

SCAN

**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK**  
**PRESENT: HON. DANIEL MARTIN**  
**Acting Supreme Court Justice**

**CULINARY CONNECTION HOLDINGS, INC., a New  
York Corporation, and LYNDIA BERMAN.**

**TRIAL/IAS, PART 34  
NASSAU COUNTY**

**Plaintiffs.**

**Index No.: 004747/95  
Sequence No.: 015**

**- against -**

**THE CULINARY CONNECTION OF GREAT NECK,  
INC., a New York Corporation, DEMETRA SIRICA,  
and ANTHONY SIRICA,**

**Defendants.**

**and**

**JOHN SERVIDER, ESQ., Individually and as Escrow  
Agent.**

**Defendant.**

**The following named papers have been read on this motion:**

	<b>Papers Numbered</b>
<b>Notice of Motion and Affidavits Annexed</b>	<b>X</b>
<b>Order to Show Cause and Affidavits Annexed</b>	
<b>Answering Affidavits</b>	<b>X</b>
<b>Replying Affidavits</b>	<b>X</b>

Plaintiffs' move for what is termed renewal of its prior motion for costs, and upon granting such renewal for an order awarding plaintiffs \$24,990.55 in costs pursuant to CPLR 8303(b) and \$700 pursuant to CPLR 8201.

The court by short form order dated January 28, 2005 denied plaintiffs' prior motion to award costs in the sum of \$71,270.36 in connection with their attempts at collecting the amended judgment against defendants in the sum of \$273,986 plus interest. In denying said motion the court found that it would not impermissibly amend its judgment in a substantive manner, as plaintiffs failed to seek said costs in its proposed judgment. See, Bank of New York v. Carlucci, 289 A.D.2d 349 (2<sup>nd</sup> Dep't 2001).

In the instant motion, plaintiffs seek to renew the prior motion on the bases that 1)

plaintiffs are entitled to discretionary costs pursuant to CPLR 8303(b); and 2) the court erred in not granting plaintiff's costs on the basis that to do so would constitute a substantive amendment of the judgment. At the outset, it appears that plaintiffs are more properly moving to reargue the prior motion. CPLR 2221. The court shall treat the motion as if properly made. Plaintiffs' motion to reargue is granted and, upon reargument, their motion for the taxation of \$25,660.55 in costs is denied.

CPLR 8303(b) provides that on a motion relating to the enforcement of a judgment, the court in its discretion may award plaintiffs the greater sum not exceeding 5 per cent of the judgment or \$50.00. Having reviewed plaintiffs' prior motion, the court notes that plaintiffs noticed the motion for the taxation of costs pursuant to CPLR 8402 and that plaintiffs almost exclusively argue for the additional taxation of such costs. It is not until the end of the motion that plaintiffs mention that the court may award a discretionary sum pursuant to CPLR 8303(b). As the original motion was not noticed as a motion under CPLR 8303(b), the court shall not permit plaintiffs to change their theory at this stage. See, Foley v. Rochee, 68 A.D.2d 558 (1<sup>st</sup> Dep't 1979).

The court also rejects plaintiffs' position that the court erred in finding that to permit plaintiff to tax the additional costs would constitute a substantive amendment to the judgment. Plaintiffs essentially argue that because the court had not made an express prior determination that plaintiff was not entitled to costs, that to permit the taxation of costs is not a substantive amendment. The fact remains, however, that this court did not execute a judgment which provided for said costs. If permitting such is not a substantive amendment, then the court can only speculate as to what is a substantive amendment.

Accordingly, based upon the foregoing, plaintiffs' motion is hereby denied in its entirety.

So Ordered.

Dated: May 18, 2005

**ENTERED**  
MAY 27 2005  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE  
A.J.S.C. 