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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER
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IRIS LEWIS,

Plaintiff,

DECISION/ORDER

Index No. 00-472
R.J.I. No. 55-00-1031
John G. Connor, J.S.C.

-against-

AL DIDONNA, Pharmacist, JAMES DIDONNA, Pharmacist, ECKERD DRUG STORE OF STONE RIDGE, NEW YORK, ECKERD CORPORATION d/b/a "Eckerd Drugs" or "Eckerd Drugstore")(a Foreign corporation), J.C. PENNY, INC.(a foreign corporation),

COPY

Defendants.

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APPEARANCES:

Plaintiff: Prior & Prior, Esqs.
by Jonathan Follender, Esq. ✓

Defendants: Boeggeman, George, Hodges & Corde, P.C.
by Harold L. Moroknek, Esq.

Connor, J.

Defendants move for an order pursuant to CPLR 2221 to reargue an Order of this Court dated April 17, 2001 which (1) granted Defendants' motion to dismiss Plaintiff's second and seventh causes of action, denied Defendants' motion to dismiss the fourth cause of action, and denied Defendants' motion for partial summary judgment. The Court's Order also granted

Plaintiff's cross-motion to dismiss the first and third affirmative defenses contained in Defendant's Answer, denied Plaintiff's cross-motion to dismiss Defendant's fourth affirmative defense, and granted Defendant sixty days to answer Plaintiff's interrogatories and submit to depositions. Defendants file a separate motion for a protective order pursuant to CPLR 3103 on the grounds that the interrogatories are overly broad. Plaintiff's cross-move to compel responses to the interrogatories and for sanctions against the Defendants.

First the Court must address the motion to reargue the Court's Decision and Order dated April 17, 2001. On a motion for reargument the movant must show that the Court has overlooked or misapprehended the facts or the law, or that it has mistakenly arrived at its decision. No new facts are submitted on a motion to reargue, and the motion is normally made upon all the original motion papers so it can be shown to the Court that it should have decided differently from the papers it had before it at the time the original motion was considered. See, Matter of Burack, 150 A.D.2d 568 (2nd Dept. 1989); Estate of Velez v. Springer, 119 Misc.2d 599 (1983). Reargument is not designed to permit the unsuccessful party another opportunity to merely argue again issues previously decided, or to present arguments different from those asserted on the original motion. See, William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22 (1st Dept. 1992); Foley v. Roche, 68 A.D.2d 558 (1st Dept. 1979). A motion to reargue

must be brought within thirty days of the service of a copy of the order determining the prior motion with written notice of entry thereon. See, McKinney's Cons. Laws of N.Y., Book 7B, C.P.L.R. §2221(d)(3).

Here the Court is not convinced that it overlooked or misapprehended the facts or the law, or that it mistakenly arrived at its decision. The Court will address the issue of loss of companionship for the sake of clarity. This Court unequivocally held that there is no cause of action for loss of companionship in the instant case. The owner of an animal may only seek to recover the fair market value of the animal from the Defendant. See, Gluckman v. American Airlines, Inc., 844 F.Supp. 151 (S.D.N.Y. 1994); Brousseau v. Rosenthal, 110 Misc.2d 1054 (1980); Corso v. Crawford Dog and Cat Hospital, Inc., 97 Misc.2d 530 (1979). The fair market value of the animal may, however, be linked to the manner in which the animal was used by the owner. For example the fair market value of a dog used by a blind person may have more value than one used strictly as a companion. Likewise, dogs may possess special training or skills that factor into the calculation of fair market value. (ie. performers and show dogs, search and rescue dogs, drug enforcement dogs, hunting dogs, security dogs, etc.). Accordingly, the Court's holding signifies only that loss of companionship proof may be allowed to the extent that the same relates to the calculation of the fair market value for the dead animal.

Next the Court will address Defendant's motion for a protective order. CPLR 3103(a) provides in pertinent part:

> **(a) Prevention of abuse.** The Court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable, annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

McKinney's Cons. Laws of N.Y., Book 7B, C.P.L.R. §3103(a). Notwithstanding the aforesaid, by Decision and Order dated April 17, 2001 this Court directed Defendants to serve Answers to Plaintiff's Interrogatories within sixty days of the April 17,. 2001 Order.

Defendants did not previously raise any issues as to whether the demands for interrogatories were overly broad or palpably improper. Instead Defendants requested the Court to extend the time to serve responses to the Interrogatories and the Court declined Defendants' request. The burden of proof as to whether Defendants are entitled to a protective order is on Defendants. See, Westhampton Adult Home, Inc, v National Union Fire Ins. Co. of Pittsburgh, Pa., 105 A.D.2d 627 (1st Dept. 1984); Virnet v. City of New York, 97 A.D.2d 435 (2nd Dept. 1983). Defendants argue that the Court should have dismissed all but the negligent causes of action and, therefore,

interrogatories are inappropriate. The Court finds that the motion papers are insufficient to satisfy Defendants' burden. Accordingly, the Court must deny Defendants' application for a protective order.

With respect to Plaintiff's cross-motion to compel and for sanctions, the Court hereby directs that Defendants provide Plaintiff with responses to the interrogatories within sixty (60) days of the date of service of a copy of this decision and order with notice of entry thereon, or be precluded at the trial of this matter from offering evidence as to those matters not provided. In addition, the depositions of the parties shall be scheduled at a mutually agreeable time and place, but in no event later than April 30, 2002. Plaintiff's have not shown that Defendants contumaciously disregarded the April 14, 2001 Order of this Court and the Plaintiffs' request for sanctions is, therefore, denied.

In summary, Defendants' motions to reargue and for a protective order are denied. Plaintiff's cross-motion for a conditional order of preclusion and for sanctions is granted, in part, and denied, in part. The aforesaid opinion constitutes the decision and order of this Court. All papers shall be forwarded to the attorneys for Plaintiffs for filing and service. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section relative to filing, entry

and notice of entry.

SO ORDERED.

Dated: January 30th 2002
Hudson, New York

JOHN G. CONNOR
Justice of the Supreme Court

Papers Considered: Defendants' Notice of Motion to Reargue, together with Affirmation of Leslie Arfine, Esq. in support thereof with Exhibits annexed; Defendants' Notice of Motion for a Protective Order, together with Affirmation of Harold Moroknek, Esq. with Exhibits annexed; Affirmation in Opposition of Leslie Arfine, Esq. with Exhibit annexed; Reply Affirmation of Leslie Arfine, Esq.; Plaintiff's Order to Show Cause to Compel Responses to Interrogatories and for Sanctions, together with Affirmation of Jonathan Follender, Esq. in support thereof with Exhibits annexed; Affirmation of Jonathan Follender, Esq. with Exhibits annexed; Reply Affirmation of Jonathan Follender, Esq. with Exhibits annexed; Amicus Curiae Brief of Robert Fellows, Esq. in Opposition to Defendant's Motion for Reargument.