

**R & D Maidman Family L.P. v Scottsdale Insurance  
Company**

2004 NY Slip Op 30309(U)

September 24, 2004

Supreme Court, New York County

Docket Number: 114437/02

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD  
*Justice*

PART 35

R & D Maidman Family CP

INDEX NO. 114437/02

MOTION DATE 8/26/04

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

- v -

Scottsdale Insurance Co

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for renew/reargue

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-6</u>
Answering Affidavits — Exhibits _____	<u>7</u>
Replying Affidavits _____	<u>8</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, the Court hereby


ORDERED that plaintiffs' motion pursuant to CPLR 2221 for leave to file and/or leave to reargue the Decision and Order of this Court entered May 17, 2004 is granted; and it is further

ORDERED that upon renewal and reargument, defendant Scottsdale Insurance Company's motion for summary judgment and plaintiffs' cross motion for partial summary judgment are denied; and it is further

ORDERED that the parties are to appear for a Compliance Conference as scheduled for January 4, 2005.

This constitutes the decision and order of the court.

Dated: 9/24/04

  
**HON. CAROL EDMEAD**, S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

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OCT 01 2004  
COUNTY CLERK'S OFFICE  
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
R & D MAIDMAN FAMILY L.P. and FASHION WEAR  
REALTY CO., INC.,

Plaintiffs,

Index No. 114437/02

**DECISION/ORDER**

-against-

SCOTTSDALE INSURANCE COMPANY and  
GREENWICH INSURANCE COMPANY,

Defendants.

----- X

MEMORANDUM DECISION

Plaintiffs, R & D Maidman Family LP and Fashion Wear Realty Co., Inc. ("plaintiffs")  
move pursuant to CPLR 2221 for leave to renew and/or reargue this Court's Decision and Order  
entered May 17, 2004, which granted summary judgment in favor defendant Scottsdale Insurance  
Company ("Scottsdale") and denied plaintiffs' cross motion for partial summary judgment. The  
Court's previous order involved directives contained in Notices of Violations ("Violations")  
issued by the Department of Building ("DOB") against plaintiffs.

In support of renewal, plaintiffs submit an affidavit of Howland H. ... (forth 1) the  
relevant provisions of the Administrative (Building) Code (the "Building Code") concerning  
DOB's power to require a property owner to perform certain emergency protective work, or have  
the work performed at the owner's expense via enforcement of a lien against the property, and 2)  
the routine practice of DOB in using its power under the Building Code to force the owner to  
perform the emergency protective work. According to plaintiffs, such material invalidates this  
Court's conclusion that plaintiffs' failure to remedy the violations would not result in liability for

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remedial costs, but instead, a fine. Plaintiffs contend that the reason this material was not submitted to the Court on its prior motion is because Scottsdale's moving/opposition papers never suggested that there was any question regarding the practical and legal necessity for plaintiffs to comply with the Violations. Also, it never occurred to plaintiffs that anyone, much less the court, *sua sponte*, would raise any issue regarding DOB's ability to enforce immediate protective orders. Further, the Court may exercise discretion to grant renewal based on facts previously known to plaintiffs since reasonable justification is given for plaintiffs' failure to previously provide such facts. Plaintiffs also argue that since the Court overlooked and improperly considered relevant provisions of the Building Code, reargument should be granted.

Upon renewal or reargument, it is argued, the Court should determine that plaintiffs were subject to legal and financial compulsion to comply with the protective orders included in the DOB Violations. According to plaintiffs, when an owner attempts to negotiate with DOB regarding compliance with a DOB protective order, it does so without choice, as DOB could make plaintiffs comply with the orders, or arrange to have it done and charge plaintiffs for it under the regulations. It is further argued that the Court misapprehended the facts by finding that the falling brick was not the cause of the remedial orders of DOB, and that such orders could have been issued pursuant to the prior notices of violations issued in 1995 and 1996, or in 2001. The 1995 and 1996 Violations were for essentially the same conditions that existed in 2001, but did not contain protective orders. Therefore, it was the brick having fallen, not the general condition of plaintiffs' building, that triggered the protective orders. Similarly, the Court improperly held that the possibility of harm differed from the fallen brick as a cause of the protective orders; to state that it was the not the fallen brick, but the possibility of further harm,

that triggered the protective orders is merely to state the obvious. Plaintiffs also argue that the issue is not whether the “condition” is ongoing, as identified by the Court, but rather, whether the “danger” is ongoing. Further, it is undisputed that the costs plaintiffs seek to recover are not for repairs to their property, but are strictly for the purpose of erecting scaffolding, net meshing and a sidewalk bridge to protect adjoining property and the public from damage or injury. Therefore, as a direct and immediate consequence of the brick having fallen, plaintiffs were required to expend substantial costs to comply with the DOB Violations which they would not have had to spend absent the falling brick.

In opposition, Scottsdale argues that plaintiffs concede that its motion is not based on new facts. Further, the affidavit does not contain any new facts, and plaintiffs were aware of the policies and procedures of DOB and failed to present these facts to the Court. Nor was the excuse proffered for failing to offer the newly submitted affidavit reasonable. It was not Scottsdale’s duty to present plaintiffs’ case for summary judgment, but to demonstrate that no issues of fact existed, and plaintiffs’ tactical decision not to present these facts to the Court does not justify renewal. Further, DOB’s Administrative Code is a matter of public record and available to plaintiffs at the time it cross-moved, and therefore, cannot serve as a proper basis for a renewal motion. Plaintiffs were afforded every opportunity to advance their claims in the prior motion that they were under this implicit threat of legal ramifications if they did not comply with the Violations. Further, with respect to reargument, it cannot be said that the Court overlooked or misapprehended relevant provisions of the Building Code, when plaintiffs failed to raise them before. Also, since plaintiffs cannot present different arguments than those advanced in their prior motion, the Court may not now entertain them on reargument. In any event, upon renewal

or reargument, the Court should adhere to its prior determination. There was no indication that plaintiffs would be subject to an adversarial proceeding if they did not comply with said Violations, as the Notice of Violations did not cite to other provisions of the Building Code in the event of noncompliance; it only stated that what the maximum penalty was for noncompliance. Scottsdale maintains that the Court's determination that (1) the single incident of a brick falling was not a "continuing harm," (2) it could not be said that the damage to the adjacent building was the basis of the DOB's remedial orders, and (3) that the expenses incurred by plaintiffs were to repair damage to their building which was not created by the brick falling incident.

In reply, plaintiffs deny making any tactical decision to omit policies and procedures of the DOB to the Court. Plaintiffs insist that the fines specified in the Violations in no way limit the DOB's power to enforce emergency protective orders contained in such Violations. Also, plaintiffs are not advancing arguments different from those initially asserted, but are simply addressing an issue raised by the Court for the first time in the Court's decision. Since the Court raised the issue of DOB's ability to enforce the protective orders, and misapprehended the law in so doing, plaintiffs are permitted to reargue such issue.

#### Discussion

##### Leave to Renew

CPLR 2221 provides that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . ." and "shall contain reasonable justification for the failure to present such facts on the prior motion." Thus, a motion to renew, when properly made, posits newly discovered facts that were not previously available

and a sufficient explanation as to why they could not have been offered to the Court originally (see discussion in D. Siegel New York Practice § 254 [3rd ed.1999]). A motion to renew, is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention (*Alpert v Wolf*, 194 Misc 2d 126, 751 NYS2d 707 [Supreme Court New York County 2002]; *Beiny v Wynyard*, 132 AD2d 190, 522 NYS2d 511 [1<sup>st</sup> Dept 1987], lv dismissed 71 NY2d 994, 529 NYS2d 277 [1988]).

While frequently invoking the general rule that leave to renew should be denied in the absence of a reasonable justification for the movant's failure to present the facts on the prior motion (see e.g. *Loperena v Buona*, 309 AD2d 592, 765 NYS2d 355 [1st Dept 2003]; *Cuccia v City of New York*, 306 AD2d 2, 761 NYS2d 31 [1st Dept 2003]; *Solomon v Ryty Inc.*, 302 AD2d 275, 755 NYS2d 387 [1st Dept 2003]; *Burgos v City of New York*, 294 AD2d 177, 742 NYS2d 39 [1st Dept 2002]), the court has continued to apply the pre-amendment exception thereto permitting the exercise of discretion to grant a motion for leave to renew, based upon facts inexplicably omitted on the prior motion (see *Mejia v Nanni*, 307 AD2d 870, 763 NYS2d 611 [1st Dept 2003]; *Garner v Latimer*, 306 AD2d 209, 761 NYS2d 657 [1st Dept 2003]; *Daniels v City of New York*, 291 AD2d 260, 737 NYS2d 598 [1st Dept 2002]; see also Siegel's Prac Rev No 149, p 4 [2004]). Although renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion (see CPLR 2221[e]), courts have discretion to relax this requirement and to grant such a motion in the interest of justice (*Mejia v Nanni, supra*).

Based upon review of cases wherein renewal was based upon law not considered in a prior motion, this Court determines to exercise such discretion and grant plaintiffs' motion to

renew.

In *Johnston v National Railroad Passenger Corp.* (161 AD2d 288 [1<sup>st</sup> Dept 1990]), plaintiff was awarded damages against defendants Amtrak and Allied Maintenance Corporation, 30% and 70% respectively. When Amtrak sought indemnification from Allied based upon a certain maintenance contract, Allied asserted that such indemnification was barred by GOL Law 5-322.1, to the degree Amtrak had itself been negligent for plaintiff's injuries. Upon renewal, Amtrak raised, for the first time, the applicability of 45 USC § 546(d), for the contention that leases and contracts entered into by Amtrak were governed by the laws of the District of Columbia, which did not have a statute analogous to GOL § 5-322.1 so as to bar enforcement of the indemnification agreement. Counsel for Amtrak claimed that he was unaware of the federal statute at the time of the original motion. The First Department found that, among other things, there was no bar to granting renewal upon the federal statute, since a motion for renewal may be based upon law not previously considered, and the excuse for failing to raise it in the first instance was valid.

However, in *Ramsco Inc. v Riozzi* (210 AD2d 592, 619 NYS2d 809 [3d Dept 1994]), the Third Department found that where plaintiff did not represent that the "new" evidence was unavailable to it at the time of the original motion for summary judgment, and that plaintiff's reason for failing to submit the new evidence was not reasonable, denial of a renewal motion was not an abuse of discretion. In *Ramsco*, plaintiff claimed that it did present the new evidence on the original motion because it "did not expect that a primary basis for the court's decision would be its finding that the description was insufficient to identify the property, and could not anticipate that this finding would be based in large part on defendants' mischaracterizations with

regard to the location and description of the property.” However, the Court observed that the papers submitted by defendants on the original motion demonstrated that they raised the issue of the property description as one ground for dismissal of the complaint, and plaintiff’s answering affidavit revealed its awareness of this argument and attempt to respond to it. “Though required to,” stated the Court, “plaintiff simply did not lay bare all of its proof in opposition to the original motion.”

It is undisputed that the Building Code sections plaintiffs now seek to assert were not presented to, and therefore, not considered by the Court on the prior motion. As in the case of *Johnston*, this motion for renewal may be based upon the Building Code sections not previously considered (*see generally Pabon v American Laundry Machinery Inc.*, 222 AD2d 223, 635 NYS2d 2 [1<sup>st</sup> Dept 1995] [reconsideration was properly granted, since motion included significant new matter not previously presented]). Since the parties’ respective forms of relief were not based on whether the amounts sought by plaintiffs constituted a “legal obligation” of plaintiffs, the additional material herein as an additional basis for summary judgment in favor of plaintiffs may be considered, provided the reason for its omission is reasonable. The sole reason for the material’s omission is that “it never occurred to plaintiffs’ counsel that anyone . . . would raise any issue regarding the ability of DOB to enforce the immediate protective orders contained in the . . . Violation.” Since this issue was never raised by defendant Scottsdale, it cannot be said that plaintiffs “simply did not lay bare all of its proof in opposition to the original motion.” Therefore, plaintiffs’ motion for leave to renew is granted.

NYC Administrative Code § 26-245, entitled Emergency measures, provides in pertinent

part:

a. Stopping work and vacating and securing structures. In case . . . any defective or illegal work in violation of or not in compliance with any of the provisions or requirements of this subchapter or *chapter one of title twenty-seven* of the code shall endanger life or property, the superintendent . . . shall have the right and is hereby authorized and empowered to order all further work to be stopped . . . and to require all persons . . . forthwith to vacate it, and also to cause such work to be done in and about the structure as . . . may be necessary to remove any danger therefrom. . . .

b. . . . During the construction or demolition of a structure, the superintendent shall notify the owner of the structure affected of any failure to comply with any of the provisions of this subchapter or *chapter one of title twenty-seven* of the code that concern the protection of the public and workers during construction or demolition. Unless the owner so notified proceeds within twenty-four hours to comply with the orders of the superintendent, *the superintendent shall have full power to correct the violation. All expenses incurred therefor shall become a lien on the property which may be enforced as provided in section 26-246 of this article.* (Emphasis added).

NYC Administrative Code § 26-246 provides that:

a. . . . the superintendent may . . . institute any . . . proceeding at law or in equity to restrain, correct or remove such violation, or the execution of any work thereon, or to restrain or correct the erection or alteration of, or to require the removal of, or to prevent the occupation or use of, such structure.

\* \* \* \* \*

f. Lien of judgment. Any judgment rendered in an action or proceeding instituted under this subchapter or *chapter one of title twenty-seven* of the code shall be and become a lien upon the premises named in the complaint in such action . . . .

NYC Administrative Code § 26-247 provides:

a. Judicial orders to comply with notices or orders. In case any notice or direction authorized to be issued by this subchapter or *chapter one of title twenty-seven* of the code is not complied with within the time designated therein, the city, by the corporation counsel, may, at the request of the superintendent, apply to the supreme court, at a special term thereof, for an order *directing the superintendent to proceed to make the alterations or remove the violation*, as may be specified in such notice or direction. (Emphasis added).

\* \* \* \* \*

e. Reimbursement of city for expenses. The expenses and disbursements incurred in the carrying out of any order issued as provided in subdivisions a and b of this section shall become a lien upon the structure or premises named in the order . . . ; and the supreme court . . . is hereby authorized and directed to grant any of the orders above named, and to take such proceedings as shall be necessary to make them effectual, and any justice to whom application shall be made is hereby authorized and directed to enforce such lien in accordance with the mechanics' lien laws applicable to the city.

As stated under Administrative Code §§ 26-245, 26-246, and 26-247, DOB may a) repair a structure as necessary during construction or demolition and cure the violation in order to protect the public and b) file a lien on the property in an amount equal to the costs of taking such remedial measures. Under Administrative Code 26-246, the DOB may also seek an injunction requiring an owner to perform any work ordered to remediate a violation.

Here, the subject Violations cited to Administrative Code § 27-127, which falls under "TITLE 27: CONSTRUCTION AND MAINTENANCE," CHAPTER 1: BUILDING CODE." Therefore, since the violation of Administrative Code § 27-127 herein may be subject to an action by the DOB to recover expenditures made to bring the subject building into compliance with the Violations, the Violations gave rise to a legal obligation on the part of plaintiffs to bear the costs for the work as ordered by the DOB. However, such finding leads to the next issue posed by plaintiffs on renewal, to wit: whether such legal obligation arises because of property damage to a third-party's property which was caused by an accident.

Leave to Reargue

On the other hand, an application for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered in the prior motion" (CPLR § 2221(d)(2)). A

motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing "that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1<sup>st</sup> Dept 1992]; *Schneider v Solowey*, 141 AD2d 813 [2d Dept 1988]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 [1<sup>st</sup> Dept 1984]) or to present arguments different from those originally asserted (*Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27, 588 NYS2d 8 [1st Dept 1992], lv denied and dismissed 80 NY2d 1005 [1992], *rearg. denied* 81 NY2d 782 [1993]). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1<sup>st</sup> Dept 1981]).

To the degree plaintiffs argue that the Court's determination was improper because it failed to consider what amounts to new material, to wit: NYC Administrative Code §§ 26-245 and 26-247, which was not presented by either party in the motion below. Defendant Scottsdale argues that since such sections were never presented to the court in the original moving papers, the sections were not "overlooked." Thus, since leave for reargument is limited to such matters as were presented to the Court upon the original submission of the motion, plaintiffs may not, as has been attempted herein, introduce new matter as a basis for reargument.

However, plaintiffs also seek reargument on the ground that the court overlooked the evidence of the 1995 and 1996 Violations when finding that the falling brick did not trigger or cause the issuance of the subject Violations, and overlooked the fact that the costs plaintiffs seek to recover are not for repairs to their property, but strictly for the purpose of protecting adjoining

property and the public from harm. Thus, leave to reargue on these latter grounds is granted.


Upon reargument, and upon reconsideration of the 1996 and 2001 violations,<sup>1</sup> the Court determines that it cannot be said at this juncture that the 2001 Violations were not issued because of damage to third party property. The Violations in 1996 alleging plaintiffs' failure to maintain the exterior building wall or structure, each directed plaintiffs to make repairs "as required" or "as necessary." The 2001 Violations at issue similarly allege plaintiffs' failure to maintain the subject building, but is silent as to any brick falling incident. However, the 2001 Violations also direct plaintiffs to "make all necessary repairs" and "protect adjacent property." Inasmuch as an issue of fact exists as to whether the DOB issued the protective/remedial orders in the 2001 Violations "because of property damage to" the adjacent building "which was caused by an accident," this Court cannot find as a matter of law that the legal obligation to expend the subject sums was "because of" "property damage" caused by an "occurrence."

The Court notes that its statement in its earlier decision that the expenses incurred by plaintiffs were to "repair damage to their building" was made in distinguishing case law cited by plaintiffs, and was not a primary basis for the Court's ruling therein.

Accordingly, upon renewal and reargument, defendant Scottsdale's motion for summary judgment is denied, and plaintiffs' cross motion for partial summary judgment as to defendant Scottsdale's liability for sums expended by plaintiffs to cure the DOB Violation is denied.

This constitutes the decision and order of the court.

Dated: September 24, 2004

**FILED**  
OCT 01 2004  
NEW YORK  
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Hon. Carol R. Edmead, J.S.

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<sup>1</sup> The October 26, 1995 Violation alleges that plaintiffs failed to maintain the exterior building wall of the subject building, but unlike the 1996 and 2001 Violations, does not include any remedial order or directive.