

**Habib v Best Yet Market of Hicksville**

2011 NY Slip Op 33743(U)

December 9, 2011

Sup Ct, Nassau County

Docket Number: 11214/09

Judge: Anthony F. Marano

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT - STATE OF NEW YORK**

PRESENT: HON. ANTHONY F. MARANO  
Justice.

TRIAL/IAS PART  
9  
NASSAU  
COUNTY

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NADIA HABIB AND ADEL HABIB,

Plaintiffs,

-against-

MOTION #005  
INDEX # 11214/09

BEST YET MARKET OF HICKSVILLE INC.  
AND BEST YET MARKET INC.,

Defendants.

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The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....x  
Answering Papers.....xx  
Reply.....  
Briefs: Plaintiff's/Petitioner's.....  
Defendant's/Respondent's.....

The motion brought by the Plaintiffs, in the above captioned action, for an order of this Court ". . . granting renewal-reargument of Plaintiff's motion, seeking issuance of judicial subpoena upon Trial Judge and for extension of time to perfect 4404 motion and upon such reargument vacating the decision of August 3, 2011 and granting leave to serve such subpoena and/or granting leave to perfect 4404 motion" is denied in all respects.

Initially, this Court must note that Rule 2221(f) of

the CPLR requires:

"A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought . . ."

As a preliminary matter, the Plaintiffs have failed to "identify separately and support separately each item of relief sought." However, this Court will decide each part of the motion now before this Court as if it were separately made (CPLR 2221[f]).

Specifically, the instant motion is addressed to a prior order of this Court, dated August 3, 2011 and entered August 15, 2011, herein which stated in its decretal paragraph:

"Plaintiff's motion for an order to show cause for execution of judicial subpoena for deposition of Justice Mahon and for extension of time to perfect vacatur motion is denied."

A motion to reargue shall be based upon matters of fact or law that the Court is alleged to have overlooked or misapprehend when deciding the prior motion. Rule 2221(d) of the CPLR.

A motion to reargue is addressed to the sound discretion of the Court and may be granted upon a showing that the Court overlooked relevant facts or misapprehended applicable law or for some other reason improperly decided the prior motion (Foley v Roche, 68 AD2d 558 [1<sup>st</sup> Dept 1979]).

A motion to reargue is not a means by which the unsuccessful party can obtain a second opportunity to argue issues previously decided or present new or different arguments relating to previously decided issues (Gellert & Rodner v Gem Community Mgt., Inc., 20 AD3d 338 [2<sup>nd</sup> Dept 2005]).

The Plaintiffs herein have failed to establish that this Court misapprehended the facts presented or misapplied the law or improperly decided the prior motion. In support of the instant motion, counsel for the Plaintiffs asserts:

"In fact I was mistaken when I tentatively responded to Justice Marano that the conversation between the jury and Justice Mahon was recorded on the record. In point of fact the conversation between the Judge and the jury was not recorded on the record at all."

Based upon the record before this Court, none of the Plaintiffs' grounds asserted in support of reargument support a finding that the Court misapprehended the facts presented or misapplied the law or improperly decided the prior motion.

A motion to renew shall be based upon new facts not previously presented to the Court that would change the Court's prior determination or shall demonstrate that there has been a change in the law which would change the prior decision and shall contain reasonable justification for failure to present the new facts on the prior motion. Rule 2221(e) of the CPLR.

Renewal is appropriate where there are new or additional facts which existed at the time of the initial motion but were unknown to the unsuccessful movant as to permit the Court's attention to be drawn thereto (William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22 [1<sup>st</sup> Dept 1992]).

A motion to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation (Matter of Weinberg, 132 AD2d 190 [1<sup>st</sup> Dept 1987], lv dismissed 71 NY2d 994 [1998]).

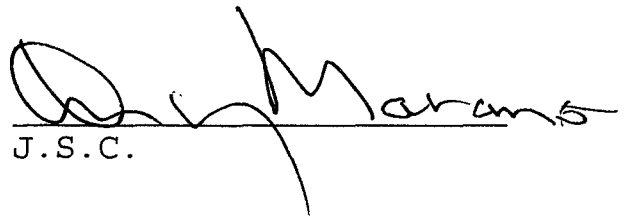
Based upon all papers submitted for this Court's consideration, the Court finds and determines that the

instant motion seeking "renewal" was not based upon new facts not offered on the prior motion that would change this Court's prior determination herein (see Matter of Wittlinger v Wing, 289 AD2d 171 [1<sup>st</sup> Dept 2001] affd 99 NY2d 425 [2003]).

In conclusion, this Court reiterates its final finding set forth in the prior order that is the subject matter of the instant motion ". . . no provision in the CPLR gives the Court authority to issue a judicial subpoena."

ORDERED, that the Plaintiffs' motion to reargue and/or renew and for an extension of time to perfect its post-trial motion for judgment and new trial, pursuant to Rule 4404 of the CPLR, is denied and this Court adheres to its determinations on the original motion as set forth in the hereinabove described August 3, 2011 order herein.

This constitutes the decision and order of this Court.

  
J.S.C.

December 9, 2011

**ENTERED**  
DEC 22 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE