

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

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THE BOARD OF MANAGERS OF THE OCEAN  
LANDING CONDOMINIUM,

Plaintiff,

Index No.: 605743/2020

-against-

MICHAEL H. NELSON, NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE,

“JOHN DOE #1” through “JOHN DOE #12”, the last  
twelve names being fictitious and unknown to plaintiff, the  
persons or parties intended being the tenants, occupants,  
persons or corporations, if any, having or claiming an  
interest in or lien upon the premises,

Defendants.

-----X  
**DEFENDANT MICHAEL H. NELSON’S  
MEMORANDUM OF LAW IN OPPOSITION TO  
PLAINTIFF’S MOTION TO REARGUE AND RENEW  
THE COURT’S SEPTEMBER 22, 2021 DECISION AND ORDER  
DENYING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

**LAW OFFICE OF MARC M. ISAAC PLLC**

34 Willis Avenue

Mineola, New York 11501

(516) 750-1422

*Attorney for Defendant Michael H. Nelson*

### PRELIMINARY STATEMENT

This memorandum of law is respectfully submitted by defendant Michael H. Nelson (“Nelson”) in opposition to plaintiff The Board of Managers of The Ocean Landing Condominium’s (the “Board” or “Plaintiff”) motion for an order granting reargument and renewal and upon reargument and renewal, rescinding the September 22, 2021 Decision and Order (the “Decision and Order”)<sup>1</sup> denying the motion for summary judgment to the extent that plaintiff had not made a prima facie case and in its place issuing an decision granting summary judgment to plaintiff, striking the answer of defendant Michael H. Nelson but without changing the portion thereof setting a traverse hearing.

The Board’s motion for leave to reargue and renew its motion for summary judgment is completely devoid of merit. The portion of the Board’s motion seeking leave to renew should be denied. A motion for leave to renew pursuant to CPLR 2221(e) must “be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination.” CPLR 2221(e). A motion for leave to renew pursuant to CPLR 2221(e) must also “contain reasonable justification for the failure to present such facts on the prior motion.” *Id.* The Board is not entitled to leave to renew because it has not presented new facts not offered on the prior motion that would change the prior determination. The Board is also not entitled to leave to renew because it has not presented reasonable justification for its failure to present such facts on the prior motion. The Board’s attorney’s conclusory, undetailed, and uncorroborated claim of

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<sup>1</sup> The Decision and Order is attached as Exhibit B to the Affirmation of Bruce J. Bergman, Esq. in Support of Plaintiff’s Motion to Renew and Reargue Summary Judgment.

law office failure does not amount to reasonable justification.

Even if the Court granted the Board's motion for leave to renew (which it should not), the Board's motion for summary judgment should still be denied. The Board has failed to make a *prima facie* showing of its entitlement to judgment as a matter of law. The by-laws that the Board attached to its motion for leave to reargue and renew are not the by-laws of The Ocean Landing Condominium. They are the by-laws of The 475 West Broadway Condominium. The Board has failed to establish that the by-laws of The 475 West Broadway Condominium were in effect or are in any way applicable with respect to the claims that the Board has asserted against Nelson on behalf of The Ocean Landing Condominium.

The portion of the Board's motion seeking leave to reargue is frivolous. A motion for leave to reargue pursuant to CPLR 2221(d) must "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." CPLR 2221(d). The Board is not entitled to leave to reargue because it has not even attempted to allege that the Court overlooked or misapprehended a matter of fact or law.

## I.

### **THE BOARD'S MOTION FOR LEAVE TO RENEW SHOULD BE DENIED**

The Board's motion for leave to renew should be denied. "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." Bank of N.Y. Mellon Trust Co., N.A. v. Talukder, 176 A.D.3d 772, 773 (2d Dept. 2019) quoting Robinson v. Viani, 140 A.D.3d 845, 848 (2d Dept. 2016) quoting Lindbergh

v. SHLO 54, LLC, 128 A.D.3d 642, 644-645; see CPLR 2221(e)(2), (3) (internal quotations omitted).

“While a court has discretion to entertain renewal based on facts known to the movant at the time of the original motion, the movant must set forth a reasonable justification for the failure to submit the information in the first instance.” Professional Offshore Opportunity Fund, Ltd. v. Braider, 121 A.D.3d 766, 769 (2d Dept. 2014); see Deutsche Bank Trust Co. v. Ghaness, 100 A.D.3d 585, 586 (2d Dept. 2012) (“a ‘reasonable justification’ for the failure to present such facts on the original motion must be presented”).

“When no reasonable justification is given for failing to present new facts on the prior motion, the Supreme Court lacks discretion to grant renewal.” Zelouf Intl. Corp. v. Rivercity, LLC, 123 A.D.3d 1116, 1116 (2d Dept. 2014); see Worrell v. Parkway Estates, LLC, 43 A.D.3d 436 (2d Dept. 2007) (“[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”).

“Law office failure can be accepted as a reasonable excuse in the exercise of the court's sound discretion.” Bank of N.Y. Mellon Trust Co., 176 A.D.3d at 775 quoting Nwauwa v. Mamos, 53 A.D.3d 646, 649 (2d Dept. 2008); see CPLR §2005. “Although a court has the discretion to accept law office failure as a reasonable excuse, a conclusory, undetailed and uncorroborated claim of law office failure does not amount to a reasonable excuse.” Bank of N.Y. Mellon Trust Co., 176 A.D.3d at 774 quoting Eastern Sav. Bank, FSB v. Charles, 103 A.D.3d 683, 684 (2d Dept. 2013).

The Board's motion for leave to renew should be denied because it is not based on new facts not available at the time of the original motion. The Board's motion for summary judgment was denied because it failed to provide the Court with a copy of by-laws establishing the Board's authority to collect alleged unpaid charges from Nelson. See Decision and Order at p. 2. The Board's motion for leave to renew is premised upon its production of purported by-laws that it referenced, and was aware of, but failed to provide to the Court in support of its motion for summary judgment. The by-laws submitted by the Board in support of its motion for leave to renew were not unavailable or unknown to the Board at the time it filed its motion for summary judgment. Therefore, the Board's motion for leave to renew should be denied because it "failed to establish that the alleged new evidence was not available at the time of the original motion." Wells Fargo Bank, N.A. v. Rooney, 132 A.D.3d 980, 982 (2d Dept. 2015).

The Board has also failed to provide reasonable justification for its failure to provide the Court with by-laws in support of its motion for summary judgment. The Board's attorney, Bruce J. Bergman, Esq., plainly admits in his affirmation that his firm's failure to annex a copy of by-laws to the Board's complaint or the Board's motion for summary judgment was the product of mere "[n]eglect." See Affirmation in Support of Plaintiff's Motion to Renew and Reargue Summary Judgment ("Bergman Aff.") at ¶6. Mr. Bergman's conclusory, undetailed, and uncorroborated claim of neglect does not constitute a reasonable excuse under CPLR §2005. "Mere neglect will not be accepted as a reasonable excuse under CPLR 2005." JP Morgan Chase Bank, N.A. v. Russo, 121 A.D.3d 1048, 1049 (2d Dept. 2014) citing Ortega v. Bisogno & Meyerson, 38 A.D.3d 510, 511 (2d Dept. 2007) ("[w]hile CPLR 2005 allows courts to excuse a default due to law office failure, it was not the Legislature's intent to routinely excuse such defaults, and mere neglect will not be accepted as a reasonable excuse").

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