

Kayantas v Restaurant Depot, LLC
2018 NY Slip Op 33688(U)
June 29, 2018
Supreme Court, Nassau County
Docket Number: 603995/15
Judge: Antonio I. Brandveen
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

PANAGIOTA KAYANTAS AS THE
ADMINISTRATOR OF THE ESTATE OF
KOSTAS KAYANTAS,

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 603995/15

Plaintiff,

Motion Sequence No. 007

- against -

RESTAURANT DEPOT, LLC,

Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, this motion is decided as follows:

The defendant, Restaurant Depot, LLC, original moves for an order pursuant to CPLR 2221 granting the leave to renew and reargue a court order dated December 8, 2017, and entered on December 12, 2017. Restaurant Depot, LLC asserts new information that was not available at the time of that prior order, and seeks denial of the portion of the plaintiff's original motion to strike the Restaurant Depot, LLC's answer. Restaurant Depot, LLC, also requests a protective order vacating the plaintiff's discovery demands dated April 27, 2017, May 25, 2017, and June 22, 2017, pursuant to CPLR §§ 3101, 3122 and 3123.

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The plaintiff, Panagiota Kayantas as the Administrator of the Estate of Kostas Kayantas, opposes the motion as untimely under CPLR 3122. Panagiota Kayantas, as the Administrator of the Estate of Kostas Kayantas, asserts that the Court properly exercised its discretion in penalizing the defendant's willful and contumacious, evasive conduct throughout the course of the discovery. Panagiota Kayantas as the Administrator of the Estate of Kostas Kayantas points out the defendant fails to satisfy the CPLR 2221 burdens of identifying a misapprehension or overlooking a material fact or principal of law by the Court, or stating any new facts not offered on the prior motion, and offering a reasonable justification for failing to offer such facts.

In reply to the plaintiff's opposition, Restaurant Depot, LLC asserts the litigation did not arise from the use of operation of a motor hence threshold "serious injury" is inapplicable to the instant matter. The defense avers the prior motion sought compliance with the plaintiff's previously served discovery demands, and not summary judgment based on liability issues surrounding the underlying action. Defendant contends that the plaintiff's opposition papers are devoid of any explanation or attempt to clarify palpably improper discovery demands. Defendant maintains that the plaintiff's papers are devoid of any opposition to that portion of the underlying motion seeking a protective order striking discovery demands as palpably improper. Defendant argues that palpably improper discovery demands do not require an objection within 20 days, and that the plaintiff is improperly seeking relief in the opposition papers.

The motion by the defendant for an order granting leave to reargue and renew the prior motions which led to the issuance of an order dated December 8, 2018 (Brandveen, J.), *inter alia* striking the defendant's answer, is granted on both grounds. Upon reargument, and upon renewal, the Court adheres to its December 8, 2017, order in its entirety.

"[A] trial court is given broad discretion to oversee the discovery process.' Thus, "[t]he supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed" [citations omitted] (*Cioffi v. S.M. Foods, Inc.*, 142 A.D.3d 526, 528, 36 N.Y.S.3d 664, 667 [2d Dept. 2016]).

A motion for leave to reargue "shall be based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include matters of fact not offered on the prior motion" (CPLR 2221[d][2]; *see Amato v. Lord & Taylor, Inc.*, 10 A.D.3d 374, 781 N.Y.S.2d 125). The

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motion does not offer an unsuccessful party, as here, successive opportunities to present arguments not previously advanced (*see Amato v. Lord & Taylor, Inc., supra; Frisenda v. X Large Enter.*, 280 A.D.2d 514, 720 N.Y.S.2d 187) *Pryor v. Commonwealth Land Title Ins. Co.*, 17 A.D.3d 434, 435–36, 793 N.Y.S.2d 452, 454 [2d Dept. 2005]).

Here, defendant Restaurant Depot, LLC, has not satisfied its burden of demonstrating material matters of fact or principals of law allegedly overlooked or misapprehended in determining that prior motion (CPLR 2221[d][2]; *see McGill v. Goldman*, 261 A.D.2d 593, 691 N.Y.S.2d 75 [2d Dept. 1999]).

A motion for leave to renew is addressed to the sound discretion of the court (*see Derby v Bitan*, 112 AD3d 881, 882 [2013]; *Lardo v Rivlab Transp. Corp.*, 46 AD3d 759, 759 [2007]; *Lawman v Gap, Inc.*, 38 AD3d 852, 852-853 [2007]). Pursuant to CPLR 2221 (e) (2), a motion for renewal must be “based upon new facts not offered on the prior motion that would change the prior determination,” and must contain “reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221 [e] [3]; *see Derby v Bitan*, 112 AD3d at 882). “A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (*Elder v Elder*, 21 AD3d 1055, 1055 [2005]; *see United Med. Assoc., PLLC v Seneca Ins. Co., Inc.*, 125 AD3d 959, 961 [2015]; *Lardo v Rivlab Transp. Corp.*, 46 AD3d at 759) *Estate of Castellone v. JP Morgan Chase Bank, N.A.*, 129 A.D.3d 771, 772, 11 N.Y.S.3d 226 [2d Dept. 2015]).

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Here, defendant Restaurant Depot, LLC, did not meet its burden of showing new facts which were not offered on the prior motion that would changed the prior court order, and a reasonable justification for the failure previously to provide such facts (CPLR 2221[e][2]; *see Cullin v. Lynch*, 148 A.D.3d 670, 48 N.Y.S.3d 711 [2d Dept. 2017]; *see also Jovanovic v. Jovanovic*, 96 A.D.3d 1019, 947 N.Y.S.2d 554 [2d Dept. 2012]).

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed are denied.

So ordered.

Dated: **June 29, 2018**

ENTER:



J. S. C.

NON FINAL DISPOSITION

ENTERED
JUL 09 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE