

Matthau v Natural gourmet Inst., Inc.

2013 NY Slip Op 33272(U)

December 10, 2013

Supreme Court, New York County

Docket Number: 103415/12

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

JENNY MATTHAU,
Plaintiff,

INDEX NO. 103415/12

MOTION SEQ. NO. 002

- against -

NATURAL GOURMET INSTITUTE, INC. and NATURAL GOURMET COOKERY CORPORATION, formerly known as NATURAL GOURMET COOKERY SCHOOL, INC., ANNEMARIE COLBIN, LISA BOYMANN, JUDITH FRIEDMAN, and GEORGE ARMIGER,

Defendants.

FILED

DEC 13 2013

COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 4, were read on this motion by the plaintiff for a preliminary injunction.

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo)

Cross-Motion: Yes No

Before the Court is Jenny Matthau's (plaintiff) motion, pursuant to CPLR 2221, to reargue and renew the prior Decision and Order (prior decision) of this Court, dated April 24, 2013, in which this Court denied as moot plaintiff's Order to Show Cause (OSC) for a preliminary injunction directing Natural Gourmet Institute, Inc., Natural Gourmet Cookery Corporation, formerly known as Natural Gourmet Cookery School, Inc., Annemarie Colbin, Lisa Boymann, Judith Friedman and George Armiger (collectively, defendants) to return to plaintiff her original recipes as defendants had already done so. Upon renewal and reargument plaintiff seeks an order modifying the prior decision and for an order restraining the defendants from

further using plaintiff's recipes. Defendants are in opposition to petitioner's motion.

In support of her application, plaintiff states that although access to her recipes has been restored, she continues to be damaged by the fact that the Court did not enjoin the defendants from continuing to use the recipes. Plaintiff further states that the defendants wrongfully continue to use her recipes despite the fact that they were copyrighted (Affirmation of Paul E. Kerson, Esq., ¶ 4).

In opposition, defendants state that the motion should be denied as the Court already determined in the prior order that plaintiff's application for an injunction precluding defendants from using certain recipes was not considered since the request for relief was not set forth in the OSC. Additionally, as plaintiff created these recipes in the course of her employment, the ownership rights and the rights to the use of the recipes are determined by a written agreement jointly drafted by defendant Annemarie Colbin. However, even in the absence of the aforementioned agreement, the corporate defendants would retain exclusive ownership rights and exclusive rights to the use of the recipes under the work-made-for-hire doctrine of the Federal Copyright Act since the recipes were created by plaintiff in the scope of her employment.

STANDARD

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" (CPLR 2221[d][2]; see *Kent v 534 E. 11th St.*, 80 AD3d 106, 116 [1st Dept 2010] ["A motion for reargument is addressed to the court's discretion and 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"]; see also *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). A motion to reargue shall be made "within 30 days after service of a copy of the order determining the prior motion and

written notice of its entry” (CPLR 2221[d][3]);

A renewal motion “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 a] reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221[e][2] and [3]). “Renewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application” (*Matter of Weinberg*, 132 AD2d 190, 210 [1st Dept 1987], *appeal dismissed sub nom Matter of Beiny*, 71 NY2d 994 [1988] [internal citation omitted]); *CPA Mut. Ins. Co. of Am. Risk Retention Group v Weiss & Co.*, 80 AD3d 431, 432 [1st Dept 2011]). Renewal “is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (*Queens Unit Venture, LLC v Tyson Court Owners Corp.*, __AD3d__, 2013 NY Slip Op 07820 * 1 [1st Dept 2013]; *see also Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010], citing *Matter of Weinberg*, 132 AD2d at 210, *app dismissed*, 15 NY3d 820 [2010], *reconsideration denied*, 16 NY3d 726 [2011]).

DISCUSSION

The portion of plaintiff’s motion seeking to reargue the prior decision is denied as untimely, as it was brought more than 30 days from Notice of Entry on May 24, 2013. However, even assuming *arguendo* that this motion had been timely made, plaintiff has not demonstrated that this Court, in its Order dated April 24, 2013, overlooked or misapprehended any matters of fact or law which would have changed the determination of the prior motion (see CPLR 2221[d][2]), which denied as moot plaintiff’s application for the return of her recipes.

Furthermore, the Court finds that the plaintiff does not meet the standard for a motion to renew in as much as she fails to demonstrate there is a change in facts not offered in her previous motion or a “change in the law” warranting a change in this Court’s prior decision (see

CPLR 2221[e][2]; *Rodriguez v Ford Motor Co.*, 106 AD3d 525, 526 [1st Dept 2013] [plaintiff's submission fails to offer new facts or demonstrate that there has been a change in the law that would change the prior determination]; *Otto v Otto*, 110 AD3d 620 [1st Dept 2013]). In its prior decision, this Court noted that the portion of plaintiff's application for an injunction restraining defendants from copying or using her recipes in any form without her written permission was not considered, pursuant to our Part Rules, as this request for relief was not included in her OSC. However, plaintiff did not move to reargue this Court's Previous Order, pursuant to CPLR 2221, in a timely manner as described in more detail above. As such, plaintiff's motion to renew is an improper attempt to rectify the previous error in her underlying motion papers. Moreover, the Court notes that plaintiff's argument in the Kerson Affirmation in support, that her recipes were copyrighted, is belied by the admission by counsel at oral argument that the plaintiff had not taken any steps to copyright said recipes and that they were not in fact copyrighted.

Here, plaintiff is seeking to renew and/or reargue portions of the prior order which were not considered by the Court and were not decided. Such is improper on a motion to renew and cannot be considered for reargument as such motion is untimely. Accordingly, petitioner's motion to reargue and to renew is denied.

CONCLUSION

Based on the foregoing papers it is hereby,

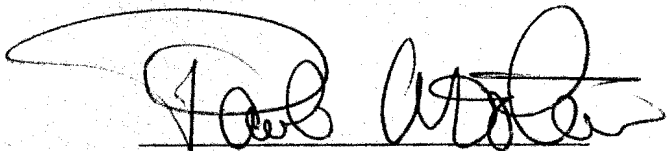
ORDERED that plaintiff's motion, pursuant to CPLR 2221, to reargue and renew the prior Decision and Order of this Court, dated April 24, 2013, in which this Court denied as moot plaintiff's Order to Show Cause (OSC) for a preliminary injunction directing Natural Gourmet Institute, Inc., Natural Gourmet Cookery Corporation, formerly known as Natural Gourmet Cookery School, Inc., Annemarie Colbin, Lisa Boymann, Judith Friedman and George Armiger (collectively, defendants) to return to plaintiff her original recipes as defendants had already

done so and upon renewal and reargument plaintiff seeks an order modifying the prior order and for an order restraining the defendants from further using plaintiff's recipes is denied; and it is further,

ORDERED that counsel for the defendants is directed to serve a copy of this Order with Notice of Entry upon the plaintiff.

This constitutes the Decision and Order of the Court.

Dated: 12/10/13


PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: : DO NOT POST REFERENCE

FILED

DEC 13 2013

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