SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARTIN SHULMAN PART 1
Justice

Ann Marie Idell, et al,

INDEX NO. 190219/16

- v -

Motion Seq. 042

Aerco International, et al.

The following papers, numbered 1 to 4 were read on this motion to reargue

	PAPERS NUMBERED
Notice of Motion - Affirmations - Exhibits A-Y (NYSCEF 961-988)	1, 2
Answering Aff./Cross-Motion - Exhibits 1-6; Mem. of Law (NYSCEF 990-997)	3
Reply Aff. - Exhibits A-D	4

Cross-Motion: ☑ Yes ☐ No

In this products liability (asbestos exposure) action, a jury *inter alia* returned a verdict on August 17, 2017, awarding then-living plaintiff Thomas McGlynn (plaintiff) $1.8 million for past pain and suffering and $1.5 million for future pain and suffering to cover a minimum period of six months and up to a maximum period of one year. Both parties filed post-verdict motions, and this court issued a bench decision on December 14, 2017 (Dec. 14th decision), entirely denying defendant Jenkins Bros.'s (Jenkins) motion for judgment of dismissal notwithstanding the verdict, but granting plaintiff's CPLR §5501[c] motion for additur. Reciting appropriate decretal directives, the Dec. 14th decision increased damages awards for past pain and suffering to $4 million and for future pain and suffering to $2.5 million.

Under this court's 30 day time deadline to either stipulate to these additur sums without prejudice to perfecting its appeal or opt for a re-trial on damages, Jenkins submitted a proposed order to show cause to extend its time to consider whether to stipulate to the increased award of $6.5 million. At a court hearing on January 16, 2018, this court learned that in addition to its time extension request, Jenkins was seeking to reargue this court's Dec. 14th decision and bolster its potential appellate record with "new" arguments and documentation it was fully capable of presenting during the prior round of post-verdict motion practice. By refusing to sign the order to show cause, this court implicitly denied Jenkins' reargument motion, but directed the parties to negotiate a written agreement regarding Jenkins' time extension request. On January 31, 2018, this court so-ordered a two attorney stipulation extending "Jenkins' time to decide whether to stipulate to the Court's additur increasing the jury's award . . . to a date on or before fourteen (14) days following the decision to be announced by the Appellate Division, First Department, in Jenkins' currently pending appeal of [this court's Dec. 14th Decision]."

Apparently not satisfied, Jenkins again submitted a second proposed order to show cause seeking the identical additional relief sought in its first proposed order to show cause and after hearing arguments on February 14, 2018, this court made it clear that its Dec. 14th decision was the last word on every issue raised and argued in Jenkins' post-verdict motion. Parenthetically, Jenkins was afforded a full and fair opportunity to raise every conceivable argument and/or submit documentation to support a post-trial judgment of dismissal notwithstanding the verdict and, alternatively, to sustain the jury verdict and deny plaintiff's additur motion. Thus, this court issued a decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Instead, Jenkins re-formatted its second proposed order to show cause for reargument/ renewal to a motion returnable on February 28, 2018. Incredibly, Jenkins annexed an emergent affirmation grounded on a looming deadline of its own making to perfect its appeal of the Dec. 14th decision. This left plaintiff's counsel no choice but to expend time and money filing a memorandum of law in opposition and perforce make a cross-motion for sanctions. Both the motion and cross-motion are consolidated for disposition.

This court did not misapprehend or overlook any facts or law or mistakenly proffered reasons underlying the Dec. 14th decision. See *Foley v Roche*, 68 AD2d 558 (1st Dept 1979)(motions for reargument, addressed to the discretion of the court, are designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law). The "new" material (e.g., damages evidence and verdicts in *Snowdale*, *Andrucki*, as well as evidence and the legal impact, if any, of plaintiff's death after the August 2017 verdict) were all capable of being produced in support of Jenkins' post-verdict motion well before the issuance of the Dec. 14th decision. Illustratively, Jenkins could have sent a letter apprising the court to take judicial notice of the *Snowdale* verdict rendered at the time the parties' post verdict motions were fully submitted.

This court is not unmindful that its declination orders prevented Jenkins from adding its "new" matter to the record on its planned appeal, which was otherwise more than adequate. Nonetheless, Jenkins' appellate record bolstering motion is substantivally untimely. Accordingly, and for purposes of appellate review, this court must reject the "new" information (i.e, those various exhibits annexed to the Dinunzio affirmation in support of Jenkins' motion never proffered and discussed in Jenkins' original post-verdict motion), and deem same dehors the record. Nor will this court consider new arguments with alleged documentary support Jenkins now makes for the first time in rearguing the Dec. 14th decision. Accordingly, Jenkins' third attempt at reargument disguised as a renewal motion is denied.

Finally, despite the multiple attempts made to reargue the Dec. 14th decision, none of which was predicated upon proper grounds pursuant to CPLR 2221 (e.g., presenting new arguments and documentation which could have been presented during post-verdict motion practice), this court's declination orders left Clyde & Co US, LLP, counsel for defendant Jenkins Bros., no choice in its quixotic quest to expand the record for its appeal. The better practice would have been to file its reargument motion the first time. Thus, plaintiff's cross-motion for costs must be denied.

Accordingly, it is

ORDERED that Jenkins Bros.' motion is denied; and it is further

ORDERED that plaintiff's cross-motion for sanctions is also denied.

The foregoing is this court's decision and order.

Dated: March 2, 2018

Martin Shulman, J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**