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Cited

As of: Dec 26, 2013

**Jean Graham Jones et al., Appellants, v 170 East 92nd Street Owners Corp. et al.,  
Respondents. (And a Third-Party Action.)**

**2003, 103156/07**

**SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST  
DEPARTMENT**

**69 A.D.3d 483; 893 N.Y.S.2d 534; 2010 N.Y. App. Div. LEXIS 363; 2010 NY Slip Op  
376**

**January 19, 2010, Decided  
January 19, 2010, Entered**

**HEADNOTES**

Motions and Orders--Reargument or Renewal

**COUNSEL:** [\*\*\*1] Law Offices of Lee M. Nigen & Assoc., P.C., Brooklyn (Lee M. Nigen of counsel), for appellants.

Gartner & Bloom, P.C., New York (Arthur P. Xanthos of counsel), for respondents.

**JUDGES:** Concur--Mazzarelli, J.P., Saxe, Acosta, DeGrasse and Manzanet-Daniels, JJ.

**OPINION**

[\*483] [\*\*535] Order, Supreme Court, New York County (Louis B. York, J.), entered February 9, 2009, which, in an action for personal injuries allegedly caused by mold in plaintiffs tenants' apartment, insofar as appealable, denied plaintiffs' motion to renew defendants

building owners' prior motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

No appeal lies from the portion of the order on appeal that denied reargument (CPLR 2221; *Stratakis v Ryjov*, 66 AD3d 411, 885 NYS2d 597 [2009]). With respect to renewal, the only purportedly new evidence submitted by plaintiffs was a doctor's affidavit responsive to the portion of the motion court's prior order stating that defendants' medical evidence was unrefuted, and opining that the mold in plaintiffs' apartment had contributed to the sinusitis and respiratory problems for which he was treating one of the two plaintiffs. Putting aside that this affidavit was inadvertently omitted from plaintiffs' [\*\*\*2] moving papers and first submitted only in their reply (*but cf. Tomaino v 209 E. 84 St. Corp.*, 68 AD3d 527, 2009 NY Slip Op 9283, \*2 [Dec. 15, 2009]), plaintiffs' attorney's bald statement that the doctor's affidavit was not included in their opposition to the prior

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motion because "it was not made available [\*484] to Plaintiffs until this time" does not satisfy plaintiffs' burden "to show due diligence in attempting to obtain the statement before the submission of the prior motion" (*see*

*Taub v Art Students League of N.Y.*, 63 AD3d 630, 882 NYS2d 94 [2009]).CPLR 2221[e][3] Concur--Mazzarelli, J.P., Saxe, Acosta, DeGrasse and Manzanet-Daniels, JJ.