

Capacity Group of NY LLC v Duni
2019 NY Slip Op 34079(U)
May 6, 2019
Supreme Court, Nassau County
Docket Number: 601202/2017
Judge: Anna Anzalone
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SUPREME COURT OF THE STATE OF NEW YORK

**PRESENT: Honorable Anna R. Anzalone
Justice of the Supreme Court**

_____ X

CAPACITY GROUP OF NY LLC,

TRIAL/IAS, PART 18

NASSAU COUNTY

Plaintiff,

- against -

Motion Seq# 9

MICHAEL A. DUNI AND CHRISTOPHER DUNI,

Index No. 601202/2017

Defendants.

_____ X

**MICHAEL A. DUNI AND CHRISTOPHER DUNI,
Defendants and Third-**

-against-

**EDGEWOOD PARTNERS INSURANCE CENTER,
INC. d/b/a EPIC INSURANCE BROKERS &
CONSULTANTS,**

Third-Party Defendant.

_____ X

The following papers read on this motion:

Plaintiff's Notice of Motion.....1

Defendants Affirmation in Opposition.....2

Plaintiff's Reply Affirmation3

Plaintiff, Capacity Group of NY LLC ("CGNY") moves for an order pursuant to CPLR §2221 granting leave to renew and reargue its prior motion that resulted in this Court's Order dated January 2, 2019, and entered January 4, 2019, wherein this Court denied plaintiffs motion

to strike certain affirmative defenses and to dismiss the counterclaims contained in defendant's answer to plaintiff's second amended complaint.

Plaintiff submits that their motion to reargue should be granted because Hon. Andrea Masley, J.S. C. of the New York county Supreme Court recently ruled, after plaintiff's motion to dismiss was submitted, that: Michael Duni is not a third-party beneficiary under the relevant CGNY operating agreement; and plaintiff properly terminated Michael Duni from his employment. Plaintiff argues: "As such, that ruling requires that the motion to renew and reargue be granted as the issues raised have been decided by another court in a related litigation between the parties." Additionally, plaintiff argues that res judicata and collateral estoppel bars Michael Duni from re-litigating Justice Masley's decision on these dispositive issues in this Court.

Plaintiff's complaint in New York County, Index number 652225/2018 seeks a declaratory judgment that Michael Duni, an at-will employee was lawfully terminated, and that plaintiff has no further obligations to him. In August of 2018, plaintiff moved for summary judgment in the New York County Action and plaintiff's counsel, Gary M. Fellner submitted an affirmation in support. Following is paragraph 3, 4, and 5 of said affirmation.

"3. CGNY and Duni, and their affiliates are also litigating other claims regarding Duni's misconduct in New York State Supreme Court, Nassau County, Index No. 601202-2017 ("Nassau County Action"). That case is based on allegation concerning Duni's misconduct while employed by CGNY, including wrongful diversion of business in breach of his fiduciary obligations owed to CGNY as its employee. Duni has recently raised several counterclaims against CGNY in the Nassau County Action, including alleged damages to personal property and

claims based on the theory that Duni is a third-party beneficiary under the CGNY operating agreement. (See accompanying Affidavit of Robert Salem, sworn to August 24, 2018, Ex 1)

4. Duni also filed an action in New York State Supreme Court, Queens County, Index No. 700090/2017, in which Duni, on behalf of himself and DFS, asserted various claims against three CGNY employees who are his co-shareholders in DFS for breach of fiduciary duty.

5. The above issues in Nassau and Queens County are separate and distinct from the straightforward issue before this Court.”

The plaintiff’s attorney affirmation confirms that the issues in Nassau, Queens and New York County are separate and distinct. This Court agrees with defendant that *res judicata* and collateral estoppel are inapplicable in the instant case. Instead of arguing as to whether Duni was an at-will employee or independent contractor, defendant was blindsided with arguments that were pending in this instant action and should not have been at issue in New York County.

A motion for re-argument addressed to the discretion of the Court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit an unsuccessful party to argue once again the very questions previously decided. *Pro Brokerage, Inc. v Home Insurance Co.*, 99 AD2d 971(1984), citing *Foley v Roche*, 68 AD2d 558, 1st Dept. (1979).

It is well settled that a motion for reargument is addressed to the sound discretion of the Court and may be granted upon a showing that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. See *McGill v. Goldman*, 261 AD2nd 593 (2nd Dept 1999). It is not designed, however, to provide an unsuccessful party with

successive opportunities to reargue issues previously decided or to present arguments different from those originally presented. *McGill v. Goldman, supra; Pahl Equip. Corp. v. Kassia*, 182 AD2nd 22, 588 NYS 2nd 8 (1992)

A review of the submissions by all the parties establish that the instant application for reargument are, in substance, founded upon the same theories which this Court already considered and rejected in connection with the original application. None of the parties' presently asserted allegations warrant a result different from that reached by the Court in its Order January 2, 2019 and entered January 4, 2019. Accordingly, and inasmuch as all parties' papers failed to establish that the court misapprehended or overlooked relevant facts or misapplied any controlling principle of law with respect to their respective claims, the instant motion Sequence # 9 must be denied. In view of the foregoing, this Court adheres to its original decision dated January 2, 2019 ad entered January 4, 2019.

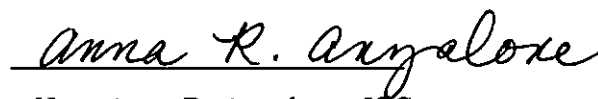
Counsel for plaintiff shall file and serve a copy of the within Order with notice of entry upon defendant within twenty (20) days from the date of this Order.

The foregoing constitutes the decision and order of the Court.

DATED: May 6, 2019

Mineola, NY

ENTER:


Hon. Anna R. Anzalone, JSC

ENTERED
MAY 08 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE