SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD *Justice* **PART** 49

MARK D'ANDREA,

Plaintiff,

-against-

INCAPTURE INVESTMENTS LLC, PETER KNEZ, and INCAPTURE LP,

Defendants.

INDEX NO. 651348/2016

MOTION DATE Nov. 1, 2017

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this application to reargue.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

The standards for reargument are well settled. "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and 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 Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [quotations omitted]). Motions for reargument must be based upon facts or law overlooked or misapprehended by the court on the prior decision (*see* CPLR § 2221; *Mendez v Queens Plumbing Supply, Inc.*, 39 AD3d 260 [1st Dept 2007]; *Carillo v PM Realty Group*, 16 AD3d 611 [2d Dept 2005]). The determination to grant leave to reargue lies within the sound discretion of the court (*see Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874 [2d Dept 2010]). However, reargument is not a proper vehicle to present new issues that could have been, but were not raised, on the prior motion or to afford an unsuccessful party successive opportunities to rehash arguments previously raised and considered (*see People v D'Alessandro*, 13 NY3d 216, 219 [2009]; *Tounkara v Fernicola*, 63 AD3d 648, 649 [1st Dept 2009]; *Lee v Consolidated Edison Co. of N.Y.*, 40 AD3d 481, 482 [1st Dept 2007]).

Plaintiff argues that the court overlooked several facts which go to show "Incapture did not intend to be bound by the 2014 Services Agreement," making the 2014 agreement unenforceable,

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

and the 2013 Services Agreement the operative agreement (Memo at 1-2). D'Andrea contends that "[t]o prevail on his cross-motion, Knez had to show . . . the 2014 Services Agreement had become effective and superceded the 2013 Services Agreement. If the 2014 Services Agreement had not become effective, then the 2013 Services Agreement was still binding, and so was his Personal Guaranty" (Reply at 1).

In plaintiff's Counterstatement of Disputed Material Facts on the Cross-Motion, "D'Andrea admit[ted] that he and Incapture entered into a certain Second Amended and Restated Services Agreement on or about the date in 2014 stated therein" (NYSCEF Doc. No. 101, ¶ 5). D'Andrea now argues that his admission should not be given any weight because his statement did not include the citation to evidence required by Commercial Division Rule 19-a (Reply at 5). D'Andrea relies on a case in which the First Department held that a plaintiff's failure to fully support its counterstatement of disputed facts did not require the court to deem the defendant's facts admitted, that the court had discretion in that matter, and was not bound to "blind adherence to the procedure set forth in rule 19-a" (*Abreu v Barkin and Assoc. Realty, Inc.*, 69 AD3d 420, 421 [1st Dept 2010]). D'Andrea, however, asks the court not to overlook his omission, but to ignore his own admission which D'Andrea should have properly supported.

Further, in the underlying motion, D'Andrea consistently took the position the 2014 Services Agreement was valid. "It is well settled that a motion to reargue is not an appropriate vehicle for raising new questions . . . which were not previously advanced. Necessarily, where a new argument is presented on the motion, that argument could not have been [previously] overlooked or misapprehended" (*People v D'Alessandro*, 13 NY3d 216, 219 [2009] [internal quotations and citations omitted]). Accordingly, the motion for reargument is DENIED.

Dated: March 19, 2018

O. PETER SHERWOOD, J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**
☐ **SUBMIT ORDER/ JUDG.** ☐ **SETTLE ORDER/ JUDG.**