Index No: 37932/2008

SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

MOT. SEQ: 010 MD

PRESENT:

Hon. RALPH T. GAZZILLO
A.J.S.C.

SUFFOLK ANESTHESIOLOGY ASSOC., P.C., by its Board of Directors consisting of ELLIOT ROSSEIN, M.D., ANTHONY BONANNO, M.D., BENJAMIN KIRSCHENBAUM, M.D., and JAMES SUAZO,	:	ROSENBERG CALICA & BIRNEY, LLP Attorneys for Plaintiffs 100 Garden City Plaza, Suite 408 Garden City, N.Y. 11530-3200
Plaintiff(s),	:	DEVITT SPELLMAN BARRETT, LLP
- against -	:	Attorneys for Defendant 50 Route 111
MATTHEW J. VERDONE, D.O.,	:	Smithtown, N.Y. 11787
Defendant(s).	:	

Upon the following papers numbered 1 to 18 read on this motion; Notice of Motion and supporting papers; Notice of Cross Motion and supporting papers numbered 1-14; Affirmation in Opposition and supporting papers numbered 15-18; it is,

ORDERED that the defendant's motion (seq. 010) for contempt is denied as withdrawn without prejudice, and it is further

ORDERED that the cross- motion by plaintiff for leave to reargue the prior motion by plaintiff which set (because the parties were unable to agree) the amount of the undertaking plaintiff was directed to provide in connection with its temporary restraining is denied (***Neikam v County of Suffolk***, 253 AD2d 416,675 NYS2d 900 [2d Dept 19981, citing ***Lawless v O'Brien***, 222 AD2d 657, 636 NYS2d 92 [2d Dept 1995]), and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this Order with Notice of Entry upon counsel for defendant, pursuant to CPLR 2103(b)(l), (2) or (3), within twenty (20) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

The motion herein seeks to reargue the prior Short Form Order of this Court dated March 24, 2010 wherein plaintiff was directed to post an undertaking in the amount of seven (7) million dollars pursuant to CPLR §6312(b) to secure against damages that could be incurred by the defendant if the preliminary injunction was erroneously granted.

A motion to reargue is designed to afford a party the opportunity to establish that the court overlooked or misapplied a controlling principle of law and "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR §2221 [d][2]; see, ***Schneider v Soloway,*** 141 AD2d 813; ***Town of Riverhead v TS Haulers***, 275 AD2d 774,776; see ***McGill v Goldman,*** 261 AD2d 593.). It is within the Court's sound discretion to grant a motion to reargue (see **Schneider v. Sozoway**, supra.). The purpose of the motion to reargue is not to afford the aggrieved party a second chance to argue over the very questions previously decided (See, ***Pro Brokerage, Inc. v Home Ins. Co.,*** 99 AD2d 971; ***Foley v Roche,*** 68 AD2d 558; app after. rem 86 AD2d 887; app den 56 NYS2d 507.). The party seeking a motion to reargue make the application within thirty (30) days "after service of a copy of the order determining the prior motion" and must set forth the facts or law the court overlooked in making the original decision (see, CPLR §2221(2)(d)(3)).

Pursuant to CPLR §6312(b), the amount of the undertaking set for a preliminary injunction is intended to cover the defendant for "all damages and cost which may be sustained by reason of the injunction"(see CPLR §6312(b)). Here, plaintiff has not provided any additional or new empirical evidence sufficient to establish that the Court overlooked or misapplied the law which would warrant the reargument of the Court's prior determination regarding the undertaking. Plaintiff merely reiterates its prior arguments.

This action was initiated in 2008. Dr. Verdone has been enjoined from engaging in certain types employment and/or activities since September 2009. Dr. Verdone's assertion that his income was at least 2 million dollars annually has not been adequately or empirically refuted by the plaintiffs. If Dr. Verdone were to prevail at trial it is not at all inconceivable that he could prove damages in excess of 7 million dollars due to the preliminary injunction.

Based upon the foregoing, it is clear that this Court has neither overlooked nor misapplied the controlling principal of law.

Accordingly, plaintiff's motion to reargue is denied.

Dated: 2/8/12
RIVERHEAD, NY

Ralph T. Gazzillo
A.J.S.C.

NON-FINAL DISPOSITION