SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

IGNAZIO TERRANOVA, as Administrator of the Estate of ADRIANO TERRANOVA, Deceased,

Plaintiff,

-against-

MOTION SEQ. NO.: 004
MOTION DATE: 11/4/11

NEW YORK-MTA-METROPOLITAN SUBURBAN BUS AUTHORITY (MSBA), COUNTY OF NASSAU, AND JOHN DOE, BUS DRIVER,

INDEX NO.: 4824/08

Defendants.

The following papers having been read on the motion (numbered 1-4):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3
Memorandum of Law.....4

Motion by defendant MTA-Long Island Bus s/h/a New York-MTA Metropolitan Suburban Bus Authority (MSBA) (hereinafter "MTA-Long Island Bus") for an order pursuant to CPLR 2221(a) to vacate "the prior order of this Court (Winslow, J.) dated May 23, 2011 and entered on May 27, 2011, which *sua sponte*, precluded defendant MTA-Long Island Bus from 'offering testimony of driver employee Owen Francis (sic - should be Frances) for any purpose in further proceedings or at the trial of the matter' " is determined as follows.

In support of its motion, MTA-Long Island Bus asserts, in pertinent part, that:

> "vacatur is warranted as the subject order was made, *sua sponte*, without a motion, without due process, and without basis as preclusionary relief may only be premised on a record which demonstrates willful and contumacious conduct violative of disclosure obligations relative to the precluded item. The bus operator, Owen Francis, had given testimony at an examination-before-trial on April 21, 2010, more than one year before the May 23, 2011 preclusion order was issued.

> No record was ever demonstrated of any willful or contumacious conduct on the part of MTA-Long Island Bus, nor was preclusion of Mr. Francis' testimony ever sought by motion or otherwise.
>
> Indeed, it is not entirely clear why this court rendered the preclusion order and, most respectfully, it may have been based on a misapprehension of prior proceedings and/or dissatisfaction with the longevity of the action.
>
> In this regard, as more fully set forth below, the minutes of the final certification conference conducted before the Hon. F. Dana Winslow, on March 29, 2011 in which the preclusion order was verbally rendered by the court, reflect that at that time court was possessed of two erroneous beliefs: (a) that the court had previously directed an *in camera* inspection of a videotape of an attempted accident reconstruction that had taken place on July 6, 2010 which in part had been coordinated by MTA-Long Island Bus as part of its defense strategy and work product; and, (2) that Mr. Michael Armienti, counsel for MTA-Long Island Bus, had previously represented to the court that such videotape was in existence. On these two points the court was in error." (¶¶ 3, 4, 5, & 6 of Vanessa Corchia's Affirmation).

In opposition to the motion, plaintiff contends that: a) no basis to vacate the May 23, 2011 has been demonstrated; b) the term "misapprehension" is used regularly in the motion and is statutorily associated with a reargument motion (CPLR 2221(d)(2); c) the present application is untimely as the subject order with notice of entry was served on June 27, 2011; d) to the extent that defendant seeks renewal, the moving papers do not offer a "reasonable justification" for the failure to present the additional voluminous facts (CPLR 2221(e)(3); and 3) "[t]he discovery proceeding in this case made clear and concerted effort by the MTA and their attorneys to tamper with and manipulate the recollections and perceptions of both their own investigation witness (Clifford Redmond) and their driver." (¶ 12 of Joseph Andruzzi's Affirmation).

In response thereto, defendant asserts that: plaintiff's papers were late and the court should reject the opposition papers as untimely; and "the moving papers

comprehensively set forth the basis on which vacatur of the prior order of this court was sought pursuant to Rule 2221(a) of the Civil Practice Law and Rules detailing the litigation events subsequent to the attempted accident reconstruction on July 6, 2010 and up to this court's *sua sponte* preclusion of testimony of bus operator, Owen Francis, at a conference conducted on March 29, 2011." In particular, defendant "included the specific details of what transpired during the four interim conferences conducted before this court on July 21, 2010, September 8, 2010, October 20, 2010 and March 18, 2011 that preceded the March 29, 2011 conference." (¶ 6 of Vanessa Corchia's Reply Affirmation).

While defendant MTA-Long Island Bus has moved pursuant to CPLR 2221(a) to vacate the prior order dated May 23, 2011, the arguments raised herein are those associated with a motion to reargue and/or renew the order dated May 23, 2011.

No basis for reargument exists here.

"Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at the earlier decision." *Barnett v Smith*, 64 AD3d 669, 883 [2nd Dept 2009], quoting *E.W. Howell Co., Inc. v S.A.F. La Sala Corp.*, 36 AD3d 653, 654 [2nd Dept 2007]; *Hague v Daddazio*, 84 AD3d 940, 942 [2nd Dept 2011]; *see* CPLR 2221[d]. "[A] motion for leave to reargue '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' " (*Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874 [2nd Dept 2010], quoting *McGill v Goldman*, 261 AD2d 593, 594 [2nd Dept 1999]; *see Woody's Lbr. Co., Inc. v Jayram Realty Corp.*, 30 AD3d 590, 592-593, [2nd Dept 2006]; *Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979], *app den.* 56 N.Y.2d 507 [1982].

Based upon the evidentiary record before the Court, we find that defendant's motion is another attempt to reargue the same issues and facts previously decided by this Court (*see Mazinov v Rella,* 79 AD3d 979 [2nd Dept 2010]; *Foley v Roche, supra*) and no basis exists to conclude that the Court misapprehended the facts and law and mistakenly found that preclusion was warranted. CPLR 2221(d)(2); *McGill v Goldman, supra; Amato v Lord & Taylor*, 10 AD3d 374 [2nd Dept 2004].

Nor is renewal warranted.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2], [3]). While a court has the discretion to grant renewal upon facts known to the movant at

the time of the original motion (*see May v May*, 78 AD3d 667 [2nd Dept 2010]; *Schenectady Steel Co., Inc. v Meyer Contr. Corp.*, 73 AD3d 1013 [2nd Dept 2010], "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' " *(Renna v Gullo*, 19 AD3d 472, 473 [2nd Dept 2005], quoting *Rubinstein v Goldman*, 225 AD2d 328, 329 [1st Dept 1996]; *see Coccia v Liotti*, 70 AD3d 747, 752-753 [2nd Dept 2010]; *Huma v Patel,* 68 AD3d 821 [2nd Dept 2010].

A review of the record indicates that the moving defendant has not presented any new facts that would change the May 23, 2011 order. (*See May v May*, *supra*; *Huma v Patel, supra).*

In view of the foregoing, the motion by MTA-Long Island Bus is **denied.**

This Court has reviewed the defendant's remaining arguments and finds them to be without merit.

This constitutes the Order of the Court.

Dated: Feb 14, 2012

J.S.C.

ENTERED
MAR 28 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE