

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12<sup>th</sup> day of January, 2006.

**P R E S E N T:**

**HON. BRUCE M. BALTER,**

**Justice.**

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**WLADYSLAW BRZOZOWY,**

**Plaintiff,**

**- against -**

**ELRAC, INC., and STYLIANOS TZOURALIS**

**Defendant(s).**

\_\_\_\_\_ X

**DECISION/ORDER**

**Index No. 48543/02**

The following papers numbered 1 to 4 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-4 and Exhibit A</u>
Opposing Affidavits (Affirmations) _____	<u>1-9 and Exhibit A</u>
Reply Affidavits (Affirmations) _____	<u>X</u>
_____ Affidavit (Affirmation) _____	<u>X</u>
Other Papers _____	<u>X</u>

**Procedural History**

Upon the foregoing papers, this is a post-trial Motion by Wladyslaw Brzozowy (“plaintiff”), for an Order pursuant to CPLR §2221, permitting renewal and re-argument of the rulings made by the Court

regarding evidentiary issues at the liability and damages portion of the trial.<sup>1</sup> A jury verdict on the issue of liability was reached in this matter on June 9, 2005. A jury verdict on the issue of damages in this matter was reached on September 1, 2005. The plaintiff served the instant Motion on November 3, 2005.

### **Discussion**

#### **1. The Plaintiff's Motion is Improper.**

The instant combined Motion to reargue and renew, is an improper utilization of CPLR §2221. This motion is misplaced, as the proper avenue for any post-trial motion would be CPLR §4405. Defense counsel argues quite astutely that the reason why plaintiff's counsel preferred to rely upon CPLR §2221 as opposed to CPLR §4405 is because a motion pursuant to CPLR §4405 would be untimely. All post trial motions, including those based upon new evidence and for reargument, must be made "withing fifteen days after ... verdict" (CPLR §4405). CPLR §4406 plainly states that:

"there shall only be one motion under this article with respect to any decision by a court, or to a verdict on issues triable of right by jury; and each party shall raise by the motion or by demand under rule 2215 every ground for post-trial relief then available to him."

The plaintiff served this motion on November 3, 2005, and the jury verdict on the issue of liability was reached on June 9, 2005. The jury verdict on the issue of damages was reached on September 1, 2005. Therefore, this motion which seeks to challenge evidentiary rulings made during both stages of trial, was made nearly five months after the liability verdict, and more than two months after the damages verdict. Although the Appellate division has held that "[a] litigant's failure to timely move is not necessarily fatal if the litigant can establish "good cause" for the delay", the instant motion did not ask for leave to make a late CPLR §4405 motion, nor did it proffer any "good cause" for the delay. In fact, the plaintiff's motion points to a single exhibit, a copy of the Appellate Division's decision to suspend a former associate of the defense counsel, for misconduct which occurred more than three years prior to the subject trial. Although the trial on liability was conducted by defense counsel's suspended former associate, the trial on damages was conducted by another attorney. There is no evidence that either attorney committed any misconduct

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<sup>1</sup> Although the plaintiff's motion is defective for failure to conform with CPLR §2214 [c], this court examined and decided the motion in the interest of justice and judicial economy.

during the course of the instant trial, no allegations were ever made at the time of trial, and no objection was ever interposed at the time of trial.

Courts routinely deny post-trial motions made more than fifteen days after the verdict, as time barred. A movant's request to label a time barred CPLR §4405 motion as one for reargument, has been repeatedly rejected and such rejections have been upheld by the Appellate Division (*Casey v. Slattery*, 213 AD2d 890 [3<sup>rd</sup> Dept 1995]). In *Casey, supra*, the Appellate Division maintained in relevant part, that:

“[the trial court] should not have accepted plaintiff's characterization of his motion as one for reargument since it was an obvious artifice designed to evade the time limitation of CPLR §4405 (citation omitted). Additionally, such maneuver was not in accord with the procedure set forth in CPLR §4406.” *Id.* at 891.

2. The Plaintiff's Motion Fails to Identify and Support Each Item of Relief Sought.

CPLR §2221 permits the movant to combine in one motion both a reargument and renewal request, requiring the movant "to identify separately and support separately each item of relief sought." The court in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made (*Andrade v. Triborough Bridge and Tunnel Authority*, 10 Misc3d 1063 (a) [Bronx County 2005]). The moving papers at bar fail to identify, and support separately each item of relief sought, to wit, reargument and renewal. The plaintiff has not, with specificity, made references to particular issues, and/or evidentiary rulings. This constitutes a fatal procedural error and is a ground for denial by the court. Moreover, in the instant case, the plaintiff's motion is further defective in that it fails to conform with the requirements of CPLR §2214 [c], in that the plaintiff did not attach a full transcript of the trial for the court's use in determining the viability of his respective arguments. Without a transcript, the court and the defendants alike are deprived of the possibility to review the counsel's affirmation's specific contentions. In the absence of a full trial record, including a transcript, reargument is unavailable (*Lower Main Street, LLC v. Thomas Re & Partners*, NYLJ, 4/5/2005, p. 19. col. 3 [Sup Ct Nassau County 2005]), cited by David D. Siegel, *Supp Practice Commentary*, McKinney's C2221:7; See also, *Gerhardt v. New York City Transit Authority*, 8 AD3d 427 [2<sup>nd</sup> Dept 2004]).

3. Motion to Reargue.

The purpose of a motion for reargument is to afford a party an opportunity to demonstrate that the

court overlooked or misapprehended the law or facts pertinent to the original motion (*Andrade, supra* at \*\*3) citing: (CPLR §2221 [d] [2]; *Andrea v. E.I. Du Pont de Nemours & Co.*, 289 AD2d 1039, 1040-1041). Its purpose is not to serve as a vehicle to permit the unsuccessful party to reargue once again the very questions previously decided (*Foley v. Roche*, 68 AD2d 558, 567 [1<sup>st</sup> Dept 1979]). Here, there is no new evidence, misapprehensions of law, or facts pursuant to the instant case. The plaintiff argues that Defense counsel's associate's suspension for failure to be forthright and honest with regard to the exchange of evidence, is enough indicia for this court to conclude that he employed similar tactics during the course of the liability trial in the case at bar. Without any reference to a transcript, the motion points to vague and ambiguous occurrences that, even if substantiated, having never been raised by the plaintiff prior to the instant motion, are moot. Therefore, with respect to a separate analysis regarding a motion to reargue, this court finds this motion to be procedurally defective, and is hereby denied in its entirety.

4. Motion to Renew.

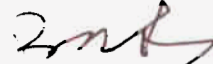
With respect to a motion for renewal, the Appellate Division, Second Department opined in *Goetschius v. Board of Educ. Of the Greenburgh Eleven Union Free School District*, (281 Ad2d 418 [2<sup>nd</sup> Dept 2001]) that: "... 'It is well settled that a motion for leave to renew must be supported by new or additional facts which, although in existence at the time of a prior motion, were not known to the court' (*E.I. Du Pont de Nemours & Co., supra*). Here, there is no new evidence pertinent to the instant case, but merely vague arguments already heard and rejected by this court. The moving papers, relying upon mere bare speculations, fall far short of the proof required for an argument for renewal. Moreover, a jury verdict should be set aside only where it appears to the trial judge that the verdict is palpably wrong and that the jury could not have reached the conclusion it did upon any fair interpretation of the evidence (*Nicastro v. Park*, 33 AD2d 129 [2<sup>nd</sup> Dept 1985]). Here, the plaintiff has failed to provide any credible fact that warrants a reversal of the jury verdict. Therefore, with respect to a separate analysis regarding a motion to renew, this court finds this motion to be procedurally defective, and is hereby denied in its entirety.

**Conclusion**

For the foregoing reasons, the plaintiff's motion is denied in its entirety.

This opinion shall constitute the Decision and Order of the Court.

Dated: January 18, 2006



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Hon. Bruce M. Balter  
Justice of the Supreme Court