8/2/12

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 05

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

----------X

RODRIGUEZ,IVAN

Index №. **0007985/2002**

-against-

Hon. **ALISON Y. TUITT** ,

E&P ASSOCIATES

Justice.

----------X

The following papers numbered 1 to 4 Read on this motion, **DISMISSAL**
Noticed on **June 03 2010** and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 2	
Answering Affidavit and Exhibits	3	
Replying Affidavit and Exhibits	4	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion and cross-motion are decided in accordance with the annexed memorandum decision

Motion is Respectfully Referred to:
Justice: Douglas NCM
Dated: 7/19/12

Dated: 7/19/12

Hon. A. Y. Tuitt
ALISON Y. TUITT, J.S.C.

FILED Aug 02 2012 Bronx County Clerk

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA-5

IVAN RODRIGUEZ,

Plaintiff,

-against-

E&P ASSOCIATES, WAYNE EISENBAUM, PHYLLIS COHEN d/b/a E&P ASSOCIATES, MODELL'S NY, INC., MODELL'S NY II, INC., DYKER ASSOCIATES, DYKER ASSOCIATES, INC., MAYER EQUITY INC., EMIL MAYER, NICHOLAS PARA, INC., NICHOLAS PARASCONDOLA, LEONARD COLCHAMIRO, P.C., LEONARD COLCHAMIRO, AMPM ENTERPRISES LLC, AMPM ENTERPRISES and ALAN J. HELENE,

Defendants.

INDEX NUMBER: **7985/2002**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 4,

Read on this Defendants' Motion to Dismiss and Plaintiff's Cross-Motion for Partial Summary Judgment

On Calendar of

Notice of Motion/Cross-Motion-Exhibits and Affirmations 1, 2

Affirmation in Opposition/Exhibits 3

Reply Affirmation 4

Upon the foregoing papers, defendants Modell's NY, Inc. and Modell's NY II, Inc. (hereinafter collectively "Modell") motion to dismiss plaintiff complaint based on the Workers' Compensation Law §11, to strike plaintiff's Note of Issue and/or dismiss the action for plaintiff's failure to provide discovery and/or compel plaintiff to provide discovery and plaintiff's cross-motion for partial summary judgment on the issue of

whether defendants may assert the Workers' Compensation defense at the time of trial, or at any time are consolidated for purposes of this decision. For the reasons set forth herein, the motion is denied in part and referred in part, and the cross-motion is granted.

This action is based upon personal injuries allegedly sustained by plaintiff on November 20, 2000 while working at the retail chain store known as "Modell's Sporting Goods". Plaintiff alleges that as a result of the accident, he sustained a fractured left ankle and developed complex regional pain syndrome. The only defendants remaining in this action are Modell's NY, Inc. and Modell's NY II Inc. All other defendants were dismissed from the case by order of Justice Nelson Roman dated August 14, 2008. On March 2, 2010, the Appellate Division, First Department affirmed Justice Roman's decision.

Modell's argues that plaintiff's action should be dismissed based on the Workers' Compensation exclusivity. Modell's contends that since plaintiff was employed by Modell's and received Workers' Compensation benefits, the Workers' Compensation defense is meritorious. Plaintiff argues that pursuant to a stipulation signed by the parties, his cross-motion seeking a determination by the Court that defendants may not assert a Workers' Compensation defense must be granted.

This issue has been previously been determined by this Court and by the agreement of the parties. Defendants had previously moved this Court to have plaintiff's complaint dismissed on the grounds that they were mere alter egos of the plaintiff's employer and that the Workers' Compensation law prohibits plaintiff from suing them. By decision and Order dated February 25, 2005, this Court denied Modell's motion holding that factual assertions of defendant's President in his affidavit

> ... without more is inadequate to establish that both entitles are alter-egos of each other. See Longshore v. Paul Davis Sys. of the Capital Dist., 304 A.D.2d 964 (3d Dept. 2003)(closely associated corporations, even ones that share directors and officers, will not be considered alter egos of each other if they were formed for different purposes, neither is a subsidiary of the other, their finances are not integrated, assets are not commingled, or the principals treat the two entitles as separate and distinct)

Therefore, as this matter has already been decided by this Court, defendants' motion is one to reargue and/or renew its prior motion. C.P.L.R. Rule 2221 permits a party to move for reargument of a motion and requires that a motion for leave to reargue be made within 30 days after service of a copy of the order determining the prior motion. Here, decision and Order was entered by the County Clerk's Office on or about

March 9, 2005. Accordingly, the motion is patently untimely. See, In re Huie, 20 N.Y.2d 568 (1967) (Motions for reargument must be made within the same time limitations as an appeal).

Moreover, defendants' motion for reargument is denied as the movant wholly fails to meet his burden in order to qualify for reargument, i.e., that this Court overlooked or misapprehended any matters of fact or law in issuing the Orders. (Reargument of a motion is not designed to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted. Massey v. City of New York, 672 N.Y.S.2d 679 (1st Dept. 1998); Pahl Equipment. v. Kassis, 588 N.Y.S.2d 8 (1st Dept. 1992). This Court adheres to its February 25, 2005 decision and Order and defendants' motion for reargument is denied in its entirety.

With respect to renewal of the motion, it is also denied. A motion for leave to renew "... *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... shall contain reasonable justification for the failure to present such facts on the prior motion.*" C.P.L.R. Rule 2221. Renewal should be denied where the motion is based on the same facts asserted in earlier motion and fails to present new facts. Pahl *supra.* Renewal should also be denied where the new facts are presented but the party fails to offer a valid excuse for not submitting the additional facts upon the original application. Foley v. Roche, 418 N.Y.S.2d 588 (1st Dept. 1979). Here, defendants fail to present any new material facts in support of their motion for renewal. Matter of State Farm Mutual Auto Insurance Co. v. Barbera, 555 N.Y.S.2d 177 (2d Dept. 1990).

Moreover, the parties had previously agreed that defendants would not assert a Workers' Compensation defense. In a Stipulation dated July 12, 2005 signed by counsels for plaintiffs and moving defendants, the parties agreed that Modell's "motion relating to the workers' compensation defense will not be renewed". Defendants' counsel signed the stipulation and then sent it to plaintiff's counsel for signature. Prior to signing the stipulation, plaintiff's counsel added, after the aforementioned sentence, "or raised at trial". Defendants argue that by adding that term, the stipulation was invalidated. However, plaintiff's counsel sent the signed stipulation to defense counsel and they never returned or rejected it because of the added language. Defendants did not object to the stipulation for over five years.

It is well-settled that "[a] valid stipulation should be construed as an independent agreement

subject to the well-settled principles of contractual interpretation." Savoy Mgt. Corp. v. Leviev Fulton Club LLC, 858 N.Y.S.2d 18, 140 (1st Dept. 2008). "Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved frm the consequences of a stipulation made during litigation." Hallock v. State of New York, 64 N.Y.2d 224, 230 (1984). Here, defendants have not alleged any fraud, mistake, collusion or accidents with respect to the stipulation. To the extent that there was a counter-offer when plaintiff's counsel added the additional language, defendants clearly accepted it in not rejecting or objecting to the stipulation. "An offer may be accepted by conduct or acquiescence." John William Costello Assoc. v. Standard Metal Corp., 472 N.Y.S.2d 325, 328 (1st Dept. 1984). Thus, defendants by their conduct in not rejecting or objecting to the stipulation once it was received, deemed to have assented to the terms set forth therein.

Accordingly, it is deemed that the stipulation and its terms were accepted by defendants. Therefore, defendants' motion is denied and plaintiff's cross-motion is granted. The branch of defendants' motion with respect to the Note of Issue and Discovery issues are to be brought before the DCM Part for decision.

This constitutes the decision of this Court.

Dated: 7/19/12

Hon. Alison Y. Tuitt