

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

D28821
C/hu

_____AD3d_____

Argued - October 14, 2010

REINALDO E. RIVERA, J.P.
JOSEPH COVELLO
FRED T. SANTUCCI
SANDRA L. SGROI, JJ.

2009-10470

DECISION & ORDER

Donald P. Rosendale, appellant, v Harrison and
Burrowes Bridge Constructors, Inc., respondent.

(Index No. 4735/07)

Donald P. Rosendale, Amenia, N.Y., appellant pro se.

The Sarcone Law Firm, PLLC, White Plains, N.Y. (Pasquale Sommella and John A.
Sarcone III of counsel), for respondent.

In an action to recover damages for negligence, nuisance, trespass, and breach of contract, the plaintiff appeals from an order of the Supreme Court, Dutchess County (Pagones, J.), dated October 8, 2009, which denied his motion, denominated as one for leave to renew and reargue, but which was, in effect, one for leave to reargue that branch of the defendant's prior motion which was to dismiss the complaint for failure to prosecute pursuant to CPLR 3216, which had been determined in a prior order of the same court dated July 20, 2009.

ORDERED that the appeal is dismissed, with costs.

The plaintiff's motion, denominated as one for leave to renew or reargue, was not based on new facts not offered on the prior motion that would change the prior determination (*see* CPLR 2221[e][2]). Thus, the motion, although denominated as one for leave to renew and reargue, was, in actuality, a motion for leave to reargue, the denial of which is not appealable (*see Frazzetta v P.C. Celano Contr.*, 54 AD3d 806; *Trahan v Galea*, 48 AD3d 791, 792; *Eight In One Pet Prods. v Janco Press, Inc.*, 37 AD3d 402; *Rivera v Toruno*, 19 AD3d 473, 474; *Koehler v Town of Smithtown*, 305 AD2d 550, 551).

November 3, 2010

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ROSENDALE v HARRISON AND BURROWES BRIDGE CONSTRUCTORS, INC.

RIVERA, J.P., COVELLO, SANTUCCI and SGROI, JJ., concur.

2009-10470

DECISION & ORDER ON MOTION

Donald Rosendale, appellant, v Harrison and
Burrowes Bridge Constructors, Inc., respondent.

(Index No. 4735/07)

Cross motion by the respondent, inter alia, to dismiss appeals from two orders of the Supreme Court, Dutchess County, dated July 20, 2009, and October 8, 2009, respectively. By decision and order on motion of this Court dated March 10, 2010, the branch of the cross motion which was to dismiss the appeal from the order dated July 20, 2009, was granted, and the branch of the cross motion which was to dismiss the appeal from the order dated October 8, 2009, was held in abeyance and referred to the Justices hearing the appeal for determination upon the argument or submission of the appeal.

Upon the papers filed in support of the cross motion, the papers filed in opposition thereto, and upon the argument of the appeal, it is

ORDERED that the branch of the cross motion which is to dismiss the appeal from the order dated October 8, 2009, is denied as unnecessary in light of our determination on the appeal (*see Rosendale v Harrison and Burrowes Bridge Constructors, Inc.*, _____AD3d_____) [decided herewith].

RIVERA, J.P., COVELLO, SANTUCCI and SGROI, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court