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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

GOLDBERG & CONNOLLY,

TRIAL TERM PART: 47

Plaintiff,

-against-

INDEX NO.:008713/06

**MOTION DATE:9-21-09
SUBMIT DATE:10-20-09
SEQ. NUMBER - 005**

XAVIER CONTRACTING, LLC.,

Defendants.

-x

The following papers have been read on this motion:

Order to Show Cause, dated 9-8-09.....	1
Affirmation in Opposition, dated 10-9-09.....	2
Reply Affirmation, dated 10-20-09.....	3

Plaintiff's motion pursuant to CPLR §2308 (i) to compel defendant and non-party Frank Acocella to give testimony pursuant to a subpoena issued by plaintiff, (ii) to impose penalties upon defendant and Acocella for failure to comply with its subpoena, (iii) for an order of civil contempt for failure to comply and (iv) for costs and disbursements, is denied.

Plaintiff obtained a judgment against defendant, an entity of which Acocella is a principal, and served upon each of defendants and Acocella a subpoena to take deposition and to produce a broad panoply of books and records pertaining to defendant, at plaintiff's law office in Nassau County. There being no appearance, this motion ensued.

Thereafter, before submission of this motion to the Court, the parties agreed by stipulation that if Acocella appeared to give testimony at a deposition on a date certain with the requested records, this motion would be withdrawn. Acocella did appear as required, gave a deposition for several hours which consumed more than 100 pages of transcript and delivered numerous documents.

After the deposition, plaintiff wrote to defendant and Acocella (on the same day) and informed them that in light of their failure to fully comply with the subpoenas, this motion would not be withdrawn.

Despite the foregoing, plaintiff has allowed this motion to be submitted on its original order to show cause and attachments which preceded the stipulation and appearance and without informing the Court of the intervening events.

As an application to punish for contempt, the motion fails because of a lack of compliance with Judiciary Law §756.

As a motion to compel, the application is denied because (i) there was compliance with the stipulation of the parties and thus the motion should have been withdrawn and (ii) the movant has failed to apprise the Court of the intervening events, information which is necessary in order to permit the Court to make an informed decision.

With respect to compliance, the Court has read the extensive deposition in which 17 exhibits were marked and finds that Acocella gave appropriate, non-evasive responses to the questioning and adequately explained the documents produced.

The failure to fully apprise the Court of events subsequent to the original motion papers, cannot be cured by way of the reply that was submitted. Plaintiff is a law firm

representing itself. The moving papers are based on an affidavit of an attorney, however, the reply is submitted in the form of an affirmation, not an affidavit, and thus, has not, except for the exhibits, been considered. Statements of an attorney who is also a party should be in affidavit form (CPLR 2106), and, if not, may be excluded from consideration. *Lessoff v. 26 Court Street Assoc., LLC*, 58 AD3d 610 (2d Dept. 2009); *LaRusso v. Katz*, 30 AD3d 240 (1st Dept. 2006); *Samuel & Weininger v. Belovin & Franzblau*, 5AD3d 466 (2d Dept. 2004). Even if considered a reply, may not cure deficiencies in the original moving papers. The new material contained in the reply for the first time should not be considered *Luft v. Luft*, 52 AD3d 479 (2d Dept. 2008). The function of reply papers is to address arguments made in opposition to the position taken by the movants and not to permit them to introduce new arguments in support of the motion. *Paul v. Cooper*, 45 AD3d 1485 (4th Dept. 2007); *Allstate Insurance Company v. Dawkins*, 52 AD3d 826 (2d Dept. 2008). Here, the reply goes far beyond its purpose and in effect, sets forth new bases for granting relief.

It is evident from a reading of the affirmation in reply that the author is not affirming from personal knowledge. There are numerous references to actions, conversations and events in which the active party is said to be “G & C” not the affirming attorney. Finally, the reply takes issue with the answers given at deposition but aside from conclusory speculation and innuendo, fails to state how a further deposition would serve any purpose and offers no objective evidence that Acocella is withholding or secreting evidence.

For all of the foregoing reasons, the motion is denied. The Court has not considered defendant’s and Acocella’s request for affirmative relief because such requests were not made by way of cross motion, see CPLR § 2215, however, they are given leave to move on proper papers for such relief.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: October 28, 2009


HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED

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COUNTY CLERK'S OFFICE