

**This opinion is uncorrected and subject to revision in the Official Reports. This opinion is not available for publication in any official or unofficial reports, except the New York Law Journal, without approval of the State Reporter or the Committee on Opinions (22 NYCRR 7300.1)**

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOHN A. MILANO IA Part 3  
Justice

<hr/>		x	Index	
PETER DALTON, as parent and natural		:	Number	<u>2943</u> 1992
guardian of BRIAN M. DALTON, an		:		
infant under the age of 18 years,		:		
		:		
	Plaintiff,	:	Motion	
		:	Date	<u>September 21, 2001</u>
- against -		:		
		:		
		:	Motion	
EDUCATIONAL TESTING SERVICE,		:	Cal. Number	<u>8</u>
		:		
	Defendant.	:		
<hr/>		x		

The following papers numbered 1 to 11 read on this motion by defendant Educational Testing Service for leave to reargue and to renew its previous motion for summary judgment to the extent that it concerned educational expenses.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1 - 6
Answering Affidavits - Exhibits .....	7 - 8
Reply Affidavits .....	9 - 11

Upon the foregoing papers it is ordered that the branch of the motion which is for leave to reargue is denied.

That branch of the motion which is for leave to renew is granted. Upon renewal, the court adheres to its original determination.

(See the accompanying memorandum.)

Dated: October 30, 2001

---

Justice John A. Milano

MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
CIVIL TERM IAS PART 3

-----  
X BY: Justice John A. Milano  
PETER DALTON, as parent and natural :  
guardian of BRIAN M. DALTON, an : Index No. 2943/92  
infant under the age of 18 years, :  
 : Motion Date: September 21, 2001  
 :  
 : Motion Cal. No.: 8  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 EDUCATIONAL TESTING SERVICE, :  
 :  
 Defendant. :  
 X  
-----

Defendant Educational Testing Service ("ETS") has moved for leave to reargue and to renew its previous motion for summary judgment to the extent that it concerned educational expenses. (The previous motion was granted in part and denied in part by this court's decision and order dated April 16, 2001.)

Plaintiff Brian Dalton took the SAT, a standard test which is administered by ETS and which is used by many colleges to evaluate applicants for admission, as a high school junior in May, 1991, and he alleges that he again took the test as a high school senior in November, 1991. Dalton received a combined verbal and mathematics score of 620 the first time and a combined score of 1030 the second time. ETS's Board of Review determined that the second score was invalid because of a substantial discrepancy between the results of the first two tests and because of handwriting differences allegedly found by an ETS employee in the

Test Security Office. When ETS refused to release the second score to colleges, the plaintiff began an Article 78 proceeding, which was converted into an action at law based on breach of contract. The parties received an expedited non-jury trial of the first cause of action, which was for specific performance. The trial court found in favor of Dalton and directed "ETS to release without comment or qualification, the November 2, 1991 SAT scores \*\*\*." (Dalton v Educational Testing Service of Princeton , New Jersey, 155 Misc. 2d 214, 225.) The Appellate Division, Second Department, affirmed the judgment of the trial part (Dalton v Educational Testing Service, 205 AD2d 402), and the Court of Appeals modified and affirmed. (Dalton v Educational Testing Service, 87 NY2d 384.) By motion submitted January 30, 2001, ETS moved for summary judgment dismissing the plaintiff's remaining causes of action which seek damages for breach of contract. By decision and order dated April 16, 2001, this court granted the defendant's motion to the extent that the complaint seeks to recover damages for emotional distress and legal expenses, but otherwise denied the motion.

That branch of the motion by ETS which is for leave to reargue its previous motion for summary judgment to the extent that it concerned educational expenses is denied. A motion to reargue may be brought where "the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." (Schneider v Solowey, 141 AD2d 813; see, CPLR 2221[d]; Grassel v Albany Med. Ctr. Hosp., 223 AD2d 803;

William P. Pahl Equipment Corp. v Kassis, 182 AD2d 22.) This court did not overlook or misapprehend the plaintiff's deposition testimony regarding his alleged obligation to repay his parents for educational expenses incurred. Indeed, this court's decision dated April 16, 2001 expressly notes that his testimony on the point "raises issues of fact and credibility which are inappropriate for summary judgment treatment. (See, Dayan v Yurkowski, 238 AD2d 541; T&L Redemption Center Corp. v Phoenix Beverages, Inc., 238 AD2d 504; First New York Realty Co., Inc. v DeSetto, 237 AD2d 219.)"

That branch of the motion by ETS which is for leave to renew its previous motion for summary judgment to the extent that it concerned educational expenses is granted. Upon renewal, the court adheres to its original determination. ETS contends that the plaintiff may not recover his educational expenses, even if there was a breach of contract which caused him to lose scholarships, because his parents paid those expenses. At his deposition, the plaintiff testified several times that he could not recall if he had an agreement with his parents to reimburse them for educational expenses paid by them. The attorney for ETS now asserts that he inadvertently failed to call the court's attention to a stipulation made at the deposition by the plaintiff's attorney after his client had been asked about the alleged obligation to reimburse the parents. The plaintiff's attorney stated: "I will stipulate, to save time, that any expenses incurred in connection with college tuition, books, rent, anything related to college, was paid for by Mr. and Mrs. Dalton with no agreement and no request to be paid

back." (Tr., 57.) The plaintiff then responded affirmatively when asked, "Is that accurate?" (Tr., 58.) It is true that the attorney for ETS did not offer a reasonable excuse for failing to present this stipulation to the court on the original motion for summary judgment. (See, CPLR 2221[e][3]; Delvecchio v Bayside Chrysler Plymouth Jeep Eagle, Inc., 271 AD2d 636.) However, under appropriate circumstances, the court has discretion to permit renewal even where the facts were known upon the original application. (See, U.S. Reinsurance Corporation v Humphreys, 205 AD2d 187.) In the case at bar, where neither side, intentionally or inadvertently, made a full disclosure of the facts to the court, including a relevant stipulation, renewal is permissible. Nevertheless, the stipulation does not alter the court's decision. The plaintiff's attorney affirms that the stipulation he made came after a question about a written agreement to reimburse the parents and that, thus, the stipulation concerns only the nonexistence of a written agreement to reimburse. In view of the conflicting allegations of the attorneys in that regard, the court cannot resolve here the issue concerning the scope of the stipulation. Moreover, while the stipulation may have a bearing on the issue of the plaintiff's credibility, that issue is not properly resolved on a motion for summary judgment. (See, Dayan v Yurkowski, supra; T&L Redemption Center Corp. v Phoenix Beverages, Inc., supra; First New York Realty Co., Inc. v DeSetto, supra.) Finally, the court notes that Radcliffe v Hofstra University (200 AD2d 562), relied on by ETS, is distinguishable from the case

at bar because in that case "[t]he parents had an absolute duty to pay the medical expenses of the plaintiff since he was under the age of 21 years and was unemancipated." (Emphasis added.) The defendant did not show on this motion that the plaintiff's parents were under a duty to pay his college expenses. The general rule, which appears to be applicable in this case, is that a "collateral recovery supplied by a source other than the transgressor does not alter the amount of the breaching party's obligation (36 NY Jur2d, Damages, § 128, at 220)." (Gray v Pashkow, 168 AD2d 849, 850.) "This rule, known as the collateral source doctrine, applies to cases in contract as well as in tort." (36 NY Jur2d, Damages, § 128; see, Gray v Pashkow, supra.)

Short form order signed herewith.

Dated: October 30, 2001

-----  
Justice John A. Milano

