duty to Plaintiffs and Plaintiffs have failed to demonstrate that the Court misapprehended the law or facts with regard to these issues. Likewise, the Plaintiffs have failed to demonstrate that they stated a cause of action with respect to the strict liability-based causes of action or that the Court erred in its analysis of the various factors to be considered to state a claim. With regard to the remaining causes of action which Plaintiffs seek to reargue, the Court has considered the arguments and found them to without merit, not once, but twice.

Accordingly, it is hereby

ORDERED that Plaintiffs' Notice of Motion for an Order granting permission to renew and/or reargue this Court's decision entered on September 15, 2023, is hereby DENIED in its entirety.

The foregoing constitutes the Decision and Order of this Court on Motion # 5.

Dated: New City, New York
February 5, 2024



HON. SHERRI L. EISENPRESS
Justice of the Supreme Court

TO:

All Parties (via- NYSCEF)