SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2

Justice

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INDEX NO. 152872/2013

ASHLEY HAN, AS ADMINISTRATOR OF THE ESTATE OF KI SUCK HAN, SE RIM HAN, AND ASHLEY HAN, INDIVIDUALLY,

Plaintiffs,

MOTION SEQ. NO. 003

- v -

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 181, 182, 183, 184, 185, 186, 187, 188, 196, 197, 198, 212, 213

were read on this motion to/for RENEWAL/REARGUMENT.

Upon the foregoing documents, it is ordered that the motion is decided as follows.

This wrongful death action arises from an incident on December 3, 2012 in which plaintiff's decedent, Ki Suck Han, was fatally injured when he was pushed onto the tracks and struck by a train at a subway station operated by the defendant New York City Transit Authority ("NYCTA"). The NYCTA moves, pursuant to CPLR 2221, for renewal and reargument of a motion (motion sequence 002) ("the prior motion") filed by plaintiffs Ashley Han, as Administratrix of the Estate of Ki Suck Han, Se Rim Han, and Ashley Han individually, pursuant to CPLR 3124 and 3126, seeking to strike NYCTA's answer for failing to produce for deposition Terrence Legree, the operator of the train which struck the decedent. This Court decided that

motion by order entered July 27, 2017 (Doc. 93)[1] and the facts of this case are set forth in detail therein.[2] In deciding the prior motion, this Court held, inter alia, that:

> After considering the foregoing facts, this Court determines that plaintiffs' motion is granted to the extent that Legree is precluded from testifying at trial due to his failure to appear for a deposition, as well as the willful and contumacious conduct of the NYCTA impeding Legree from being deposed. The NYCTA is also precluded from introducing at trial any statements made by Legree in connection with the alleged incident. Additionally, plaintiffs are entitled to an adverse inference instruction against the NYCTA at trial based on Legree's repeated failure to appear for deposition and the NYCTA's actions in preventing the deposition from proceeding.

Doc. 93 at p. 14.

For the reasons set forth below, this Court declines to alter the findings set forth above.

Reargument

> 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." *(Schneider v Solowey,* 141 AD2d 813.) Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided *(Pro Brokerage v Home Ins. Co.,* 99 AD2d 971) or to present arguments different from those originally asserted *(Foley v Roche,* 68 AD2d 558).

That branch of NYCTA's motion seeking reargument of the prior motion is granted. As the NYCTA asserts, this Court incorrectly stated in the prior order that "[b]y order dated April 22,

[1] Unless otherwise noted, all references are to the documents filed with NYSCEF in connection with this matter.
[2] Any additional relevant facts are set forth herein.

2016, Justice Stallman denied the NYCTA's motion for a stay and directed Legree to appear for a deposition by May 19, 2016. Doc. 66." Doc. 93 at 12. The April 22, 2016 order actually directed, inter alia, that counsel appear for a conference on May 19, 2016 for the scheduling of "depositions and remaining disclosure." Doc. 66. Despite this error, however, this Court nevertheless adheres to its prior determination given the protracted evasion and lack of cooperation by the NYCTA during the discovery process, which is described in great detail in the prior order.

The NYCTA further asserts that this Court erred by stating in its prior order that the NYCTA's attorney, Michael Armienti, requested an adjournment of Legree's deposition because he (Mr. Armienti) "was ill." Doc. 93 at 11. NYCTA maintains that Mr. Armienti was not "ill" but simply needed to undergo medical tests. To the extent that this Court may have been incorrect in stating that Mr. Armienti was "ill", this clearly does not warrant a different result than that set forth in the prior order, especially given that plaintiff's counsel agreed to the adjournment and this Court did not state that it believed Mr. Armienti made any misrepresentation regarding the need for him to undergo such procedure.

Additionally, the NYCTA maintains that this Court erred by precluding Legree from testifying at trial based on his failure to appear for a deposition and simultaneously finding that an adverse inference charge was warranted against the NYCTA based on its conduct related to the production of Legree for deposition. In support of this argument, the NYCTA relies on *Bzezi v Eldib*, 112 AD3d 772 (2d Dept 2013) and *Giraldo v Rossberg*, 297 AD2d 534 (1st Dept 2002).

In *Bzezi*, the Appellate Division, Second Department held that the trial court properly denied a request by two of the defendants for a missing witness charge as to the third defendant since that third defendant was precluded by an earlier order from testifying at trial.

In *Giraldo*, the Appellate Division, First Department held that the trial court properly refused to give a missing witness charge where it failed to show that the witnesses in question were under the defendants' control. The court also stated: "[w]e also note that plaintiff had successfully precluded the [missing witnesses'] testimony." *Giraldo,* 297 AD2d at 535.

However, both *Bzezi* and *Giraldo* are distinguishable herein. Nowhere in the prior order did this Court state that the adverse inference instruction to be given at trial was to be part of a missing witness charge related to Legree. Doc. 93. Rather, this Court stated that "plaintiffs are entitled to an adverse inference instruction against the NYCTA based on Legree's repeated failure to appear for deposition and the NYCTA's actions in preventing the deposition from proceeding." Doc. 93 at p. 14. Even assuming, arguendo, that this Court stated its intention to give an adverse inference charge arising from the fact that Legree was a missing witness, neither *Bzezi* or *Giraldo* specifically holds that a court may not punish a party with both preclusion and an adverse inference charge. Indeed, this Court has previously imposed this very punishment. In *General Motors Acceptance Corp. v New York Cent. Mut. Fire Ins. Co.*, 2012 NY Slip Op 31304(U) (Sup Ct New York County 2012), this Court (Kenney, J.), finding that defendant had spoliated evidence, stated, inter alia, that:

> Plaintiff[s] ha[ve] proven that [defendant] has prejudiced their ability to effectively prosecute this bad faith action. The continued evasive responses, the lack of production of documents, the fact that defendant was in possession of documents that are now missing and went missing during the course of this bad faith action without any viable and reasonable explanation by defendant, [and] the repeated mis-characterization [and] mis-representation of the identity of documents that have been produced . . . lends itself, at this juncture, to not only an adverse inference charge at trial against defendant, but also an [o]rder of preclusion against defendant. Contrary to defendant's contention, issuance of both such orders is not contradictory, nor prohibitive, under the circumstances of this case and is not the equivalent of striking defendant's answer.

Gen. Motors Acceptance Corp. v NY Cent. Mut. Fire Ins. Co., 2012 NY Slip Op 31304[U], *6-7 (Sup Ct, NY County 2012).

Finally, since the preclusion sanction was clearly directed at Legree in order to prevent him from surprising plaintiffs by coming forward with any evidence against them at trial, whereas the adverse inference sanction was directed at the NYCTA for its role in preventing Legree from appearing for his deposition, the preclusion sanction, combined with the adverse inference charge, was neither excessive nor duplicative.

Therefore, this Court grants reargument and, upon reargument, adheres to its initial determination as set forth in the prior order, as this Court properly exercised its broad discretion in imposing the foregoing sanctions.

Renewal

The NYCTA argues that it should be granted renewal pursuant to CPLR 2221 (e) based on additional affidavits which, it submits, explain the reasons for its failure to produce Legree for deposition.[3]

> "Renewal is granted sparingly ... ; it 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, 210, 522 NYS2d 511 [1987], *lv dismissed* 71 NY2d 994, 524 NE2d 879, 529 NYS2d 277 [1988]). It is statutorily decreed that a renewal motion "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]) and that the application "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]). While the statutory prescription to present new

[3] The NYCTA does not deny that it failed to produce Legree for deposition. Doc. 158 at p. 20.

> evidence "need not be applied to defeat substantive fairness" (*Lambert v Williams*, 218 AD2d 618, 621, 631 NYS2d 31 [1995]), such treatment is available only in a "rare case" (*Pinto v Pinto*, 120 AD2d 337, 338, 501 NYS2d 835 [1986]), such as where liberality is warranted as a matter of judicial policy (*see Wattson v TMC Holdings Corp.*, 135 AD2d 375, 521 NYS2d 434 [1987] [leave to amend complaint]), and then only where the movant presents a reasonable excuse for the failure to provide the evidence in the first instance (*see Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 377, 720 NYS2d 487 [2001]).
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> *Henry v Peguero*, 72 AD3d 600, 602 (1st Dept 2010).

This Court denies that branch of the NYCTA's motion seeking renewal since it failed to adequately explain why it did not submit these affidavits in opposition to the prior motion. See CPLR 2221(e) (3); *Jones v City of New York*, 146 AD3d 690, 691 (1st Dept 2017). Although the NYCTA correctly argues that this Court has the "discretion to relax the requirement that a motion to renew be based on newly discovered evidence or evidence not previously available" (*Hines v New York City Tr. Auth.*, 112 AD3d 528, 528 [1st Dept 2013]), this Court finds that the circumstances of this case do not warrant such relief since the prior motion exclusively involved the reasons for Legree's failure to appear for a deposition, the specific issue which the newly submitted affidavits address. Docs. 147-148, 156-157. Since the NYCTA had the opportunity to thoroughly address this issue upon the prior motion, this Court, in its discretion, thus declines to grant renewal in the interest of justice. Finally, the facts in the newly submitted affidavits would not have changed this Court's determination in the prior order. *See Kraeling v Leading Edge Elec.*, 2 AD3d 789, 791 (2d Dept 2003).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by the defendant New York City Transit Authority seeking reargument of this Court's order entered July 27, 2017 is granted and, upon reargument, this Court adheres to its original determination; and it is further

ORDERED that the branch of the motion by the defendant New York City Transit Authority seeking renewal is denied; and it is further

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

12/14/2018
DATE

HON. KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE