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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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LISA LI,

Plaintiff,

-against-

Index No.: 102974/2009

STARWOOD HOTELS & RESORTS WORLDWIDE, INC., EXTELL TIMES SQUARE HOTEL L.L.C., 226 REALTY L.L.C., MIYABI, L.L.C., f/k/a MIYABI, INC. and NEW DIAMOND CAFE L.L.C. d/b/a DANNY'S GOURMET DELI,

Defendants.

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STARWOOD HOTELS & RESORTS WORLDWIDE, INC.,

Third-Party Plaintiffs,

-against-

Index No.: 590198/2010

MIYABI, L.L.C., f/k/a MIYABI, INC. and DANNY'S GOURMET DELI,

Third-Party Defendants.

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YORK, J.:

Defendants Starwood Hotels and Resorts Worldwide, Inc. (Starwood) and Extell Times Square Hotel L.L.C. (Extell), move, pursuant to CPLR 2221 (d) and (e), for renewal and reargument, and to vacate an order of this court dated February 2, 2012, which denied Starwood and Extell's motion to preclude the testimony of expert engineer, Stanley Fein, P.E. (Fein). Starwood and Extell contend, that upon renewal and reargument, pursuant to CPLR 3126, Fein should be precluded from testifying because the expert disclosure served by defendants/third-party defendants Miyabi, L.L.C., f/k/a Miyabi, Inc. (Miyabi) and New Diamond Café L.L.C.

d/b/a Danny's Gourmet Deli (New Diamond), was untimely.

CPLR 2221 (d) (2) provides, in pertinent part, that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." The First Department has held that a motion for reargument, "is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the *relevant facts,* or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971, 971 (1st Dept 1984) (citations omitted).

While Starwood and Extell contend that the February 2, 2012 order must be vacated, the order clearly states that the motion to preclude defendants/third party defendants Miyabi and New Diamond from producing Fein, an expert engineer, was denied because Starwood and New Diamond submitted a defective affirmation of good faith which was not in accordance with section 202.7 of New York Code of Rules and Regulations. The court held that Starwood and Extell failed to provide a good faith affirmation which indicated the time, place, and nature of consultations regrading the disclosure issues, and that there was no indication that any effort was made to resolve the issue prior to bringing the motion. Starwood and Extell have not demonstrated that the February 2, 2012 order overlooked or misapprehended any matters of fact or law which would have changed the determination of the prior motion. Therefore, Starwood and Extell's motion to reargue is denied.

Starwood and Extell also move to renew their prior motion to preclude the expert report of Fein. Pursuant to CPLR 2221 (e) (2), 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." CPLR 2221 (e) (3) states that a motion to renew "shall contain reasonable justification for the failure to present such facts on the prior motion." Here, Starwood and Extell have failed to assert new facts that were previously known and not offered in their motion to preclude, which would change this courts earlier determination. Therefore, Starwood and Extell's motion to renew is denied.

Starwood and Extell, also move, pursuant to CPLR 3126, to preclude Miyabi and New Diamond's expert, Saied Jalilvand, L.S., C.S. (Jalilvand), from testifying at trial because the expert disclosure which identified the expert and discussed his potential testimony, was served several months after the deadline which was set by the court. Pursuant to the preliminary conference order as well as several other discovery orders, the expert disclosure was to be provided within sixty days following the filing of the note of issue. Plaintiff filed the note of issue on April 29, 2011, and the expert disclosure for Jalilvand was not served until October 28, 2011, four months after the court's deadline.

The Appellate Division, First Department, has held that an expert's testimony will be admitted where there "is no proof of intentional or willful failure to disclose . . . and an absence of prejudice to the parties opposing the testimony." *See McDermott v Alvey, Inc.*, 198 AD2d 95, 95 (1st Dept 1993); *see also Banks v City of N.Y.*, 92 AD3d 591, 591 (1st Dept 2012) (holding that an expert report provided by plaintiff two weeks before the commencement of a trial was not deemed prejudicial to defendants).

Here, Miyabi and New Diamond contend that, as of February 7, 2011, Starwood and

Extell were on notice that Jalilvand would be produced as an expert in this case. On that date, defendant 226 Realty L.L.C. served on Starwood and Extell expert disclosure which identified Jalilvand as their own potential expert witness. Miyabi and New Diamond maintain that they also decided to produce Jalilvand and determined that they would share in the expert's costs with 226 Realty L.L.C. Michele Schuster, Esq., counsel for Miyabi and New Diamond, affirms that, once the receipt for the costs was received, Miyabi and New Diamond immediately served expert disclosure for Jalilvand on Starwood and Extell. Although there was a long delay in receiving the receipt for the expert from 26 Realty L.L.C., Miyabi and New Diamond contend that there was never an intentional or wilful failure to produce the expert disclosure.

Although the disclosure was served later than the time period in which this part's directives set forth, the prejudice which Starwood and Extell allegedly suffered is unclear, as the expert disclosure of Jalilvand, was provided to Starwood and Extell before the commencement of mediation, and before a trial date was set. Furthermore, as discussed above, Miyabi and New Diamond provide a good faith explanation for the delay, and Starwood and Extell were made aware in February of 2011 that Jalilvand would be called to testify at trial for 26 Realty L.L.C. Therefore, because Starwood and Extell fail to meet their burden and do not demonstrate that Miyabi and New Diamond's delay in providing expert disclosure of Jalilvand was intentional, willful, or prejudicial, Starwood and Extell's motion to preclude must be denied.

Accordingly, it is

ORDERED that the part of defendants Starwood Hotels and Resorts Worldwide, Inc. and Extell Times Square Hotel LLC,'s motion seeking to renew and reargue their motion to preclude the testimony of expert engineer, Stanley Fein, P.E., is denied; and it is further

ORDERED that the part of Starwood Hotels and Resorts Worldwide, Inc. and Extell Times Square Hotel LLC's motion seeking to preclude the testimony of Miyabi, LLC, f/k/a Miyabi, Inc. and New Diamond Café LLC d/b/a Danny's Gourmet Deli, expert Saied Jalilvand, L.S., C.S., is denied.

Dated: 8/28/12

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.