

September 24, 2001

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Re: *Albu Trading, Inc. v. Allen Family Food, Inc.*
C.A. No. 00C-05-131-JRS

Dear Counsel:

The Court is in receipt of Plaintiff's Motion to Alter or Amend Judgment and/or to Reopen, filed with the Court on September 14, 2001, and served on opposing counsel that same date. Plaintiff's motion questions the factual predicate of the Court's decision granting defendant's motion for summary judgment. As such, the motion is more appropriately styled as a motion for reargument under Del. Super. Civ. R. 59(e). *See Hessler, Inc. v. Farrell*, Del. Supr., 260 A.2d 701, 702 (1969). Rule 59(e) requires that motions for reargument be served on opposing counsel within 5 days after the filing of the Court's opinion or decision. Accordingly,

compliance with Rule 59(e) required the motion to be served¹ on or before September 7, 2001. The certificate of service accompanying the plaintiff's motion indicates that service did not occur until September 14, 2001. Consequently, the motion was not timely filed under Rule 59(e). *See also* Del. Super. Civ. R. 6(b) (the Court may not extend the time for taking any action under Rule 59(e)).

Moreover, the Court notes that the motion for reargument simply rehashes arguments made to the Court in plaintiff's response to defendant's motion for summary judgment. "Motions for reargument will be denied where they rely on grounds not raised in the original proceeding or where they merely advance the same matters that were already considered in the original proceeding." *Steadfast Ins. Co. v. Eon Labs Mfg., Inc.*, Del. Super., C.A. No. 98C-01-058, Del. Pesco. J. (August 18, 1999)(Letter Op. at 2)(citing *Miles Inc. v. Cookson Am., Inc.*, Del. Ch., 677 A.2d 505, 506 (1995)). With the exception of providing an expert report produced for the first time far beyond the Court-ordered deadline for discovery², the plaintiff's motion for

¹*See Hessler, Inc.*, 260 A.2d at 702 (concluding that Rule 59(e) requires service on opposing counsel, as opposed to filing with the Court, to occur within 5 days of the filing of the Court's opinion or decision.)

²The Court notes that plaintiff has never requested an extension of the discovery cut-off,

reargument does precisely what this court, and other Delaware trial courts, consistently have proscribed: it rehashes old ground without identifying clear factual

or legal error, and then it seeks to introduce new matter into the proceedings by supplying an untimely expert report.

even after defendant filed its renewed motion for summary judgment. The Court also notes that the untimely submission of the expert report follows on the heels of plaintiff's untimely submission of an affidavit after oral argument on the motion. The Court considered that affidavit notwithstanding the violation of the scheduling order. The Court is not inclined to do so again now that a decision has been rendered on the motion.

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The Court is satisfied that summary judgment was appropriate in this case where, in the face of a properly supported motion, plaintiff simply has been unable to demonstrate under even the most generous interpretation of the facts that it will be able to carry its burden of proof at trial.³ Consequently, the motion for reargument must be, and hereby is, **DENIED**.

IT IS SO ORDERED.

Very truly yours,

Joseph R. Slights, III

JRS, III/sb

Original to Prothonotary

³See *Davis v. University of Delaware*, Del. Supr., 240 A.2d 583, 584 (1968) ("The disposition of litigation by motion for summary judgment should, when possible, be encouraged for it should result in a prompt, expeditious, and economical ending of lawsuits"). This is especially so when the parties have been given adequate time to develop a factual record.