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SHORT FORM ORDER

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INDEX
NO.: 8956-01

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 3-19-03
SUBMITTED: 5-1-03
MOTION NO.: 006 - MD
007 - MD

ATKINS NUTRITIONALS, INC. and
ROBERT C. ATKINS, M.D.,

Plaintiffs,

-against-

ERNST & YOUNG LLP and CAP GEMINI
ERNST & YOUNG US LLC,

Defendants.

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Upon the following papers numbered 1 to 42 read on this motion to replead and cross-motion for sanctions; Notice of Motion/Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers 12 - 36; Answering Affidavits and supporting papers 37 - 41; Replying Affidavits and supporting Papers 42; it is,

ORDERED that the motion by plaintiff for leave to replead consequential damages and the cross-motion by defendant Ernst &Young for sanctions are denied.

The plaintiff Atkins Nutritionals Inc. (Atkins) entered into an agreement with the defendant Ernst & Young LLP (E&Y) in which E&Y was to assist Atkins in selecting a computer system for its new distribution center. E&Y recommended that Atkins acquire a computer software system called Cayenta. Thereafter, Atkins entered into an agreement with defendant Cap Gemini Ernst & Young U.S. LLC (CGEY) to oversee implementation of the computer system. Atkins alleges that it encountered numerous problems with the Cayenta system and commenced this action for, *inter alia*, breach of contract. The defendants moved, pursuant to CPLR 3211(a)(7), to dismiss certain causes of action in the complaint. This Court (Costello, J.) dismissed the first cause of action for malpractice but denied the motions as to the remaining claims. On appeal, the Appellate Division, Second Department modified the order by dismissing additional causes of

action including the plaintiffs claim for consequential damages. The Court concluded that the plaintiffs complaint failed to allege that those damages were within the contemplation of the parties at the time the contract was executed *(see,* **Atkins Nutritionals v Ernst & Young,** 301 AD2d 547). The plaintiff did not request leave to replead and the order of the Appellate Division did not grant such relief. The plaintiff now moves before this Court for leave to replead its claim for consequential damages and E&Y cross-moves for sanctions.

The plaintiff failed to comply with CPLR 3211(e) which requires a party who opposes a motion to dismiss for insufficiency to make a request, in his opposing papers, for leave to replead in the event the motion is granted *(see,* **Cuglietto v Ferone,** 269 AD2d 556 [2d Dept 20001; **Bello v Cablevision Systems,** 218 AD2d 680 [2d Dept 1995]; **Licensing Dev. Group v Freedman,** 184 AD2d 682 [2d Dept 19921). The plaintiff did not request leave to replead in opposition to the original motion or before the Appellate Division and has offered no excuse for its failure to do so *(see,* **Fleet Factors Corp. v Werblin,** 138 AD2d 565 [2d Dept 19881). Under certain circumstances, a court may, as a matter of discretion, grant a plaintiff leave to replead notwithstanding the plaintiffs failure to request such relief in its opposition papers *(see e.g.,* **Martell Realty v Vanderveer-Oakdale Assocs.,** 265 AD2d 384 [2d Dept 1999; **Elliman v Elliman,** 259 AD2d 341 [1st Dept 19991). However, in this case, the claim for consequential damages was dismissed by the Appellate Division and not by this Court. When a cause of action is dismissed and the party wishes to replead where no leave to replead is contained in the order of dismissal, the party should move for leave to replead before the court which granted the order of dismissal *(see,* **Rainbow v Rosenberg,** 54 AD2d 1121 [4th Dept 19761; **Loudin v Mohawk Airlines,** 27 AD2d 517 [1st Dept 19661). Therefore, the plaintiff should have made an application before the Appellate Division. The case relied upon by the plaintiff is distinguishable since the complaint therein was originally dismissed by the Supreme Court *(see,* **Rochester Poster Advertising Co. v Town of Penfield,** 51 AD2d 870 [4th Dept 19761). Accordingly, under these circumstances, the plaintiffs failure to comply with CPLR 3211(e) warrants denial of the motion *(see,* **Cuglietto v Ferone,** *supra;* **Licensing Dev. Group v Freedman,** *supra;* **Dunn v Dunn,** 162 AD2d 433 [2d Dept 19901).

In any event, even if the court were to consider the plaintiffs motion, CPLR 3211(e) requires that the plaintiff demonstrate "good ground" to **support** an application to replead. A motion must be supported by "evidence as on a motion for summary judgment" **(Pritchard Services v First Winthrop Properties,** 172 AD2d 394, 395 [1st Dept 19911 quoting **Walter & Rosen v Pollack,** 101 AD2d 734, 735 [1st Dept 19841; *see,* **527 Smith Street Brooklyn Corp. v Bayside Fuel Oil Depot Corp.,** 262 AD2d 278 [2d Dept 19991). Here, the plaintiff submits an affidavit from its senior vice president of operations, Norman J. Stafford, who asserts that the plaintiff should be able to seek consequential damages for lost profits, damage to inventory and loss of goodwill. Stafford claims that these damages were within the contemplation of the parties because E&Y had expertise in the area, conducted a warehouse analysis and was familiar with Atkins' business since E&Y was also Atkins' outside auditor. Stafford further claims that he had extensive discussions with two E&Y employees regarding the ramifications of the computer system. However, the record demonstrates that neither Stafford nor the two E&Y employees were involved in negotiating or drafting the contract. Thus, the mere fact that Stafford had discussions regarding the scope of the system does not demonstrate that E&Y contemplated that it would be liable for all consequential damages at the time the contract was executed. The record indicates

that the agreement was prepared by E&Y on January 24,2000, prior to most of these discussions, and was limited to assisting Atkins in selecting a software product. The contract expressly provided that project management and implementation services were not part of the agreement and, in fact, Atkins entered into a separate agreement to implement the computer system with CGEY. Under these circumstances, the plaintiff has failed to demonstrate that consequential damages were contemplated by the parties at the time the agreement was executed (see, **Kenford Co. v County of Erie,** ***73*** NY2d **3** 12). Accordingly, the motion to replead is denied. The cross-motion by E&Y for sanctions, costs and attorneys fees is also denied.

DATED: **May 28,2003**

HON. ELIZABETH HAZLITT EMERSON

J. S.C.