| **Rivera-Mejia v Schwartz** |
| --- |
| 2018 NY Slip Op 33718(U) |
| February 26, 2018 |
| Supreme Court, Westchester County |
| Docket Number: Index No. 51908/2017 |
| Judge: Joan B. Lefkowitz |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

----------x

MARIA-TERESA RIVERA-MEJIA,

Plaintiff,

-against-

DR. ERIKA T. SCHWARTZ and GINA CALDERON,

Defendants.

----------x

**DECISION AND ORDER**

Index No.: 51908/2017
Decision Date: Feb. 26, 2018
Motion Seq.: 6

LEFKOWITZ, J.

The following papers were read on defendants' motion for an order (1) pursuant to CPLR 2221(d), seeking leave to reargue such portion of the Decision and Order of this Court (Lefkowitz, J.) dated January 8, 2018, as awarded plaintiff costs and fees in the amount of $450; (2) pursuant to CPLR 2221(e), renewing the portion of the Decision and Order of this Court (Lefkowitz, J.) dated October 30, 2017, that the January 8, 2018, Decision and Order construed to hold that "the law of the case is that defendants conceded plaintiff's identity"; and (3) pursuant to CPLR 2221(d), seeking leave to reargue such portion of the Decision and Order dated October 30, 2018, as held that "the law of the case is that defendants conceded plaintiff's identity":

Order to Show Cause, Affirmation, Memorandum of Law
Exhibit A (Transcript of Oral Argument dated October 30, 2017)
Affirmation in Opposition

Upon the foregoing papers, this motion is determined as follows:

As this Court (Lefkowitz, J.) enumerated in its Decision and Order dated October 30, 2017 (hereinafter "Underlying Order") and again in its Decision and Order dated January 8, 2018 (hereinafter "Challenged Order"), plaintiff commenced this action on February 12, 2017, to recover unpaid wages that she alleges defendant Schwartz and her assistant, defendant Calderon, owed plaintiff for work plaintiff performed as Schwartz's housekeeper between 2009 and 2016. As relevant here, the Underlying Order noted defendants' concession in their motion papers that "plaintiff's identity no longer is an issue substantially in dispute," and that defendants' assertions that "plaintiff committed identity fraud and submitted fraudulent documents concerning her identity are speculative." Partly on that basis, the Underlying Order granted plaintiff's motion for a protective order pursuant to CPLR 3103(a) against further discovery of plaintiff's immigration status, and denied defendants' motion to compel disclosure of plaintiff's tax and banking records "without prejudice to a further such motion on good grounds shown after party depositions in accordance with the Differentiated Case Management rules of this Court." Plaintiff's identity

apparently being resolved, the Underlying Order set a schedule to proceed with party depositions. Defendants did not move to renew, reargue, stay or appeal the Underlying Order, and party depositions since were conducted.

Before conducting such depositions, however, defendant served a subpoena on nonparty Chase Bank seeking discovery of plaintiff's bank records – including documents plaintiff used to open bank accounts, for the purpose of adducing proof of plaintiff's identity. By Decision and Order dated January 8, 2018, this Court (Lefkowitz, J.) issued the Challenged Order, which quashed the nonparty subpoena as substantially overbroad and for defense counsel's failure to serve it timely on plaintiff. By the Challenged Order, this Court, after granting defense counsel notice and opportunity to be heard, also directed defense counsel to make a monetary payment of $450 to plaintiff for costs associated with that motion. By Order to Show Cause dated January 16, 2018, defendant then moved pursuant to CPLR 2221(d) to reargue so much of the Challenged Order as imposed a $450 assessment on defense counsel, and to both renew and reargue so much of the Challenged Order as narrated that "plaintiff's identity no longer is an issue substantially in dispute" and that based partly on the Underlying Order, "the law of the case is that defendants conceded plaintiff's identity." Defendants' motion papers also ask that the Challenged Order be modified to be without prejudice.

**Analysis**

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d][2]; *see Matter of Carter v Carter*, 81 AD3d 819 [2d Dept 2011]). Re-argument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted (*Pryor v Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Dinstber v Fludd*, 2 AD3d 670 [2d Dept 2003]). The determination to grant leave to reargue a prior motion lies within the sound discretion of the court that decided it (*see Barnett v Smith*, 64 AD3d 669 [2d Dept 2009]). A motion for leave to renew must be based on new facts, not offered on the prior motion, that would change the prior determination and the movant must show a reasonable justification for the failure to present such facts on the original motion (CPLR 2221[e][2][3]; *Aronov v Shimonov,* 105 AD3d 787 [2d Dept 2013]*; Commisso v Orshan*, 85 AD3d 845 [2d Dept 2011]). A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. In determining a combined motion for leave to reargue and leave to renew, this Court must "decide each part of the motion as if it were separately made" (CPLR 2221[f]).

As to the branch of defendants' motion seeking to modify the Challenged Order to be without prejudice, defendants offer no basis to grant such relief. Moreover, as defendants fail to dispute so much of the Challenged Order as quashed the nonparty subpoena for substantial overbreadth and for defense counsel's failure timely to serve it on plaintiff, *a fortiori* defendants identify no matter of fact or law that this Court overlooked in making those determinations. Such relief thus is denied under CPLR 2221(d). Likewise, as defendants offer no new fact that would change either of such determinations, leave to renew is denied under CPLR 2221(e).

As to the $450 assessment, defense counsel's papers likewise fail to address that issue. Especially given that defendants fail to address this Court's holding that the challenged subpoena was substantially overbroad and was not timely served on plaintiff – thus rendering the subpoena defective on its face in ways that never should have resulted in motion practice – defense counsel fails to offer any matter of fact or law that this Court overlooked or misapprehended in relation thereto. Accordingly, this branch of defendants' motion is denied, and defense counsel shall comply with the payment requirement in accordance herewith.

Turning to the substantive core of this application, defendants seek leave to both reargue and renew the Challenged Order to the extent of its determination that "the law of the case is that defendants conceded plaintiff's identity." As to the reargument branch, defense counsel asserts that this Court mistakenly construed either defendants' motion papers on the Underlying Order, and/or the Underlying Order itself, to state a concession that defendants did not make. Further, defendants imply that this Court could not properly conclude that the law of the case was that plaintiff's identity was conceded as of the challenged Order unless the Court explicitly wrote "the law of the case is that defendants conceded plaintiff's identity" in the Underlying Order on which the Challenged Order relied (*see* Defs' Aff. in Support, at ¶ 4). This argument strains credulity. First, it was the Underlying Order that deemed defendants to concede "that plaintiff is proceeding under her legally valid name" (NYSCEF Doc. 59, at 2), based on defense counsel's explicit statement in his papers on that motion (*see id.*, at 3 & n.1). Defense counsel sought no relief from such Order, and thus no such relief lies on the instant motion, which comes several months after the Underlying Order from which defendants profess aggrievement. Allowing a collateral attack on the Underlying Order would allow a party disadvantaged by a prior ruling to wait far longer than the 30 days that statute allows to reargue such motion, with substantial negative impact to party incentives and judicial economy (*see* CPLR 2221[d][3]).

Moreover, defense counsel's apparent explanation for not seeking such relief is that the Challenged Order of "January 8, 2018, was the first time that [d]efendants were informed that the Court was interpreting the [Underlying] Order of October 30, 2017, as a binding ruling that [d]efendants concede that Ms. Mendez and Ms. Rivera-Mejia were the same person" (Defs' Aff. in Support, at ¶ 8). This argument is specious: this Court's Underlying Order was unambiguous to that effect, as was defendants' concession on which it relied. Defendants offer no authority for the proposition that a court is bound to the law of the case only when it first uses those words, or words to that effect, to announce the precedential impact of its decision.

Defendants having identified no matter of fact or law that this Court overlooked in relation thereto, the branch of the motion seeking leave to reargue is denied.

As to the branch of the motion seeking leave to renew, this Court appreciates the position of plaintiff's counsel that this issue has now been before this Court three times, and this Court is loathe to invite limitless argumentation. Given the strong public policy to adjudicate disputes on the merits – and the liberality of discovery under CPLR 3101(a)(1) (*see Matter of Kapon*, 23 NY3d 32 [2014], *quoting Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] ["liberal" discovery under CPLR 3101[a][1]) – courts generally should approach with liberality a motion for leave to reargue discovery motions whose results restrict discovery. Here, however,

defendants' renewal motion fails to posit new facts that reasonably might bear on the result or any reasonable excuse for failing to proffer them sooner. Accordingly, this Court is constrained to deny this remaining branch of defendants' motion.

Even were this Court to grant leave tor renew and reconsider the limited issue presented, however, the Court would reach the same result. Defendants' concession on the Underlying Order speaks for itself as the law of the case, and defendants' affidavit hypothesizing that plaintiff proceeded under a false name remains entirely self-serving and speculative. This Court further rejects defendants' suggestion that the Underlying Order's "without prejudice" denial of discovery of plaintiff's financial records in the Underlying Order favors the relief defendants seek. The Underlying Order's plain language held that discovery of plaintiff's financial records might be relevant to plaintiff's *employment status*, not plaintiff's *identity* (*see* NYSCEF Doc. 59 [Underlying Order], at 4). Given the well-settled law that discovery of financial records such as tax records and bank records is disfavored absent a "strong showing" based on the record (*see Latture v Smith*, 304 AD2d 534, 536 [2d Dept 2003]), the Underlying Order concluded that such discovery was premature prior to party depositions that might better develop the record. This Court did not hold, and has no basis to hold, that defendants may undertake a limitless fishing expedition of plaintiff's financial records in a speculative attempt to disprove plaintiff's identity. Accordingly it is hereby

ORDERED that defendants' motion is denied; and it is further

ORDERED that not later than March 5, 2018, defense counsel will make a monetary payment to plaintiff in the amount of $450, as the Challenged Order previously directed, and upload to NYSCEF an affirmation of payment; and it is further

ORDERED that counsel for all parties will appear in the Compliance Part, Room 800 of this Courthouse, at 9:30 a.m. on March 7, 2018, as previously directed.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
February 26, 2018

HON. JOAN B. LEFKOWITZ, J.S.C.

TO: Jordan El-Hag, Esq.
El-Hag & Associates, P.C.
*Attorneys for Plaintiff*
777 Westchester Avenue, Suite 101
White Plains, New York, 10604
**By NYSCEF**

Timothy C. Parlatore, Esq.
FisherBroyles, LLP
*Attorneys for Defendants*
445 Park Avenue, 9th Floor
New York, New York 10022
**By NYSCEF**