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

PRESENT: MANUEL J. MENDEZ *Justice* PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION
DONA FISCHER, as Executrix of the Estate of BENJAMIN FISCHER, deceased

INDEX NO. 190271/2016

Plaintiff(s),

- against -

AMERICAN BILTRITE, INC., *et al.*,

Defendants.

MOTION DATE 6/5/2019

MOTION SEQ. NO. 005

MOTION CAL. NO.

FOR THE FOLLOWING REASON(S):

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

The following papers, numbered 1 to 6 were read on Dona Fischer as Executrix of the Estate of Benjamin Fischer's motion for summary judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1- 3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff Dona Fischer's (hereinafter "Plaintiff") motion to vacate this Court's Decision and Order dated March 20, 2019 and for leave to reargue or renew pursuant to CPLR § 2221 is denied.

Plaintiff-decedent, Benjamin Fischer, was diagnosed with mesothelioma on February 10, 2016 and died from it on December 26, 2017 (Hodrinksy Aff., Exh. A at 1). Plaintiff commenced this action on September 7, 2016 to recover for Benjamin Fischer's personal injuries due to asbestos-exposure (Hodrinksy Aff., Exh. A at 1). At his deposition on November 16-18, 2016, Mr. Fischer identified "Lord & Burnham" (hereinafter, "Burnham") as the manufacturer of two greenhouses which his family's florist business purchased-used, owned, and operated. Mr. Fischer allegedly was exposed to asbestos from about the 1950s - 1970s due to his work on potting benches located in two Lord & Burnham greenhouses owned by the decedent's family. Nonetheless, decedent (Benjamin Fischer) stated that he did not know who manufactured those benches (Hodrinksy Aff., Exh. A at 6). He also stated that he did not know the manufacturer of the boiler in the greenhouse from which he specifically alleged exposure to asbestos (Hodrinksy Aff., Exh. A at 1).

Burnham filed a motion for summary judgment on December 21, 2018. Defendant alleged that plaintiff had failed to provide any evidence that the deceased was exposed to any asbestos-containing material manufactured, distributed, sold or installed by Burnham. This Court granted summary judgment, holding that plaintiff was unable to identify Burnham products as a specific source of his asbestos-exposure.

Plaintiff now moves for an order, pursuant to CPLR § 2221, granting her leave to renew and reargue her opposition to defendant Burnham LLC's motion for summary judgment. Plaintiff argues that new evidence has been discovered which would change the outcome of this Court's earlier determination and that there is a reasonable excuse for not having submitted this evidence earlier. Plaintiff also argues that this Court overlooked or misunderstood the fact that Burnham failed to meet its prima facie burden. Defendant opposes the motion, claiming that Plaintiff has failed to provide a reasonable excuse for not submitting the evidence and that this Court did not overlook or misunderstand the law.

CPLR §2221[e][2] states that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR §2221[e][2][3]). A motion to renew requires the movant to show new facts "which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court" (*Matter of Naomi S. v Steven E.*, 147 AD3d 568, 46 NYS3d 786 [1st Dept 2015]). Renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588 [1st Dept 1979]).

CPLR §2221[d] states that a motion for leave to reargue (i) shall be identified specifically as such, (ii) 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, and (iii) shall be made within thirty (30) days after service of a copy of the order determining the prior motion and written notice of its entry.

A motion to reargue requires a showing that the Court "has overlooked significant facts or misapplied the law in its original decision" (*Town of Poestenkin v New York State Dept. of Environmental Conservation*, 229 AD 2d 650, 644 NYS 2d 602 [3rd Dept 1996], citing *Foley v Roche*, 68 AD 2d 558, 418 NYS 2d 588 [1st Dept 1979]). The movant cannot use a motion to reargue as a successive opportunity to merely restate previously unsuccessful arguments, reargue previously decided issues, or present new and different arguments (*Setters v Al Properties and Developments (USA) Corp.*, 139 AD 3d 492, 32 NYS3d 87 [1st Dept 2016]).

Plaintiff argues that leave to renew and denial of defendant's motion for summary judgment is warranted. This is because the affidavit of Mr. Brian Fischer allegedly gives a clearer picture of the provenance of the Burnham greenhouse and asbestos-containing components to which he and plaintiff-decedent, Benjamin Fischer, were exposed. Plaintiff claims this affidavit also provides more information about exposure to Burnham asbestos window glazing products and the transite benches at issue. Notably, Plaintiff claims that Brian Fischer is a non-party who is not under the control of Plaintiff and efforts to obtain his cooperation in this matter have been difficult; therefore, Plaintiff alleges that there is a reasonable excuse for not having presented Brian Fischer's testimony in the earlier motions.

Plaintiff further contends that leave to reargue is warranted because this court overlooked and misapprehended how the law applied to the facts of this case. Specifically, Plaintiff claims that defendant did nothing more than point to gaps in Plaintiff's case to fulfill its prima facie burden. Plaintiff claims that Burnham does not provide admissible evidence to prove it did not sell transite potting benches or that a competitor may have sold such benches despite Burnham holding a patent for transite benches. Plaintiff claims this court did not properly apply the legal standard for determining which party met the burden for summary judgment.

Defendant opposes the motion, arguing that leave to renew should be denied because there is no valid excuse provided for not having obtained and presented Brian Fischer's affidavit earlier in opposition to summary judgment. Defendant also claims that the affidavit contains no new facts that would change this Court's prior summary judgment determination.

Defendant contends that leave to reargue should be denied because Burnham did not merely point to gaps in Plaintiff's proof to support its burden for summary judgment. Rather, Burnham maintains that Plaintiff did not present any evidence that Burnham manufactured, distributed, or supplied any of the asbestos-containing material to which the decedent was allegedly exposed.

Leave to renew under CPLR §2221[e][2] requires "a valid excuse for not submitting the additional facts upon the original application" (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588 [1st Dept 1979]). In this case, Plaintiff contends that it has provided such a valid excuse and it cites two cases to show that renewal may be granted in rare instances even when facts were known or knowable to the movant at the time of the original motion, in order to avoid substantive unfairness. This argument is unavailing because these two cases do not have facts which parallel those of the instant case.

In the instant case, Plaintiff claims that Brian Fischer's testimony could not be obtained earlier because he was estranged from his brother Benjamin and the extent of his knowledge was allegedly unknown. Plaintiff does not, however, claim that Brian could not be subpoenaed or was completely unreachable during the relevant time-period. Moreover, *Tishman Construction Corp v City of New York* (the first case cited by Plaintiff) is factually different from this case because the movant in that case had already attempted to subpoena the information it needed before moving for leave to renew (*Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 720 NYS2d 487 [1st Dept 2001]). Essentially, the movant's excuse for not presenting the information at issue earlier in that case was due to difficulties concerning an entity attempting to thwart a subpoena (*see id.*). Such circumstances fail to mirror the circumstances of the instant case.

In *Ramos v Dekhtyar* (the other case cited by Plaintiff), leave to renew was granted despite the facts already being known to the movant at the time of the original motion (*Ramos v Dekhtyar*, 301 AD2d 428, 753 NYS2d 489 [1st Dept 2003]). This was because the Court found it was not prejudicial to allow the movant to rectify the simple procedural error of having submitted a witness's

statement in the form of an affirmation instead of an affidavit (*see id.*). Again, this situation does not mirror the circumstances of the instant case where the Plaintiff failed to subpoena Brian Fischer because it did not initially recognize the utility of his testimony. Therefore, Plaintiff is denied leave to renew.

Plaintiff also moves to reargue claiming this Court did not properly analyze how the parties met the burden for summary judgment. To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS2d 184 [1st Dept 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

Burnham met its burden for summary judgment by demonstrating that Plaintiff had failed to identify its products as the source of plaintiff-decedent's exposure to asbestos (*see Klein v City of New York, supra*). Plaintiff then failed to present sufficient contrary evidence to require a trial as to whether Benjamin Fischer was, in fact, exposed to asbestos from Burnham products (*see Amatulli v Delhi Constr. Corp., supra*). This Court did not overlook or misapprehend the law as it applied to the facts of this case; leave to reargue is, therefore, denied.

Accordingly, it is ORDERED, that plaintiff Dona Fischer's motion to vacate this Court's Decision and Order dated March 20, 2019 and for leave to reargue or renew pursuant to CPLR § 2221 is denied.

MANUEL J. MENDEZ
ENTER: J.S.C.

Dated: June 10, 2019

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION x NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE