

Chibcha Rest., Inc. v Kaminsky

2011 NY Slip Op 33726(U)

December 23, 2011

Sup Ct, NY County

Docket Number: 112224/10

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JUDITH J. GISCHE, J.S.C.

PRESENT: _____
Justice

PART 10

Index Number : 112224/2010
CHIBCHA RESTAURANT, INC.
vs.
DAVID A. KAMINSKY & ASSOC
SEQUENCE NUMBER : 002
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

DEC 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/23/11

JUDITH J. GISCHE, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
Chibcha Restaurant, Inc. d/b/a
Oxes Nightclub and Miguel Rojas,

Plaintiff (s),

-against-

David A. Kaminsky & Associates, P.C.,
David A. Kaminsky, Esq. and James A.
English, Esq.,

Defendant (s).
-----X

DECISION/ ORDER
Index No.: 112224/10
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	FILED	Numbered
Pltf's n/m (RR) w/RB affirm, exhs		1,2
Defs' opp, exhs	DEC 27 2011	3
Pltf's reply		4

-----X
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action for legal malpractice and related claims. The court granted the defendants' preanswer motion for the dismissal of this action (Order, Gische J., 8/2/11) ("prior order"). Plaintiffs now seek to reargue defendant's motion and the court's prior order on the basis that the court misapprehended the facts and misapplied the law. Plaintiffs also seek to renew their opposition to that motion in light of a recent decision by the Hon. Peter Moulton dated March 30, 2011, the judge presiding over the parties' legal fees dispute in in the Civil Court, New York County (David A. Kaminsky, P.C. v. Chibcha Restaurant, Inc. et al, Civil Court, N.Y. Co., Index no. 043060 CV 2009) ("legal

fees action").

A motion for leave to reargue pursuant to CPLR § 2221 is addressed to the court's discretion (Foley v. Roche, 68 A.D.2d 558 [1st Dept. 1979]). It may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision (William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22 [1st Dept. 1992]). It is not a vehicle to permit a party to argue again the very questions previously decided (Foley v. Roche, 68 A.D.2d 558 [1st Dept. 1979]; *see also* Frisenda v. X Large Enterprises Inc., 280 A.D.2d 514 [2nd Dept. 2001] and Rodney v. New York Pyrotechnic Products Co., Inc., 112 A.D.2d 410 [2^d Dept. 1985]) or to offer an unsuccessful party successive opportunities to present arguments not previously advanced (Giovanniello v. Carolina Wholesale Office Mach. Co., Inc., 29 A.D.3d 737 [2nd Dept. 2006]).

On the other hand, a motion to renew is based upon the discovery of material facts which existed at the time the prior motion was made but were not then known to the party and for that reason not disclosed to the court [Foley v. Roche, 68 AD2d 558, 567 [1st Dept. 1979]]. An event that takes place after the prior order is made is not considered newly discovered evidence that would support a motion to renew [Donnelly v. Donnell, 114 AD2d 671 [3rd Dept. 1985]].

For the reasons that follow, permission to reargue and/or renew the prior motion is denied:

The court did not misapprehend any of the facts alleged by plaintiffs in connection with the underlying motion or incorrectly interpret the orders made by the judges in the Queens County action. Contrary to plaintiffs' argument, the court afforded

the complaint and its facts a liberal construction and found plaintiff did not have the causes of action stated, for reasons expounded in the court's prior order. The court did not, as argued by plaintiffs, incorrectly apply the law applicable to motions for summary judgment.

The recent decision by Judge Moulton is not a "new" fact commanding that this court reconsider its prior order. Judge Moulton made his decision to vacate the default against the Chibcha defendants after this court dismissed the complaint (Donnelly v. Donnell, supra). In any event, Judge Moulton's decision does not change this court's prior determination.

While plaintiffs disagree with this court's order, that is not a justification for reargument or renewal. Plaintiffs have all available remedies to them in connection with their pending appeal.

Therefore, plaintiff's motion to reargue and renew is denied in its entirety. The court adheres to its prior order. Arguments raised but not expressly addressed are hereby denied. This constitutes the decision and order of the court.

Dated: New York, New York
December 23, 2011

So Ordered:

FILED

DEC 27 2011

NEW YORK
COUNTY CLERK'S OFFICE



Hon. Judith J. Gische, JSC