

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 18 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 3-17-05
Submission Date: 5-12-05
Motion Sequence No.: 007/MOT D

FRANK MANISCALCO and JUDY
MANISCALCO,

Plaintiffs,

COUNSEL FOR PLAINTIFF
Kate McGuire, Esq.
10 Knolls Lane
Manhasset, New York 11030

- against -

CURTIS MAZER, ROGER L. FLORE
ASSOC., INC. MML INVESTORS
SERVICES, INC. and
MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY,
Defendants.

COUNSEL FOR DEFENDANTS
(for Curtis Mazer)
Winget, Spadafora & Schwartzberg,
LLP
45 Broadway - 19th Floor
New York, New York 10006

(for Roger L. Flore Assoc. Inc.)
Nixon Peabody, LLP
990 Stewart Avenue
Garden City, New York 11530

(for Massachusetts Mutual Life
Insurance Co. And MML Investors
Services, Inc.)
Edwards & Angell, LLP
750 Lexington Avenue
New York, New York 10022

ORDER

The following papers were read on Plaintiff's motion to renew and/or reargue from the Court's order dated December 14, 2004:

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Notice of Motion dated March 3, 2005;
Affirmation of Kate E. Maguire, Esq. dated December 14, 2004;
Plaintiff's Memorandum of Law;
Affirmation of Christopher W. Healy, Esq. dated April 21, 2005;
Affirmation of Kate Maguire, Esq. Dated May 11, 2005.

Plaintiffs, Frank Maniscalco and Judy Maniscalco (collectively "Maniscalco"),
move to renew and reargue this Court's order dated December 14, 2004.

BACKGROUND

Between 1988 and 1994, Maniscalco invested the sum of \$800,000 in various
Massachusetts Mutual Life Insurance Company products through Defendant, Curtis
Mazer, ("Mazer"). During that time, Mazer was affiliated with Defendant Roger L. Flore
Assoc., Inc. ("Flore"). He was also a general agent of Defendants Massachusetts
Mutual Life Insurance Company ("Mass Mutual") and/or MML Investors Services, Inc.
("MMLIS")

Mazer terminated his affiliation with Flore in February 1995. In so doing, he also
terminated his status as a general agent of Mass Mutual and MMLIS.

Mazer used the funds provided to him by Maniscalco to purchase life insurance
policies and at least six variable annuity contracts from Mass Mutual or MMLIS.

Maniscalco alleges that in 1995, Mazer advised them that they would not have to
pay any additional premiums for the life insurance policies since the premiums already
paid were sufficient to cover all future policy premiums.

Maniscalco alleges that this representation was false. In actuality, as a result of
Maniscalco's failure to pay the annual premiums, Mass Mutual automatically charged

the annual premium as a loan against the policy. Maniscalco claims that they first learned that the premiums were being charged as a loan against the policy in 2002. At that time, Mass Mutual had charged them with loans of \$300,000 against the policy for payment of the premiums.

Maniscalco further alleges that by 2002 because of Mazer's mismanagement of their investments the value of their investment in the annuities had fallen to approximately \$100,000.

Maniscalco alleges that they were not advised that Mazer had terminated his affiliation with Flore in February 1995 or that he terminated his status as a general agent for Mass Mutual. They allege that Mazer continued to administer their accounts and held himself as an agent of Mass Mutual after his resignation.

The complaint alleges causes of action for fraud and violation of General Business Law §349.

Plaintiffs demanded, in a Notice for Discovery and Inspection, that Mass Mutual and/or MMLIS produce copies of complaints made to the NASD and/or other regulatory agencies regarding Mazer. Mass Mutual and MMLIS objected to the production of these items asserting that production would be burdensome, that the material may contain confidential material and/or that the material is irrelevant to the claims in this action.

Mass Mutual and MMLIS sought a protective order regarding these items.

By order dated September 6, 2004, this Court directed that these items be

produced for *in camera* inspection. The material was produced for *in camera* inspection, and after such review, by order dated December 14, 2004, the Court granted Mass Mutual and MMLIS' motion for a protective order.

Maniscalco now moves to renew and reargue that order and, upon reconsideration, order the production of any complaints made to the NASD or any other regulatory agencies regarding Mazer.

DISCUSSION

A. Reargument

CPLR 2221(d) provides that a motion to reargue should be so designated, shall be based upon matters of law or fact alleged to have been overlooked or misapprehended by the Court when it decided the initial motion and shall be made within 30 days of service of a copy of the order with notice of entry from which reargument is sought.

A motion to reargue is addressed to the discretion of the court and may be granted upon a showing that the court misapprehended the facts or misapplied the law or, for some other reason, improperly decided the prior motion. Hoey-Kennedy v. Kennedy, 294 A.D.2d 573 (2nd Dept. 2002); Long v. Long, 251 A.D.2d 631 (2nd Dept. 1998); and Foley v. Roche, 68 A.D.2d 558 (1st Dept. 1979). A motion to reargue is not a means by which the unsuccessful party can obtain a second opportunity to argue issues previously decided or present new or different arguments relating to the previously decided issues. Gellert & Rodner v. Gem Community Mgt., Inc., - A.D.3d -, 797 N.Y.S.

2d 316 (2nd Dept. 2005); and McGill v. Goldman, 261 A.D.2d 593 (2nd Dept. 1999).

Maniscalco has failed to indicate how the Court misapprehended the facts, or misapplied the applicable law. Maniscalco has also not demonstrated that the Court improperly decided the motion for any other basis.

Maniscalco is, at best, seeking to present new or different arguments relating to previously decided issues. This is not an appropriate basis for granting reargument. Accordingly, the motion to reargue must be denied.

B. Renewal

CPLR 2221(e) provides that a motion to renew shall be designated as such and shall be based upon new facts, which were not offered on the prior motion and which were not available at the time of the earlier application, and which would change the court's prior determination. Alternatively, renewal can be sought on the grounds that there has been a change in the law that would warrant a result different than the prior determination.

Maniscalco does not allege that the law has changed since the Court issued its December 14, 2004 order.

Maniscalco asserts that "new facts" - - facts Maniscalco learned since the Court issued its September 6, 2004 order - - provide a basis for renewal. When the Court considers these "new facts", Maniscalco urges that production of the material which is subject to the protective order be produced.

The party seeking renewal must provide the Court with a reasonable explanation regarding its failure to present the “new facts” on the prior motion. Renna v. Gullo, - A.D.3d -, 797 N.Y.S.2d 115 (2nd Dept. 2005); and Yarde v. New York City Transit Auth., 4 A.D.3d 352 (2nd Dept. 2004). The party seeking renewal must demonstrate that the facts although in existence were unknown to the party seeking renewal when the original motion was made. Yi v. Ahn, 278 A.D.2d 372 (2nd Dept. 2000); and Miller v. Fein, 269 A.D.2d 371 (2nd Dept. 2000).

The alleged “new facts” presented here relate to discovery obtained from a non-party pursuant to subpoena and pursuant to this Court’s September 6, 2004 order.

After Mazer terminated his employment with Flore, he went to work for Descap Securities, Inc. (“Descap”). When he went to work for Descap, Mazer was required to file a Form U-4 entitled, “Uniform Application for Securities Industry Registration or Transfer” with the NASD. Question 22N on the Form U-4 asks Mazer, “Have you ever been voluntarily resigned, been discharged or permitted to resign after allegation were made that accused you of: (1) violating investment related, statutes, regulations, rules or industry standards of conduct?” Mazer answered these questions “NO”.

Mazer signed this Form U-4 on February 3, 1995, the day he resigned from Flore and Mass Mutual. The Form U-4 was also signed by Helen Antinucci on behalf of Mass Mutual. By signing the Form U-4, the signatories acknowledged that the information contained on the form was accurate.

On February 1, 1999, Mazer filed an amended Form U-4 in which he answered the same Questions 22N "Yes". In explanation of this answer, Mazer asserted that he voluntarily resigned from Flore due to an investigation commenced by MML Investors arising from a customer complaint of September 16, 1994.

The complaint involved whether Mazer advised the customer of Contingent Deferred Sales Charges. Mazer asserted in his amended Form U-4 that he voluntarily resigned because he did not like the way the investigation was being handled. Mazer further claims that he had advised the clients prior to the time of the sale of the Contingent Deferred Sales Charges and that the contract which was delivered to the customer contained a description of all charges and expenses. The amended Form U-4 indicates that the matter was closed and settled as a result of his voluntary resignation.

The other "new facts" upon which Maniscalco relies in connection with their application for renewal is the copy of the contract between Mazer and Flore by which Mazer became an agent of Mass Mutual. There is a handwritten notation of unknown origin on the contract which states: "Terminate for Cause, 2-3-95." This document was provided to Maniscalco on October 8, 2004 in compliance with the Court's September 6, 2004 order.

Despite the notation on the contract, Roger Flore testified at his deposition that Mazer's termination from Mass Mutual was voluntary.

Maniscalco asserts that this material is discoverable in connection with their General Business Law §349 causes of action. More specifically, Maniscalco alleges that the material relates to their claim that Flore and Mass Mutual violated General Business Law §349 by failing to advise their customers of Mazer's misleading business practices and/or taking appropriate action to assure that Mazer was not making false or misleading statements to the public about the products.

General Business Law §349 makes actionable conduct which does not rise to the level of common law fraud. Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999). The statute provides a remedy to consumers who have been subject to deceptive or misleading business practices. Oswego Laborers Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20 (1995). For the purposes of General Business Law §349, a deceptive act or practice is one which is likely to mislead the reasonably prudent consumer. Karlin v. IVF America, Inc., 93 N.Y.2d 282 (1999); and Acquista v. New York Life Ins. Co., 285 A.D.2d 73 (1st Dept. 2001).

The amended complaint makes clear that the liability of Flore and Mass Mutual is premised on *respondeat superior*. Maniscalco asserts that Flore and/or Mass Mutual are liable for Mazer's actions because Mazer was their employee and/or agent when he made the misleading and/or deceptive representations. Maniscalco further alleges that because Flore and/or Mass Mutual failed to advise them that Mazer had terminated his affiliation with those companies, they are liable for Mazer's actions committed after he terminated his affiliation.

Based upon this “new evidence,” renewal is appropriate. In the first instance, this material was not available when the initial motion was heard. Mazer’s employment contract was produced in compliance with the Court’s September 6, 2004 order. The Forms U-4 were produced pursuant to subpoena in July, 2004, which is after the submission of the motion which resulted in the Court’s September 6, 2004 order.¹ Therefore, none of this material was considered by the Court when it rendered its September 6 or December 14, 2004 orders. Clearly, these items are “new facts” which existed at the time the original motion was heard but were unknown to Maniscalco when that motion was decided. Additionally, Maniscalco offers a valid reason for not providing this material to the Court.

Several of the complaints made to Mass Mutual and/or Flore relate misrepresentations purportedly made by Mazer to customers regarding provisions of insurance policies and/or annuities and payments due thereon. The notation on Mazer’s contract that he was terminated for cause certainly contradicts Mazer and Flore’s testimony that Mazer voluntarily resigned.

CPLR 3101(a) provides for full disclosure of “...all matter material and necessary in the prosecution of the action...regardless of the burden of proof.” In determining whether the demanded information is subject to discovery, the Court must determine if the information will “...assist preparation for trial by sharpening the issues and reducing

¹The motion was decided by the Court’s September 6, 2004 order was submitted on May 18, 2004.

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delay and prolixity.” Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 406 (1968).

Discovery must be provided if the material can be used as evidence in chief, for rebuttal or for cross examination. Wind v. Eli Lilly & Co., 164 A.D.2d 885 (2nd Dept. 1990).

Discovery is permitted of material that is not admissible in evidence provided that the material may lead to the discovery of admissible evidence. Southampton Taxpayers Against Reassessment v. Assessor of the Village of Southampton, 176 A.D.2d 795 (2nd Dept. 1991); and Fell v. Presbyterian Hospital in the City of New York, 98 A.D.2d 624 (1st Dept. 1983).

The party seeking the discovery has the burden of establishing that the demanded material may lead to the discovery of admissible evidence while the party opposing the production has the burden of establishing that the material is irrelevant, privileged or confidential. Crazytown Furniture, Inc. v. Brooklyn Union Gas, 150 A.D.2d 420 (2nd Dept. 1989); and Herbst v. Bruhn, 106 A.D.2d 546 (2nd Dept. 1984).

The notation on Mazer’s contract that he was terminated for cause contradicts Mazer and Flore’s testimony that Mazer resigned voluntarily. Additionally, these documents may have some relevance in connection with what Flore and/or Mass Mutual knew about Mazer’s conduct and the type of unchecked representations he was making to the public regarding Mass Mutual products.

Thus, renewal is appropriate. On renewal, the Court directs production of all material previously produced for *in camera* inspection regarding complaints made to Mass Mutual, MMLIS and/or Flore about Mazer prior to February 3, 2005. Two of the

complaints were made after Mazer terminated his employment with Mass Mutual and Flore and, thus, are too remote to the issues herein.

In granting renewal and directing production, it must be clearly understood that this Court is not ruling on the relevance or admissibility of this material at trial. Rulings on these issues are reserved for trial.

However, due to the potential harm that may be caused by the exchange of the material, which the Court may determine are not relevant or are otherwise inadmissible, such material shall be produced solely for use by the attorneys for the parties in connection with this action and shall not be disclosed to the Plaintiffs or anyone else without prior consent of the attorneys for Mass Mutual and Flore or by order of this Court.

Accordingly, it is,

ORDERED, that Plaintiffs' motion seeking reargument of this Court's order of December 14, 2004 is **denied**; and it is further,

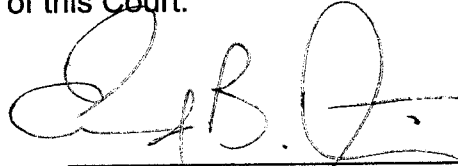
ORDERED, that Plaintiffs' motion seeking renewal of this Court's order of December 14, 2004 is **granted** to the extent indicated and the such material shall be provided to counsel for the Plaintiffs and Flore within ten days of service of a copy of this order with Notice of Entry; and it is further,

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ORDERED, that the material produced pursuant hereto shall be for used by counsel solely for the purposes of this action and shall not be disclosed to Plaintiffs or any other person without prior written consent of the attorneys for Mass Mutual, MMLIS and Flore or by order of this Court.

This constitutes the decision and order of this Court.

Date: Mineola, NY
August 1, 2005



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

AUG 03 2005

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**