

Eskenazi v Mackoul
2012 NY Slip Op 01425
Decided on February 21, 2012
Appellate Division, Second Department
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Decided on February 21, 2012

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT**

WILLIAM F. MASTRO, A.P.J.

MARK C. DILLON

SANDRA L. SGROI

ROBERT J. MILLER, JJ.

2011-01453

(Index No. 17248/06)

[*1]Lynn Eskenazi, et al., respondents,

v

Robert E. Mackoul, et al., appellants.

Traub Lieberman Straus & Shrewsbury, LLP, Hawthorne, N.Y.
(Gerard Benvenuto and Sheryl A. Bruzzese of counsel), for
appellant One Beacon Insurance Company.

Sobel & Schleier, LLC, Huntington, N.Y. (Curtis Sobel and

Christopher J. Roess of counsel), for appellants Robert E. Mackoul, Deborah K. Mackoul, and Hanover Insurance Group.
Frederick Eisenbud, Commack, N.Y. (John Pittoni of counsel), for respondents.

DECISION & ORDER

In an action to recover damages for personal injuries and injury to property, the defendant One Beacon Insurance Company appeals, and the defendants Robert E. Mackoul, Deborah K. Mackoul, and Hanover Insurance Group separately appeal from an order of the Supreme Court, Nassau County (Phelan, J.), dated December 17, 2010, which denied the motion of the defendant One Beacon Insurance Company, in which the defendants Robert E. Mackoul, Deborah K. Mackoul, and Hanover Insurance Group joined, for leave to renew its prior motion, in which the defendants Robert E. Mackoul, Deborah K. Mackoul, and Hanover Insurance Group joined, inter alia, to compel further discovery after the filing of the note of issue, which had been denied in an order of the same court dated July 1, 2010.

ORDERED that the order dated December 17, 2010, is affirmed, with one bill of costs payable by the defendants appearing separately and filing separate briefs.

Pursuant to CPLR 2221(e), a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2], [3]). Although a court has the discretion to grant renewal upon facts known to the movant at the time of the initial motion, the movant must

offer a reasonable justification for the failure to present those facts on the initial motion (see *May v May*, 78 AD3d 667; *Schenectady Steel Co., Inc. v Meyer Contr. Corp.*, 73 AD3d 1013; *Lawman v Gap, Inc.*, 38 AD3d 852; *Lafferty v Eklecco, LLC*, 34 AD3d 754, 754-755). "[A] motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Renna v Gullo*, 19 AD3d 472, 473, quoting *Rubinstein v Goldman*, 225 AD2d 328, 329; *see Coccia v Liotti*, 70 AD3d 747, 753; *Huma v Patel*, 68 AD3d 821, 822). [*2]

Here, the Supreme Court providently exercised its discretion in denying the motion for leave to renew, since the defendants failed to set forth a reasonable justification as to why they did not depose certain individuals or investigate the underground petroleum storage tank on the plaintiffs' property prior to their initial motion (see *Ferdico v Zweig*, 82 AD3d 1151; *Huma v Patel*, 68 AD3d 821; *Baldwin v Mateogarcia*, 66 AD3d 806; *cf. Gonzalez v Vigo Constr. Corp.*, 69 AD3d 565). In any event, the defendants failed to demonstrate that the new facts would change the Supreme Court's prior determination denying their motion to compel further discovery after the filing of the note of issue (*see* CPLR 2221[e][2]). The existence of the underground petroleum storage tank on the plaintiffs' property was made known to the defendants in January of 2008, prior to the close of discovery. The defendants' lack of diligence in investigating the tank does not constitute an "unusual or unanticipated circumstance[] develop[ing] subsequent to the filing of [the] note of issue" which would warrant further discovery (22 NYCRR 202.21[d]; see *Tirado v Miller*, 75 AD3d 153, 161; *Silverberg v Guzman*, 61 AD3d 955, 956; *Marks v Morrison*, 275 AD2d 1027; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 140).

MASTRO, A.P.J., DILLON, SGROI and MILLER, JJ., concur.

ENTER:

Aprilanne Agostino

Clerk of the Court