

<b>Balk v New York Inst. of Tech.</b>
2011 NY Slip Op 34052(U)
March 7, 2011
Supreme Court, New York County
Docket Number: 150030/09
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

*Mar. 9, 2011* J.S.C.

PRESENT.

PART 57

Index Number : 150030/2009

BALK, DENNIS

vs

NEW YORK INSTITUTE OF

Sequence Number : 003

REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for reargue

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion *and cross-motion are*  
*determined as per decesses/order dated 3-7-11*

FILED

MAR 09 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3-7-11

  
MARCY S. FRIEDMAN, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG.

☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_ x

DENNIS BALK,

*Plaintiff,*

- against -

NEW YORK INSTITUTE OF TECHNOLOGY, et  
al.,

*Defendants.*

\_\_\_\_\_ x

Index No.: 150030/09

DECISION/ORDER

**FILED**

**MAR 09 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Dennis Balk moves for leave to reargue and renew the prior motion of defendant New York Institute of Technology (NYIT) to dismiss the complaint. That motion was granted by this court's decision and order dated September 8, 2010. Defendant NYIT cross-moves for an order modifying or resettling the September 8, 2010 order and for other relief.

A motion for leave to renew must ordinarily "be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court." (Foley v Roche, 68 AD2d 558, 568 [1<sup>st</sup> Dept 1979].) A renewal motion "shall be based upon new facts not offered on the prior motion that would change the prior determination," and "shall contain reasonable justification for the failure to present such facts on the prior motion." (CPLR 2221[e][2],[3].) A motion for reargument "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." (Foley, 68 AD2d at 567-568.)

This court's September 8, 2010 order dismissed plaintiff's third cause of action for breach of contract on the ground that this cause of action was duplicative of a discrimination claim filed by plaintiff before the New York State Division of Human Rights (DHR). Plaintiff seeks renewal on the ground that DHR dismissed the discrimination claim for lack of jurisdiction, by order dated August 23, 2010. Plaintiff wholly fails to offer any explanation for his failure to bring the dismissal to the court's attention while the motion to dismiss was still pending. As the pendency of the discrimination claim was the very basis for defendant's claim that the breach of contract cause of action should be dismissed, it was plaintiff's burden to bring the DHR dismissal to the court's attention when defendant did not do so.

As plaintiff's breach of contract claim was not heard on the merits, however, the court will modify the September 8, 2010 order to the limited extent of providing that the breach of contract claim is dismissed without prejudice.<sup>1</sup>

Plaintiff also seeks renewal on the ground that he acquired new information, from testimony given by NYIT professor Christopher Moylan before DHR on July 27, 2010, regarding NYIT's role in publishing defamatory statements about plaintiff. Again, plaintiff fails to offer any excuse for his failure to seek to present these facts while the motion to dismiss was pending. Leave to renew is not proper to fill in gaps in proof on the original motion. (Santini v Grant & Co., 272 AD2d 271 [1<sup>st</sup> Dept 2000].)

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<sup>1</sup>The court notes parenthetically that a serious question exists as to whether plaintiff will be able to prove damages for breach of contract. It is undisputed that NYIT paid plaintiff his full salary through the expiration date of the contract. Plaintiff claims that he lost sales from art that he expected to exhibit, and that he lost future employment notwithstanding that he had a contract for a fixed term with no right of renewal. While these claims appear to be speculative, the court does not finally determine the issue as it was not addressed on the motion.

As to the branch of the motion which seeks leave to reargue, the court is unpersuaded that it misapprehended applicable facts or law.

The branch of the motion for leave to amend is untimely, as this action has been concluded by virtue of the September 8, 2010 order dismissing the complaint. (See Siegel, New York Practice, § 275 [4<sup>th</sup> ed].)

The court has considered plaintiff's additional contentions, and finds them without merit.

NYIT's cross-motion seeks an order directing the Clerk to enter judgment or, alternatively, "settling judgment." The clerical relief of a directive to the Clerk will be granted. Defendant also claims that the Clerk may not enter judgment unless this court makes a finding that defendants NYIT-Bahrain and Hussein were not served with the summons and complaint in this action. While there is no basis for this court to grant this relief, the court, on its own motion, will amend the September 8, 2010 order to indicate that the motion to dismiss was brought only by defendant NYIT.<sup>2</sup>

It is accordingly hereby ORDERED that plaintiff's motion is denied in its entirety, and the court declines to grant plaintiff leave to renew or reargue; and it is further

ORDERED that the September 8, 2010 order is modified to provide that plaintiff's third cause of action for breach of contract is dismissed without prejudice, and the September 8, 2010 order otherwise remains in full force and effect; and it is further

ORDERED that defendant NYIT's cross-motion is granted solely to the extent of 1)

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<sup>2</sup>After conferring with the Judgment Clerk, it is the court's understanding that the issue of whether any defendant other than NYIT appeared in this action relates solely to the assessment of costs and disbursements, and that in seeking such sums, defendant NYIT may submit an affidavit to the Clerk stating that the other named defendants did not appear.

directing the Clerk to enter judgment dismissing the third cause of action of the complaint without prejudice and dismissing all other causes of action with prejudice; and 2) modifying the September 8, 2010 order to clarify that the motion to dismiss was brought solely by defendant New York Institute of Technology.

This constitutes the decision and order of the court.

Dated: New York, New York  
March 7, 2011



MARCY FRIEDMAN, J.S.C.

**FILED**

**MAR 09 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**