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Commentary:

The motion to reargue

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In June of 1999, a bionic engineering inventor, whom we'll call Paul Metuk, refinanced his home to pay for a research laboratory.

His attorney, Al Sayanything, represented him in the transaction.

Honest Title Insurance Co. issued a title insurance policy to the refinancing lender, ensuring the lender had the dominant mortgage on the house as security for a refinancing loan.

In issuing the policy, Honest Title relied on Sayanything's written guaranty that he would pay off the pre-existing mortgage on Metuk's house using the proceeds of the new loan so the refinancing lender would hold the first mortgage as security for its loan.

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After assembling prototype human bionics at the old workbench in his garage, Metuk needed a human test subject, but could not get government clearance. Not wanting to risk installing bionics in a chimpanzee, he invited his sister, Anne, over for dinner, got her tipsy and installed bionics in her as soon as she fell asleep. For the most part, the operation was a success.

But the thing about chimpanzees is that they think it's cool if you feed them gin and give them phenomenal bionic strength while they are passed out on your couch. Paul's sister did not. Anne was to be married in October and she refused to accompany Metuk to an autumn investor's convention to showcase his "technology." What Paul hadn't considered was the fact that a bionic sister can administer a bionic wedgie before storming out of the garage.

Unable to cash in on his invention, through the ensuing six years Metuk's financial condition worsened until he couldn't even afford to buy new underwear. He defaulted on his debts and was sued by his creditors.

As you may have guessed, Sayanything failed to honor his written guaranty to pay off Metuk's original mortgage, leaving the refinancing lender's mortgage subordinate to the original. When the first mortgage was foreclosed, the refinancing lender lost its collateral, and its mortgage was worthless. Naturally, the lender turned to Honest Title to make good on its policy and pay off the loan. Honest Title paid on the policy, then referred the matter to its in-house counsel, Ben. Ben called me.

In May 2005, Honest Title filed a lawsuit against Metuk's attorney, Sayanything, to enforce his written guaranty.

Sayanything moved for summary judgment contending, *inter alia*, he was entitled to the protection of the shorter, three-year attorney malpractice statute of limitation by virtue of his status as an attorney. The plaintiff opposed this on the grounds, *inter alia*, that there was no attorney-client relationship and the defendant breached his clear written guaranty to the plaintiff, directly resulting in a loss. Significantly, there was no attorney-client relationship between Sayanything and Honest Title, and Sayanything's client was not injured by Sayanything's breach of the guaranty (although he was caused some lasting discomfort by his sister's wedgie, however).

The court reluctantly ruled for the defendant, holding the plaintiff's action time-barred by the three-year statute of limitation for attorney malpractice. The court and the parties focused arguments and analysis on the law addressing an attorney's liability to third parties — a difficult and evolving area of the law. The court's decision, although unfavorable for my client, was exceptionally well-reasoned and thoughtful, and it noted the regrettable result that the bad guy — the errant Sayanything — got away.

We decided to appeal, but given the obvious discomfort with which the court ruled against us, we first tried to persuade the court to reconsider a decision that, while plausible, reached a flawed conclusion and overlooked important precedent. It is rare for a court to simply miss the point. Typically, the motion to reargue only is the right choice when, as in this case, the facts and the law support an alternative, compelling conclusion.

Motion to reargue

Requirements for a motion to reargue are set forth in CPLR 2221, which states in pertinent part: "Rule 2221. Motion affecting prior order: (a) A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or

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modify, an order shall be made, on notice, to the judge who signed the order. ... (d) A motion for leave to reargue: 1. shall be identified specifically as such; 2. 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; and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. ... (f) ... If a motion for leave to reargue ... is granted, the court may adhere to the determination on the original motion or may alter that determination," CPLR Rule 2221; see, e.g., *Grasso v. Schenectady County Public Library*, 30 A.D.3d 814, 816 n. 1 (Third Dept. 2006 — "Supreme Court's decision and order, which addressed the merits of [the] defendants' motion, granted reargument and adhered to its original order"); see generally *Andrea v. E.I. DuPont DeNemours & Co.*, 289 AD2d 1039, 1040-41 (Fourth Dept. 2001).

"It is well settled that a motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and is properly granted upon a showing that the court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision," *Peak v. Northway Travel Trailers Inc.*, 260 A.D.2d 840, 842 (Third Dept. 1999). The court's discretion in granting a motion to reargue is broad, even permitting more than one, successive motions in appropriate cases, *People v. Oceanside Institutional Ind. Inc.*, 15 Misc.3d 22, 25 (Sup. Ct. App. Term, Ninth and 10th Dists. 2007 — "the court did not improvidently exercise its discretion when it granted the people's second motion for reargument. A motion for reargument is addressed to the sound discretion of the court.").

The court may grant leave to reargue and still adhere to its original decision, CPLR 2221(f); see, e.g., *Li v. LeClaire*, 16 Misc.3d 1124(A), 2007 WL 2333031, (N.Y. Sup. Ct. 2007 — "Motion to reargue granted, and upon such reargument, the court adheres to the determination in its decision, order and judgment").

"'If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination,'" *Andrade v. Triborough Bridge*, 10 Misc.3d 1063(A), 814 N.Y.S.2d 559 (NY Sup. Ct. 2005) (citing *Giardina v. Parkview Court Homeowners'*, 284 A.D.2d 953, 730 N.Y.S.2d 585 (Fourth Dept. 2001) and *Seltzer v. City of New York*, 288 A.D.2d 207, 732 N.Y.S.2d 364 (Second Dept. 2001)); *In re Kaszuba ex rel. Estate of Seviroli*, 4 Misc.3d 1014(A), 798 N.Y.S.2d 345 (N.Y.Sur. 2004 — granting motion to reargue but adhering to original decision).

"[A] motion to reargue made pursuant to CPLR 2221 is not a proper vehicle for a moving party to alter a previously held position or to introduce a new 'theory' of the case," *Andrade*, 10 Misc.3d 1063(A), 814 N.Y.S.2d 559. "'Reargument is not available where the movant seeks only to argue a new theory of liability not previously advanced,'" *Id.* (citing *DeSoignies v. Cornasesk House Tenants' Corp.*, AD3d, 800 N.Y.S.2d 679 (First Dept. 2005).

Similarly, 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," *Id.* (emphasis in original).

The motion to reargue is supported by a policy preference for conserving resources that would be exhausted on an appeal, see *Siegel*, New York Practice § 254 (Fourth Ed. Thompson West 2005). A motion to reargue is a "procedural avenue ... available which allow[s] an ... attorney to correct an ... error without resort to an unnecessary appeal, *Kent v. Kent*, 29 A.D.3d 123, 130 n.8 (First Dept. 2006).

"There is case law which, in an effort to promote judicial economy, permits a motion to reargue despite the expiration of the time to appeal the original order where the motion is based upon an intervening change in the law and the original order is an intermediate one which would ultimately be subject to review upon appeal from the final judgment," *Matter of Barnes* (Council 82, AFSCME, o/b/o Monroe), 652 N.Y.S.2d 383 (Third Dept. 1997) (pre-1999 amendment to CPLR 2221).

Of course, an appellate court also may consider "arguments made by the appellants for the first time on appeal ... since the issue is one of law which appears on the face of the record and could not have been avoided by the [appellant] if brought to her attention on the original motion," *Green v. Fox Island Park Autobody Inc.*, 255 A.D.2d 417, 418 (Second Dept. 1998).

Conclusion

In this case, the court denied reargument and adhered to its original decision, which probably will be the subject of a future essay after the appeal — fingers crossed, please. There is a policy interest in resolving disputes at the trial level; However, the multitude of appellate courts and dissenting, concurring and plurality opinions clearly indicates there is a wide margin of error. While the motion to reargue should be used sparingly, it can be the right choice in a novel case in which a decision yields a result not completely intellectually or morally satisfying, and there is evidence the judge might have overlooked the importance of fact or legal precedent.

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