To be Argued by:
JOSEPH J. HEATH
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

CAYUGA NATION,

Docket No.:
CA 23-00740

Petitioner-Appellant,

– against –

CARLIN SENECA-JOHN and CARLIN SENECA-JOHN
d/b/a Gramma Approved Sovereign Trades,

Respondents-Respondents.

BRIEF FOR RESPONDENTS-RESPONDENTS

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QUESTIONS PRESENTED:

Question: Was the denial of Appellant's motion for leave to reargue appealable in this Court?

Answer: No.

Question: Was the denial of Appellant's motion for leave to renew proper because it presented no new facts which had not been known at the time of its filing of its Petition?

Answer: Yes.

Question: Was the denial of Appellant's motion for leave to renew proper when Appellant did not present reasonable justification for renewal, as mandated by CPLR 2221(e)(3)?

Answer: Yes.

Question: Whether a default money judgment from a tribal court, based solely on a fine, was entitled to recognition as a New York State Supreme Court judgment, pursuant to CPLR 5302 (b) (2)?

Answer: No.

PRELIMINARY STATEMENT

In this appeal, Appellant seeks this Court's review of the lower court's proper denial of Appellant's Motion for leave to renew and reargue. Since New York law is absolutely clear that the denial of a motion for leave to reargue is not appealable, this appeal must be denied.

Although Appellant's motion also claimed to also contain a motion for leave to renew, no new facts were submitted which were unknown to Appellant at the time of the filing of the Petition. Therefore, pursuant to CPLR 2221(e)(2), it was properly denied.

Further, Appellant's motion, denominated as a motion for leave to renew, failed to present the reasonable justification mandated by CPLR 2221(e)(3), and therefore was properly denied.

Lastly, Appellant's motion was fatally defective from the outset, as the underlying judgment at issue seeks enforcement of a fine, which is prohibited by CPLR 5302 (b) (2).

This is Appellant's second appeal in this same matter, and although it purports to appeal the denial of Appellant's motion for leave to reargue and renew, the vast majority of the text of this second appeal does not address that motion denial. Instead, it repeats the same arguments which were contained in Appellant's first appeal, Index No. CA 22-01826.

STATEMENT OF FACTS

The lawsuit underlying the present action was initiated in Appellant's court against Respondent Carlin Seneca on December 10, 2021. (R. 14). Appellant's court ultimately levied a civil fine against Mr. Seneca for $28,000. (R. 14). Neither party disputes that the January judgment constitutes a fine. *See* (R.14). Appellant sought to domesticate this January judgment in New York by bringing an action pursuant to N.Y.C.R.R. § 202.71. (R. 8-10.)

The lower court judge declined to enter a judgment in favor of Appellant, expressing doubts regarding the validity and jurisdiction of Appellant's tribal court. (R. 17-18). The appeal of that decision of the court below is also before this Court, index no. CA 22-01826. Subsequent to the aforementioned denial, Appellant filed a motion for leave to renew and reargue, alleging, *inter alia*, that the Nation was not required to demonstrate its jurisdiction and that the tribal court was valid under Nation law. (R. 21-24). This motion was correctly denied on the grounds that "the Cayuga Nation Civil Court has no legal authority" to regulate citizens living on the territory in question, because the Cayuga Nation Court system "does not provide impartial tribunals or procedures compatible with the requirements of due process of law." (R. 3-6). The present appeal challenges the judge's denial of the petitioner's motion to renew and reargue.

ARGUMENT

POINT ONE

DENIAL OF A REARGUMENT MOTION IS NOT APPEALABLE, AND THIS APPEAL SHOULD BE DISMISSED.

New York common law is fundamentally clear that denial of a motion for reargument is not appealable: "[i]t is *well settled* that the denial of motion to reargue is not appealable . . . ." *Roberts v. County Court of Wyoming County*, 39 AD 2d 246, 248 (4th Dep't 1972) (emphasis added), a*ff'd* 34 NY 2d 246 (1974); *see also Phillips v. Village of Oriskany*, 57 AD 2d 110, 113 (4th Dep't 1977); *Crouse-Irving Memorial Hospital, Inc. v. Chartier*, 125 A 2d 971 (4th Dep't 1986); *Entech Engineering, PC v. Leon DeMatteis Construction Corp*., 176 AD 3d 500 (1st Dep't 2019); *Wilmington Savings Fund Society, FSB v. Matamoro*, 200 AD 3d 79 (2d Dep't 2021); *Hyman v. Pierce*, 145 AD 3d 1224 (3d Dep't 2016); *Kitchen v. Crotona Park W. Hous. Dec. Fund Corp.,* 145 A.D.3d 521 (1st Dep't 2016).

Respondents respectfully submit that Appellant's motion, while denominated for leave to "renew and reargue," is in actuality just a motion for reargument. Appellant offered no new facts which were not known at the time of the Petition, and failed to provide a reasonable justification for why the additional submissions were not originally produced in support of its Petition. A careful review of the

Attorney Affirmation in support of the Motion, (R. 21), the supplemental Appellant's Attorney Affirmation, (R. 40), and the Court's denial of the motion, (R. 17), support this view that the motion was actually for reargument, and not for renewal.

The Decision and Order challenged in this appeal was the denial of a motion for leave to reargue, and therefore not appealable. Consequently, this appeal should be dismissed.

POINT TWO

APPELLANT'S MOTION FOR LEAVE TO RENEW AND REARGUE IS IN ACTUALITY ONLY A MOTION TO REARGUE:

Even though this branch of Appellant's motion was denominated as a motion for leave to renew, it was in reality a motion for reargument, because it was not based on new facts. Hence, its denial is not appealable, and this appeal should be dismissed. *See Tokio Marine and Fire Ins. Co., Ltd. V. Borgia*, 11 AD 3d 603, 604 (2d Dep't 2002):

> The branch of the appellant's motion, denominated as one for leave to renew the plaintiff's prior motion, *was not based on new evidence which was unavailable to them at the time* of the original motion, and *therefore the motion was, in effect, one for reargument,* the denial of which is not applicable" [emphasis added].

In this appeal, this Court is asked to review the denial of Appellant's motion in the court below which was denominated by the Appellant as a motion for leave to renew. However, since it was not based on new evidence as detailed herein, it must be regarded as a motion for leave to reargue. There is no appeal from a motion for leave for reargument, and this appeal should be dismissed.

POINT THREE

CPLR 2221(e)(2) MANDATES THAT A MOTION FOR LEAVE TO RENEW BE BASED UPON NEW INFORMATION:

Even if this Court determines that Appellant presented a motion to renew, the lower court properly denied it. In *Deutsche Bank Trust Co. v. Ghaness*, 100 AD 2d 585, 586 (2d Dep't 2012), the Second Department reviewed a motion for leave to renew and made these findings:

> A motion for leave to renew *must be based upon new facts,* not offered on the original motion that would change the prior determination. The new or additional facts either *must have not been known to the party* seeking renewal or may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the motion. However, in either instance, a reasonable justification for the failure to present such facts on the original motion must be presented. (CPLR 2221(e)(3)). Here, the "new evidence" offered by the appellant consisted of information *which appellant knew or should have known to have existed* at the time of his motion . . .

> , and he failed to set forth a reasonable justification as to why he failed to submit this information in the first instance.
>
> Accordingly, the Supreme Court properly denied that branch of the appellant's motion which was for leave to renew. . . . [internal citations and quotations omitted, emphasis added].

Appellant's motion suffers the same deficiencies as the motion in *Ghaness*, and so was properly denied by the court below. The motion did not offer the court below any new information which was unknown to the Appellant at the time of the filing of the Petition, and it failed to provide a reasonable justification for why the existing information that it did provide was not originally presented to the court.

The timeline in the instant matter lays bare the fundamental deficiency in Appellant's motion: the information at issue was readily available to the Appellant, who simply failed to provide it to the court below as a part of a litigation strategy that it now regrets. To wit:

1. the Decision and Order denying Appellant's request for recognition of the default tribal court judgment, R. 17, was rendered on July 19, 2022.[1]
2. Appellant filed its Motion for Leave to Reargue and Renew, R. 19 to 24, on August 5, 2022.

[1] This matter is on appeal now before this Court, index no. CA 22-01826

3. This Motion includes an Affirmation by Appellant's which addresses "Petitioner's Motion for Leave to Renew" in paragraphs 6 to 11, R. 22 & 23. Appellant attached several exhibits to this Affirmation, including:
    a. a *2020 Ordinance of the Appellant*, R. 26 10 31 [emphasis added], and
    b. a *2020 Resolution of the Appellant* [emphasis added].

Clearly, the 2020 Ordinance and Resolution were known to the Appellant when it filed its Petition in January of 2022, and Appellant presents no argument or information to the contrary.

Appellant chose to withhold those Ordinances and Resolution—known facts—from the court as a part of its litigation strategy. If the facts are "known" and the moving party, on a motion for leave to renew, wishes to submit them, CPLR 2221(e)(3) mandates that the moving party provide ". . . *reasonable justification* for failure to present such facts on the prior motion" (emphasis added). *See Ulster Sav. Bank v. Goldman*, 183 Misc. 2d 893, 894 (Sup. Ct. Rensselaer Co. 2000); *Deutsche Bank Tr. Co. V. Ghaness*, 100 A.D.3d 585 (2d Dep't 2012); *Maddox v. Schur*, 53 AD 3d 738, 739 (3d Dep't 2008). Accordingly, a motion to renew should be denied unless the moving party offers a reasonable excuse as to why additional facts available to it were not submitted on the original application. *See Caffee v. Arnold*, 104 AD 2d 352, 352 (2d Dep't 1984) ("[l]eave to renew

should be denied unless the moving party offers a reasonable excuse as to why the additional facts were not submitted on the original application"); *Dominski v. Firestone Tire & Rubber Co*. 92 AD 2d 704, 705 (3d Dep't 1983).

In this matter, Appellant contends that "it has a valid reason for not submitting these documents," because it ". . . previously [did] not anticipate[] that this Court would raise this issue and require such documentation." R. 23 ¶ 11. Respondents submit that Appellant should have anticipated that, as a part of their burden under CPLR 5302 (c), those known facts relating to Appellant's Ordinances would be imperative. After all, CPLR 5302 (a) (2) requires Appellant to demonstrate to the lower court that "under the law of the [Indigenous nation] where [the judgment was] rendered, [such judgment] is final, conclusive and enforceable . . . ." *See* CPLR 5302 (a) (2). Nevertheless Appellant, as a part of its litigation strategy, decided to withhold this known, critical information from the court.

New York common law holds that a litigation strategy which a party subsequently regrets, does not constitute a justifiable reason for failing to file the information earlier. In *Matter of James H. Supplemental Needs Trusts*, 172 3d 1570, 1574 (3d Dep't 2019), the Third Department rejected an analogous claim of law office failure as a reasonable justification under CPLR 221:

> A motion to renew is not a second chance to remedy inadequacies that occurred in failing to exercise due diligence in the first instance. Respondent explained that the information he presented on his motion to renew had been in his possession prior to his response to the original motion, but he had not presented it at that time on the advice of counsel. Because respondent did not offer new facts and his litigation strategy—which he now regrets—does not constitute a justifiable excuse for failing to present the information earlier, Supreme Court did not abuse its discretion in denying that part of respondent's motion seeking renewal. [internal citations omitted].

See also Bank of New York Mellon Trust Company, NA v. Talukder, 176 AD 3d 772, 774 (2d Dep't 2019) (". . . reliance on incorrect or incomplete advice of [] counsel constitute[s] a misguided strategy, not [reasonable justification for renewal]."); *Seegopaul v. MTA Bus Company*, 210 AD 3d 715, 717 (2d Dep't 2022); *Cole-Hatchard v. Grand Union*, 270 AD 2d 447 (2d Dep't 2000).

Appellant failed to introduce its own ordinance and resolution when it filed its Petition, and its excuse was that counsel did not think it was necessary to do so. This litigation strategy, which it now regrets, is not a reasonable justification for a motion to renew. Therefore, the lower court was correct in denying Appellant's motion, and this proper denial should be affirmed by this Court.

POINT FOUR

A MOTION FOR LEAVE TO REARGUE IS NOT DESIGNED TO PROVIDE AN UNSUCCESSFUL PARTY WITH SUCCESSIVE OPPORTUNITIES TO REARGUE AN ISSUE PREVIOUSLY DECIDED:

A motion for leave to reargue should not be a second chance for the moving party, who did not exercise due diligence in its initial filing, to take a bite at the same apple. *See Serviss v. Incorporated Village of Floral Park*, 164 AD 3d 512, 513 (2d Dep't 2018) ("[t]he Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion. Moreover, when the Court did not misapprehend any law or fact and Plaintiffs improperly seek a second bite at the apple to argue summary judgment, the plaintiffs' motion must also be denied on this basis as well. *Homar v. American Home Mtge. Acceptance, Inc.*, 2012 N.Y. Misc. LEXIS 6682 at *8 (Sup. Ct. Orange Cnty. 2012). *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") (internal quotations omitted, emphasis added); *see also Semenov v. Semenov*, 98 AD 3d 962, 963 (2d Dep't 2012); *Okumus v. Living Room Steak House*, 112 AD 3d 799, 800 (2d Dep't 2013); *Ciccia v. Liotti*, 70 AD 3d 747, 753 (2nd Dept 2010); *Hallett v. City of New York*, 219 AD 3d 809, 810 (2d Dep't August 23, 2023) (". . . [a Rule 2221] motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues

previously decided or to present arguments different from those originally presented."); *Mayer v. National Arts Club*, 192 AD 2d 863, 865 (3d Dep't 1993).

In this matter, Appellant has made three separate attacks on the Decision and Order being appealed herein. After the court below issued its Decision and Order which denied recognition of Appellant's default tribal court judgment on July 19, 2022, Appellant filed a Notice of Appeal. That appeal has been perfected and it is pending in this Court. *See* Index No. CA 22-01826. Shortly after that, Appellant also filed this motion for leave to reargue. Additionally, in eight of the fourteen companion, nearly identical cases, Appellant filed a Motion for Recusal,[2] and the primary grounds stated by Appellant was that Justice Porsch had denied recognition of this same default tribal court judgment. Those motions were also properly denied. The court below correctly deciphered that Appellant's motion to renew and reargue was little more than another improper attack on a legal issue that it had already argued and lost, and so denied Appellant's motion. This Court should uphold that determination.

[2] For an example, see Seneca Supreme Court Index No. 20210290, NYSCEF No. 41.

POINT FIVE

A MOTION FOR LEAVE TO REARGUE IS NOT PERMITTED TO ATTACK A FINAL ORDER:

A motion to reargue is not a proper vehicle for challenging a final order. *N.Y. Cent. R. Co. v. Banton Corp*, 110 N.Y.S.2d 64, 66 (App. Term, 1952) ("A motion for reargument has a serious purpose; it is intended to point out to the court an error in point of law or fact of such a nature as to be decisive of the matter. To merely repeat and rediscuss what has gone before and been considered and determined is not the purpose of reargument"); *Mazinov v. Rella*, 79 A.D.3d 979, 980 (2d Dep't 2012) ("A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion") (internal quotation omitted).

Reargument does not allow parties to present new legal arguments not offered previously to the court, even if the movant now believes those would have been successful arguments at the time they were made. *Nationstar Mortg., LLC v. Jong Sim*, 197 A.D.3d 1178 (2d Dep't 2021) ("a movant's mistaken reliance on one argument is not a reasonable justification for failing to submit sufficient evidence to support another").

Here, the Decision and Order challenged by Appellant's motion was the final denial of the relief which Appellant had requested in its Petition, and the Appellant's Motion does not include any new legal arguments beyond those that were available to Appellant before the order. July 19. It is clear that Appellant considers this appeal another method by which it can attack a final order, which is disallowed, and this Court should accordingly uphold the decision of the court below.

POINT SIX

EVEN IF THIS WERE A VALID RENEWAL MOTION, APPELLANT SEEKS DOMESTICATION OF A FINE, WHICH IS PROHIBITED BY CPLR 5302 (b) (2):

The Proposal section of the sponsoring Memorandum in support of adopting 22 § NYCRR 202.71 indicates that State Court recognition of tribal court judgments will only be authorized "[i]f the court finds that the judgment is entitled to recognition under the provisions of Article 53 of the CPLR. . . ." Article 53 establishes that a party seeking recognition of a foreign country money judgment has the burden of proving that the judgment is subject to the Uniform Foreign Country Money Judgment Act. *See* CPLR 5302 (c) ("[a] party seeking recognition of a foreign county judge *has the burden* of establishing that this article applies to

the foreign county judgment.") (emphasis added); *see also Vinogradov v. Sokolova*, 77 Misc. 3d 284, 287-89 (Sup. Ct., NY Co., 2022) (a plaintiff seeking enforcement of a foreign country judgment bears the burden of making a prima facie showing that the mandatory grounds for nonrecognition do not exist).

CPLR 5302 addresses the applicability of Article 53 and the recently-amended subdivision (b) (2) otherwise prohibits recognition of foreign country judgments that are comprised of penalties or fines. *See* CPLR 5302(b)(2): "[t]his article does not apply to foreign country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent that the judgment is: . . . (2) a fine or penalty."); *see also Vinogradov* at 287-89 (CPLR Article 53 does not apply to foreign country money judgments to the extent said judgments are a penalty).

The objective of Appellant's motion for leave to reargue was to convince Justice Porsch to reverse his earlier decision not to recognize Appellant's default tribal court judgment which was for collection of a *fine*, in the amount of $28,000.00. This is beyond dispute, given the contents of ¶ 6 of the Petition itself, which describes other provisions of the judgment as being: "[i]n addition to [the] assess[ment of] a *civil fine* in the amount of $28,000. . . ." (R. 9) (emphasis added).

Additionally, the plain wording of the January 7, 2022 tribal court Order and Judgment sought to be recognized herein makes it clear that the money judgment

was a fine. The January 7, 2022 tribal court judgment's final paragraph stated that: "Defendants are hereby assessed a *civil fine* of $1,000 per day beginning December 10, 2021 and continuing to present, same being $28,000." (R. 12) (emphasis added).

Therefore, because Appellant sought the recognition of a foreign judgment which was indisputably a fine, Appellant failed to meet its burden of proving the applicability of Article 53. The State Court was prohibited from even entertaining the Petitions and therefore its Decision not to recognize was mandatory.

Given that recognition was prohibited by CPLR 5302, Appellant's motion for leave to reargue could not have been granted by the lower court and its denial of that motion was correct. It should be affirmed by this Court.

CONCLUSION:

The denial of a motion for leave for reargument is not appealable and therefore this appeal must be dismissed.

Appellant also denominated a portion of its motion as one for leave to renew, but since it failed to comply with the clear mandates of CPLR 2221(e), it was not properly a motion for leave to renew. No new facts which had not been known to Appellant at the time of the filing of the Petition in the court below were

submitted, as required by CPLR 2221(e)(2). Further, no reasonable justification for the failure to have included them was contained in the motion. That Appellant's counsel did not think they were necessary is not a reasonable justification—it is regret over a litigation strategy, and nothing more.

Therefore, this branch of Appellant's motion was not properly for leave to renew, making the entire motion one for reargument. Accordingly, its denial is not appealable.

Finally, it is clear that Appellant seeks domestication of a foreign judgment that consists solely of a fine, which is prohibited by CPLR 5302 (a) (2). Fundamentally, its Petition is deficient, and so any motions related thereto must be denied.

The bulk of Appellant's brief, NYSCEF No. 6, does not address the denial of Appellant's motion to reargue, but rather is a repeat of the arguments Appellant raised in its first appeal—which addresses the lower court's denial of recognition of Appellant's default tribal court judgment. Those portions of Appellant brief in this appeal which do not address its motion for leave to reargue, should be disregarded by this Court as it reviews the denial of the motion for leave to reargue.

For the above noted reasons, this appeal must be dismissed.

Dated: Syracuse, New York
October 23, 2023

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