SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

Index Number : 602813/2007

KOSOVSKY, PETER

VS

PARK SOUTH TENANTS CORP.

Sequence Number : 004

REARGUMENT/ RECONSIDERATION

PART 5

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

CAL # 40

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

AUG 13 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8-7-13
AUG 07 2013

_____, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

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 OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

----------X

PETER KOSOVSKY, M.D.,

Plaintiff,

-against-

PARK SOUTH TENANTS CORP., BOARD OF DIRECTORS OF PARK SOUTH TENANTS CORPORATION, ROSE ASSOCIATES, INC., AM&G WATERPROOFING, LLC and ELISEO ASSOCIATES, PLLC,

Defendants.

----------X

DECISION/ORDER
Index No. 602813/2007
Seq. No. 001

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-4
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	
ANSWERING AFFIDAVITS	5
REPLYING AFFIDAVITS	6
EXHIBITS	
OTHER (Memos of law)	7-8

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendants' Park South Tenants Corporation, Board of Directors of Park South Tenant Corporation ("Park South") and Rose Associates, Inc. ("Rose"), move for an Order pursuant to CPLR§ 2221(e), granting leave to renew the Court's written decision rendered on January 22, 2013 granting the motion in limine by Eliseo Associates, PLLC ("Eliseo"), and the cross-motion by plaintiff which sought to strike the Board's cross-claims based on the Board's spoliation of evidence; and upon renewal, denying the motion of Eliseo to dismiss the cross-claims of the movants, as well

as plaintiff's cross-motion to strike the Answer of the movants. Defendants also move pursuant to CPLR§ 2221(d), for leave to reargue the motion by Eliseo and the cross-motion by plaintiff, and upon re-argument, denying the motion of Eliseo, to dismiss the cross-claims of the movants, as well as plaintiff's cross-motion to strike the Answer of the movants.

Plaintiff opposes. After a review of the instant motion, all relevant statutes and case law, the Court **denies** the motion.

Factual and procedural background:

In addressing the instant motion, the Court provides the same recitation of facts as provided in its former decision. The instant action emanates from construction work performed on the balconies and facade of an apartment building located at 200 Central Park South, New York, New York, 10019. Park South is a cooperative corporation which owns said premises. Rose manages said premises. Co-defendant AM&G performed waterproofing and other construction services at said premises. Eliseo performed supervisory and design services at said premises.

Plaintiff assumed a leasehold interest via a proprietary lease to Apartment 21D in the aforementioned premises on October 25, 2001. He resided in the apartment through March 2006, when Park South commenced renovations of the premises. In 2006, the cooperative board for the building decided to replace the roof and balcony railings, consisting of a form of metal and wire, with panels that were made of glass framed in metal. The proposed panels were deemed to be stronger and superior to the metal and wire railings. Additionally, the terrace floors which had been made of terrazzo, were to be replaced with concrete pavers covered with a waterproofing substance.

Rose hired AM&G to perform the waterproofing, re-grading and restoration of the balconies and terraces during the renovation process. Rose, in turn, hired Eliseo to provide architectural and

engineering services with regard to building envelope repairs including work on the facade and balconies of the building. During the period of this renovation work, plaintiff made several complaints to South Park. He complained that an inordinate amount of dust had infiltrated his apartment. He also complained that a pervasive and offensive odor had permeated the entire apartment, due to the openings that were created during the work on the building. He further complained that cracks suddenly began appearing on the walls, ceilings and windows, which he presumed were a result of the continuous vibration of the loading and unloading of heavy materials, roof removal and jack hammering. Unable to tolerate these conditions any longer, plaintiff felt compelled to move out of his apartment.

According to Park South, when plaintiff's complaints were brought to the attention of Mr. Frank Eliseo, Mr. Eliseo was actually in the process of developing a plan to correct the problem. Park South neglected to elaborate about this proposed plan, and/or if it was ever implemented. However, Park South alleged that the dust issue was never fully resolved because plaintiff allegedly refused to permit entry to anyone to clean it, nor did he clean it himself. Moreover, in 2006, Park South informed plaintiff that during the process of the construction, it was discovered that the original windows in his apartment had been improperly installed. Plaintiff was advised that his original windows had not been attached to the structure of the building, and as a result of this detachment, they could not seal the apartment appropriately, to prevent the entry of dust and other particles. Park South also alleged that when they urged plaintiff to contact the contractor who originally installed the windows to correct this defect, he refused to do so.

After the exterior brickwork had been completed and the terrazzo flooring was removed from the terraces of the building, the waterproofing process commenced. This process consisted of

applying the substance "decothane" to the structural concrete which remained after the removal of the terrazzo flooring. At some point, subsequent to plaintiff's complaints of a persistent odor, Mr. Eliseo went to plaintiff's apartment to investigate. Mr. Eliseo ultimately determined that the odor was emanating from the pooling of water on the balconies. He determined that to correct this problem, the balconies would have to be re-pitched to allow proper drainage of the stagnating water. Ultimately, this problem was resolved and the use of the decothane was discontinued.

Park South also alleged that they were able to resolve other conditions that plagued plaintiff. They allege that they were able to rectify the problem of soot and dust entering plaintiff's apartment by covering certain vents during the roof work. However, despite their sincere efforts, plaintiff felt it necessary to commence the instant action alleging constructive eviction, breach of warranty of habitability, breach of contract and negligence.

In November 2011, plaintiff made an official complaint to the New York City Department of Buildings, (hereinafter the "DOB"). On November 23, 2011, the DOB issued a "NOTICE OF VIOLATION AND HEARING," against Park South for a "failure to maintain." It also found an existing defect, stating "Brick and stone work below interior of window has deteriorated and top of window is leaning outward approximately one inch in apartment 21D." The DOB established a "cure date" of January 9, 2012. When Park South failed to "cure," on January 19, 2012, after a full hearing on the matter, at which time Park South had the right to be represented by counsel but declined to put forward a case, the DOB fined them the sum of $200.00. It is important to note that during this period, counsel for Park South had assured this Court during one of several conferences, that they were intent on repairing the defective conditions listed in the violation.

In response to a motion in limine made by Eliseo, the Court ordered that Eliseo and his expert, Ivan Mrakovcic, P.E., be present at the premises in order to observe the work to the window and subject wall performed by Park South's repair people. The Court notes that Eliseo's original motion in limine, dated November 29, 2011, sought to preclude the results of certain testing that had been conducted by plaintiff's experts. Among other findings, plaintiff's experts found that the wall in question needed to be rebuilt. Upon receiving information that plaintiff intended to rely on this testing, Eliseo requested the right to perform its own testing, arguing that for it to determine that the wall really required re-building, it would need to do destructive testing. Plaintiff refused Eliseo entrance to his apartment based on the fact that the Note of Issue and Certificate of Readiness had already been filed.

Following extensive oral argument on Eliseo's motion, the Court decided that the pending repair work would afford all parties the opportunity to observe the condition of the wall. It is important to note that plaintiff not only requested that his counsel and his expert be present during the repair work, but also, that prior to the commencement of said repair work, he would be able to discuss the scope of the work with the Board. On completion of oral argument, the Court ordered on the record, that all parties were to be present with their respective experts when the repair work was scheduled to commence. Nevertheless, on March 14, 2012, without plaintiff's, Eliseo's or AM&G's knowledge, Park South obtained access to plaintiff's apartment by procuring a locksmith to drill through the locks on his door. Once inside, the repair work commenced without plaintiff's or Eliseo's knowledge or consent. Plaintiff has vehemently maintained that the apartment was "broken into," even though he was present in the building at the time, and could have been notified of the need to gain entry into his apartment.

Both Eliseo and plaintiff asserted that Park South blatantly disregarded the Order of this Court. Eliseo argued that Park South had spoliated the evidence which was ordered by the Court to be examined and preserved. Eliseo complained that it had been deprived of the opportunity to observe the repairs being performed, which would inevitably prejudice its defense to the instant action. Plaintiff argued that Park South's actions had compromised his expert witness's ability to examine the evidence.

Park South argued that dismissal of its cross claims was not an appropriate remedy for this alleged destruction of evidence. It asserted that the repairs "were not performed with any motive other than to comply with the DOB's directive to complete the repairs by the end of March." It argued that Eliseo has not been prejudiced since its attorney, Mr. Schwartzberg, acknowledged that Eliseo had seen the probes on January 4, 2012, prior to the commencement of the repairs. Moreover, Park South asserted that numerous photographs were taken prior to, during, and after the repairs, thus sufficiently memorializing the conditions in the apartment for subsequent review.

Park South further asserted that they were under the mistaken impression that Mr. Shmulewitz of the firm of Belkin, Burden Wenig & Goldman, LLP, who represented defendants at the ECB hearing, had apprised Mr. Bernstein, plaintiff's attorney, of the repair schedule that they had drawn up. The Court notes that Park South failed to adequately explain, why, if they believed this to be the case, they arrived at the subject apartment's door with a locksmith in attendance. Additionally, Park South conceded that "as a result of inadvertent mis-communication among the parties, it appears that Mr. Schwartzberg, counsel for Eliseo, and counsel for AM&G, were not informed of the date of the repairs.

After oral argument and submitted papers, the Court found that Park South spoliated evidence, in that plaintiff and defendant Eliseo, were severely prejudiced by essentially being deprived of the opportunity to observe the condition of the wall and repairs that South Park unilaterally deemed necessary to cure the violation.

Positions of the parties:

Park South first argues that its motion to renew should be granted based on consideration of its improperly rejected opposition/sur-reply, as well as new information presented. It asserts that their motion"is based in part on information that was available to the Court at the time of its decision and in part, on information that was not" (see Notice of Motion, p. 4, ¶ 9). Additionally, they assert that with respect to the information that was not originally available to the Court, they now proffer the affirmations from Aaron Shmulewitz, the Board's real estate counsel and George Rubin, current Board President. Park South asserts that said affirmations demonstrate "two facts that appeared to be of no moment at the time of the original motions, namely" 1) the lack of knowledge on [their] part of the need to advise anyone other than the shareholder as a unit holder, not a litigant, and his counsel about the March repairs; and 2) the absence of bad faith on [their] part" (*id.* at p. 6, ¶16).

Park South argues that the Court's " 'order' got lost in the complexity of the labyrinth of litigation, building violations and landlord-tenant actions that have come to define this seven year long dispute...and that the 'order' was never properly treated as an order. It was never reduced to a signed order and, accordingly, was never entered"(*id.* at ¶ 19). Consequently, Park South now vehemently insists that such a requirement was never quite understood by them.

Park South also argues that the Court erred in previously deciding not to consider their opposition/sur-reply. They assert that their original opposition to plaintiff's cross-motion regarding

spoliation, was submitted on September 14, 2012. On that date, plaintiff served a cross-motion on their prior counsel's old address, not re-serving it until September 28, 2012. Thus, plaintiff's cross-motion was not properly served on them until after Eliseo had already served its reply containing the new affidavit of their expert, Ivan Mrakovcic. Park South defendants also asserts that "to oppose plaintiff's cross-motion and 'combat' Eliseo's expert affidavit, they served one document acting as both opposition and sur-reply," and that "no prejudice to either Eliseo or the plaintiff would have resulted if the Court considered [their] submission" (*id.* at 15), in that "the submission of these papers .....were necessitated by Eliseo's impermissible reply that included new information by way of an expert affidavit and a cross-motion from the plaintiff that was not properly served until after [they] already filed their opposition. The net effect of the refusal to consider the papers was that both plaintiff and Eliseo were able to present uncontested arguments to the substantial prejudice" they suffered (*id.* p. 5-6, 15-16).

Now, Park South defendants urge the Court to consider their opposition/sur-reply, including the affidavit of Giulia Alimonti and accompanying photographs; Eliseo's deposition transcript; and the affirmations of Aaron Shmulewitz, Andrew Solomon (a former member of the Board), and Mr. Rubin; the Note of Issue, the letter from plaintiff's counsel stating that there was no further need for discovery and his statements that he was prepared to proceed to trial; the e-mail exchanges indicating plaintiff had ample notice of the impending repairs; and the photographs taken after oral argument on the spoliation motion. The aforementioned are all annexed to Park South's moving papers as exhibits.

Park South defendants argue that it is well settled that a motion to renew is properly granted when an issue is first raised only in reply papers, and also when evidence to counter another party's

submissions is brought up in reply. Thus, they assert that now for the first time on reply, Eliseo offered an expert affidavit from Ivan Mrakovcic, which articulated what Eliseo believed was the prejudice that accrued to it. Furthermore, after receiving this reply, and after already having submitted opposition to Eliseo's initial motion, Park South defendants also received plaintiff's cross-motion which had initially been sent to the wrong address.

Park South defendants also argue that there was reasonable justification for the failure to present these facts on the prior motion, and that each of their proffered documents evidences the absence of bad faith and prejudice. Moreover, they argue that "the rule that a motion for renewal must be based on newly discovered facts is a flexible one, thus the court, in its discretion, may grant renewal on facts known to the moving party" (*id.* p. 6).

Park South also argues that plaintiff and Eliseo's reliance on the unsigned transcript of the court conference of February 6, 2012 to establish the duty to preserve evidence (i.e. insuring that all parties were present to review the repairs), is misplaced. Park South argues that because said transcript did not and does not constitute a valid "court order" to preserve evidence, they cannot realistically be accused of violating its directive(s). Thus, the duty to perform the repairs in the presence of all parties was not clear from the colloquy contained in said transcript.

Park South also argues that it is not guilty of spoliation of evidence, and that a spoliation sanction is only appropriate in situations where the adversary was deprived of an opportunity to inspect the alleged spoliated evidence. In this case, it argues that plaintiff, Eliseo and their respective experts inspected the premises prior to the alleged spoliation, and issued several reports. Moreover, Park South argues that where there is adequate documentation of the evidence, such as reports, photographs and testimony, dismissal of a pleading is not an appropriate sanction.

Park South further argues that for spoliation to exist, there must be evidence of bad faith. It argues that obtaining the services of a locksmith for the purpose of entering the subject premises to rectify an existing problem was not acting in bad faith, especially in consideration of the fact that the proprietary lease specifically permits them to enter an apartment to make necessary repairs, where the occupant fails to leave a key with the building. Furthermore, Park South refers to and relies on the case of *Weiss v. Industrial Enterprises*, 7 A.D.3d 518 [2d Dept. 2004], for the proposition that New York courts tend not to find the existence of spoliation where, as in the instant case, there exists a mandate from the Department of Buildings. Park South reminds the Court that the Department of Buildings directed that a violation be corrected by March 30, 2012. Therefore, since they could not coordinate a mutually convenient time with plaintiff to make the necessary repairs, they "were left with no choice but to enter plaintiff's apartment pursuant to the proprietary lease to make the necessary repairs, to avoid any further sanction from the Department" (*Id.* p. 14).

Park South next argues that their motion to reargue should be granted because the Court overlooked or misapprehended matters of fact and law in the underlying motion. In the instant case, it argues that their repairs were made in good faith and resulted in no prejudice to either Eliseo or plaintiff. Hence, the Court's decision to strike their Answer was inappropriate and an unnecessary abuse of discretion.

Eliseo responds that there is "absolutely no justification," why Park South did not attach any of its aforementioned "new evidence" to its original affirmation in opposition to Eliseo's motion dated September 14, 2012 (see Aff. in Opp. p. 5, ¶ 6). Eliseo asserts that the Court's rejection of Park South's sur-reply was procedurally correct and Park South's late submission of exhibits contained therein were properly rejected. Eliseo also argues that Park South is improperly utilizing

renewal as a "second chance," and that the purported "new evidence" in the form of the Alimonti affidavit, would not change the Court's prior determination, in that said affirmation contains false information. It also argues that the affidavit "parroted the false statements made in the Board's sur-reply papers that no anchoring system for the window existed at all. The fact that no anchors may have been visible at the time of Eliseo's prior observations of the window did not mean that the anchoring system was non-existent" (*Id.* p. 19 ¶ 14). Moreover, Eliseo argues that it was made quite clear to the Park South's counsel at the February 6, 2012 court appearance, that Eliseo and its expert were required to be present when the actual repairs were being made.

Eliseo also argues that Park South's spoliation of evidence was intentional, in light of the fact that at the February 6, 2012 court appearance, all counsel and the Court were under the impression that counsel and their respective experts would be present for the impending repair work. Eliseo asserts that based on the transcript of the oral argument held on November 13, 2012, the Court was certainly under this impression, because it repeatedly indicated that its Order had been violated by Park South. Eliseo further argues that Park South' memorandum of law improperly cites to the proprietary lease as evidence of its alleged good faith. However, its reliance on same is improper since said proprietary lease was an exhibit annexed to its sur-reply, which the Court refused to consider.

Plaintiff, like Eliseo essentially argues that Park South had a duty to preserve evidence and failed to do so in direct contravention of the Court's Order. He argues that "the general rule is that when a litigant appears by an attorney, notice to the attorney will serve as notice to the client" (*Lesnick & Mazarin v. Cutler*, 255 A.D.2d 367 [2d Dept. 1998]). Plaintiff also argues that the Alimonti affidavit upon which Park South relies, only states that no anchors were visible during her

December 12, 2011 and January 4, 2012 inspections. However, plaintiff emphasizes that Ms. Alimonti fails to indicate what she actually observed during the repairs in March 2012, the time period at issue. Plaintiff asserts that since "nothing suggests that [Park South] did not sneak a locksmith past Plaintiff to break into his home" (Plaintiff's Mem. of Law, p. 9). Thus, striking Park South's Answer was an appropriate remedy for their deliberate disregard of this Court's order and their spoliation of evidence.

Conclusions of law:

A motion for leave to renew, pursuant to CPLR §2221(e), "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination," and "shall contain reasonable justification for the failure to present such facts on the prior motion. The granting of a motion for leave to renew is "granted sparingly, and only in cases where there exists a valid excuse for failing to submit additional facts on the original application" (*Matter of Beiny*, 132 A.D.2d 190, 219 [1st Dept. 1987], *lv. dismissed* 71 N.Y.2d 994 [1988]; *Alpert v. Wolf*, 194 Misc.2d 126, 133, 2002 N.Y. Slip Op. 2726 (Civ Ct, NY County 2002)).

A motion for leave to reargue, pursuant to CPLR§ 2221(d), "shall be based upon matters of fact allegedly overlooked or misapprehended by the court in determining the proper motion." Such motion "is addressed to the sound discretion of the court" (*William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22 [1st Dept.1992], *lv dismissed*, 80 N.Y.2d 1005 [1992], *rearg denied* 81 N.Y.2d 782 [1993]). Reargument is not designed or intended to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v. Home Ins. Co.*, 99 A.D.2d 971 [1st Dept. 1984]), or to present arguments different from those originally asserted (*Foley v. Roche*,

68 A.D.2d 558; *William P.Pahl Equip. Corp. v. Kassis*, 182 A.D.2d at 24; *Amato v. Lord & Taylor, Inc.*,10 A.D.3d 374 [2d Dept. 2004]). On reargument, the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (see *Macklowe v. Browning School*, 80 A.D.2d 790 [1st Dept. 1981]). Professor David Siegal in N.Y. Prac, § 254, at 434 [4th ed] succinctly instructs that a motion to reargue "is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind."

In the case at bar, the Court finds that Park South has failed to proffer arguments sufficient to warrant renewal and/or reargument. As a threshold issue, Park South's argument that the Court's Order lacks validity because it was orally rendered and not reduced to writing, is patently ridiculous. The Court's Order was rendered "on the record." Indeed, when it was determined that the wall was going to undergo repair, the transcribed minutes of the February 6, 2012 court appearance clearly indicate that all parties were on notice of the impending repairs and were required to arrange a mutually convenient time when counsel and their respective experts could observe said repairs work.

THE COURT: Well, Mr. Cipolla, what sort of schedule did you have in mind?

MR. CIPOLLA: As far as the motions go?

THE COURT: Well, no. As far as the repairs go?

MR. CIPOLLA: Like I indicated the other day, Your Honor, there is–there will be a letter going to counsel, going to Dr. Kosovsky, with a proposal with respect to what work we plan on doing, that we think is appropriate, the building thinks is appropriate...He [Mr. Bernstein] got back to me and told me what Dr. Kosovsky's preference was. I explained that to my client....

Interestingly, counsel for Park South was the only attorney present that somehow "misapprehended" the fact that at both plaintiff and Eliseo were to be present with their respective

experts during the performance of said repair work.

The Court also finds unavailing, Park South's argument that the Court did not afford it the opportunity to submit its aforementioned "new evidence," thus compelling them to use the instant motion as a procedural vehicle to do so. The Court agrees with Eliseo in that any of said aforementioned items which were dated prior to September 14, 2012, were in existence at the time the original opposition was served. Thus, there is no legitimate reason why they were not submitted with said opposition. Moreover, Park South's allegation that the Court made a procedural error by preventing them from submitting the Alimonti affidavit and accompanying photographs in the form of a sur-reply, lacks merit. It is well settled precedent in the First Department that claims raised for the first time in a surreply shall not be considered by the court (see *Coleman v. Korn*, 92 A.D.3d 595 [1st Dept. 2012]; *Garced v. Clinton Arms Assoc.*, 58 A.D.3d 506 [1st Dept. 2009]; *Fishpond Construction, LLC v. State of New York*, 39 Misc.3d 1240(A), 2012 N.Y. Slip Op. 52489(U), (Ct Claims 2012)).

It is clear from plaintiff's papers that the Alimonti affidavit does not address the repairs made in March 2012, which is the period in question. Rather, it addresses only observations made by Ms. Alimonti in December 2011 and January 2012. Hence, it would have provided no relevant information, but, nevertheless, would have been available to defendant to include in its original opposition to the motion.

The transcribed minutes of the court appearance on November 13, 2012 prove that counsel and the Court discussed the Court's refusal of South Park's surreply on the record during a court appearance on November 13, 2012.

MR. CIPOLLA: Your Honor, first, I just want the record to be clear that in making my argument, I am relying on all the evidence that has been presented before Your Honor in this issue, the exhibits that have not only been presented by myself on behalf of my client, but the exhibits that have been presented by Dr. Kosovsky, his attorney and Mr. Eliseo through his counsel.

THE COURT: When you say all the evidence, you're talking about your surreply, the one you didn't ask the Court to be allowed to do, that you put in late, and in fact, you showed up in Court the last time and none of the parties had even had the exhibits?

MR. CIPOLLA: Well, yes, actually. (See Park South's Procedural & Factual Aff., Ex. "K," p. 31, lines 6-20).

Indeed, renewal cannot be utilized as a second opportunity for parties who failed to exercise due diligence in making their first factual presentation (see *Chelsea Piers Management v. Forest Electric Corp.*, 281 A.D.2d 252 [1st Dept. 2001]). Furthermore, the Court does not find renewal to be appropriate in the instant case since the alleged "new evidence" (particularly in the form of Ms. Alimonti's affirmation), would not have changed its previous determination (see CPLR§ 2221(e)(2); *Emigrant Mortgage Company, Inc. v. Turk*, 71 A.D.3d 722 [2d Dept. 2010]), that Park South disobeyed its Order and thus, spoliated evidence.

In its portion of its motion seeking leave to reargue, Park South alleges that its prior counsel (presumably Mr. Cipolla), failed to communicate the Court's Order that all parties were required to be present for the prospective repair work. Park South's argument is patently disingenuous in that it first attempts to undermine the validity of the Court's Order simply because it had not been reduced to writing and had not been filed. However, it also argues that it cannot be accused of bad faith because it was simply not aware of the Court's Order. Park South cannot have it both ways.

Indeed, it appears that Park South and not the Court, misconstrued and/or misapprehended the facts of this case. Indeed, Mr. Cipolla's knowledge and/or awareness of the Court's Order was imputed to his client (see *Sherman v. Eisenberg*, 267 A.D.2d 29 [1st Dept. 1999], *lv dismissed* 94 N.Y.2d 899 [2000]).

Furthermore, the Court did not misapprehend any principles of law. Evidence was spoliated because Park South failed to afford plaintiff and Eliseo as well as their respective experts, the opportunity to inspect the repairs to the subject wall. In its previous decision, the Court aptly opined that based on the obvious destruction of evidence, "[w]e are now in a position that we have to speculate what was in there [the wall]" (Ex. "K").

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the defendant Park South's motion to renew and reargue is denied; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: August 7, 2013

ENTER:

Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT