

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D18505  
Y/hu

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Argued - January 25, 2008

WILLIAM F. MASTRO, J.P.  
REINALDO E. RIVERA  
ROBERT A. SPOLZINO  
THOMAS A. DICKERSON, JJ.

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2006-10164  
2007-04912

DECISION & ORDER

Keiko Ito, et al., plaintiffs-respondents,  
v 324 East 9<sup>th</sup> Street Corp., appellant, Legend  
Valve, et al., defendants-respondents.

(Index No. 4329/02)

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Palmeri & Gaven, New York, N.Y. (John J. Palmeri of counsel), for appellant.

Jacob D. Fuchsberg Law Firm, LLP, New York, N.Y. (Alan L. Fuchsberg of counsel), for plaintiffs-respondents.

Ohrenstein and Brown, LLP, Garden City, N.Y. (Matthew Kogan and Bennett R. Katz of counsel), for defendant-respondent Legend Valve.

John P. Humphreys, New York, N.Y. (Eric P. Tosca of counsel), for defendant-respondent Greenwich Village Plumbers Supply Co.

In an action, inter alia, to recover damages for personal injuries, the defendant 324 East 9<sup>th</sup> Street Corp. appeals (1) from an order of the Supreme Court, Kings County (Firetog, J.), dated October 13, 2006, which granted the plaintiffs' motion for leave to reargue (a) the plaintiffs' prior cross motion for leave to amend the bill of particulars, which had been denied in a prior order of the same court dated September 23, 2005, and (b) the prior motion of the defendant 324 East 9<sup>th</sup>

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Street Corp. for summary judgment dismissing the complaint insofar as asserted against it, which had been granted in the order dated September 23, 2005, and, upon reargument, vacated the order dated September 23, 2005, granted the plaintiffs' prior cross motion for leave to amend the bill of particulars, and denied its prior motion for summary judgment, and (2) as limited by its brief, from so much of an order of the same court entered May 17, 2007, as upon granting its motion, in effect, for leave to reargue, adhered to its original determination.

ORDERED that the appeal from the order dated October 13, 2006, is dismissed, as that order was superseded by the order entered May 17, 2007, made upon reargument; and it is further,

ORDERED that the order entered May 17, 2007, is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the plaintiffs and the defendant Legend Valve payable by the defendant 324 East 9<sup>th</sup> Street Corp.

Motions for reargument are addressed to the sound discretion of the court which decided the original motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (*see E.W. Howell Co. Inc. v S.A.F. La Sala Corp.*, 36 AD3d 653, 654; *Carrillo v PM Realty Group*, 16 AD3d 611; *Viola v City of New York*, 13 AD3d 439, 440). Contrary to the contention of the appellant 324 East 9<sup>th</sup> Street Corp., the Supreme Court providently exercised its discretion in granting leave to reargue to the plaintiffs, as it misapprehended several facts, applied the wrong standard on a cross motion for leave to amend the bill of particulars, and incorrectly concluded that prejudice would result were leave granted.

Leave to amend a bill of particulars is ordinarily freely given in the absence of prejudice or surprise (*see Grande v Peteroy*, 39 AD3d 590, 591; *Dalrymple v Koka*, 295 AD2d 469, 469-470). Here, there was no evidence that granting the plaintiffs leave to amend the bill of particulars to add a new theory of liability would prejudice or otherwise surprise the appellant. In fact, even on the new theory, the appellant contended that it had tendered sufficient evidence to warrant granting summary judgment in its favor (*see Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365). In the absence of prejudice or surprise, any delay was insufficient to defeat the amendment (*see id.*). Accordingly, the Supreme Court providently exercised its discretion in granting the plaintiffs leave to amend the bill of particulars (*see Telsey v County of Nassau*, 237 AD2d 428, 429; *Becker v City of New York*, 106 AD2d 595, 597; *cf. Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d at 365).

Contrary to the appellant's contention, it failed to satisfy its prima facie burden of establishing its entitlement to judgment as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557, 562). The failure to make such a showing required the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegard v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

The parties' remaining contentions are without merit.

MASTRO, J.P., RIVERA, SPOLZINO and DICKERSON, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style with a large initial "J".

James Edward Pelzer  
Clerk of the Court