

**Battle v Zaffuto Constr. Co., Inc.**

2007 NY Slip Op 33778(U)

November 15, 2007

Supreme Court, Queens County

Docket Number: 0020308/2004

Judge: Patricia P. Satterfield

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY  
Present : HONORABLE PATRICIA P. SATTERFIELD IA Part 19  
Justice

	x	Index Number <u>20308</u> 2004
LEMORGE BATTLE,		
Plaintiff,		Motion Date <u>September 19,</u> 2007
- against -		
ZAFFUTO CONSTRUCTION CO., INC.,		Motions Cal. Number <u>4</u>
Defendant.		Motion Seq. No. <u>4</u>
	x	

ZAFFUTO CONSTRUCTION CO., INC.,

Third-Party Plaintiff,

- against -

DRILLCO EQUIPMENT COMPANY, INC. and  
BOVIS LEND LEASE LMB, INC.,

Third-Party Defendants.

x

The following papers numbered 1 to 18 read on this motion by Zaffuto Construction Co., Inc. (Zaffuto), for leave to reargue/renew the court's order dated May 30, 2007, which denied its motion for summary judgment in its favor and, upon reargument, for an order dismissing all claims and cross claims against Zaffuto; and cross motion by Bovis Lend Lease LMB, Inc. (Bovis), for summary judgment in its favor pursuant to CPLR 3212.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-6
Notice of Cross Motion -Affidavits-Exhibits.....	7-10
Answering Affidavits - Exhibits.....	11-14
Reply Affidavits.....	15-18

Upon the foregoing papers it is ordered that the motion and cross motion are denied.

Plaintiff in this negligence action seeks damages for personal injuries sustained on April 15, 2003, at 434 Beach 54th Street, in Far Rockaway, New York ("the premises"). At the time of the accident, plaintiff was employed as a caretaker for the New York City Housing Authority ("NYCHA"), and was assigned to work at the premises, also known as the "Edgemere Houses." It is alleged that plaintiff was carrying garbage when he fell while walking on a public walkway in the "Edgemere Houses" complex. Plaintiff claims that he tripped and fell on debris that was being deposited on the walkway by workmen doing brick repair or renovation work on scaffolds above the walkway. Zaffuto was the general contractor on the job, hired by NYCHA. Zaffuto hired Drillco Equipment Company, Inc. ("Drillco"), a subcontractor, to perform the actual work, which consisted of refacing the front of the buildings. Plaintiff sued Zaffuto, and Zaffuto instituted a third-party action against Drillco, and Bovis Lend Lease LMB, Inc., ("Bovis").

In seeking summary judgment in the prior application, Zaffuto alleged that (1) all of the workmen were employees of Drillco, (2) that Zaffuto did not create the alleged dangerous condition, and (3) that Zaffuto was not the owner, tenant or occupier of the premises and thus owed no duty of care to plaintiff. By order dated May 30, 2007, this court denied the motion based upon Zaffuto's failure to establish the lack of existence of any triable issue of fact concerning whether Zaffuto bore any responsibility for the safety of the area where plaintiff fell and whether it had notice of the alleged dangerous condition (see Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966 [1988]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). The court also denied the motion on the ground that it was premature.

It is upon the foregoing that Zaffuto moves for leave to reargue/renew and upon reargument, dismissing all claims and cross claims against it. Bovis cross-moves for summary judgment in its favor, pursuant to CPLR 3212.

#### Motion

A motion for leave to renew, pursuant to CPLR Rule 2221(e), "shall be based upon new facts not offered on the prior motion that could change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and it "shall contain reasonable justification for the failure to present such facts on the prior motion." A motion for leave to renew is "granted sparingly, and only in cases where

there exists a valid excuse for failing to submit additional facts on the original application" (Matter of Beiny, 132 AD2d 190, 210 [1987]. In Elder v Elder, 21 AD3d 1055 [2005]), the Court instructed that "[a] motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation (see Renna v Gullo, 19 AD3d 472 [2005]; Rubinstein v Goldman, 225 AD2d 328 [1996]; Hart v City of New York, 5 AD3d 438 [2004])."

A motion for leave to reargue, pursuant to CPLR Rule § 2221(d), "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." The purpose of a motion for leave to reargue " [] is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (Foley v Roche, 68 AD2d 558, 567 [1979]. It is also not an opportunity for an unsuccessful party to present arguments not originally presented (Amato v Lord & Taylor, Inc., 10 AD3d 374 [2004]; Pryor v Commonwealth Land Title Ins. Co., 17 AD3d 434 [2005]; Giovanniello v Carolina Wholesale Office Mach. Co., Inc., 29 AD3d 737 [2006]). Moreover, CPLR § 2221(f) requires that a "combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion ... shall decide each part of the motion as if it were separately made."

Zaffuto has not met any of the criteria discussed above for leave to renew or reargue. The information proffered in the motion to renew/reargue was considered by the court. Zaffuto's claim that the court failed to specifically state whether Zaffuto had a duty in the first instance is insufficient to grant renewal or reargument. Specifically, while the deposition testimony of Zaffuto's project manager indicates that Drillco was hired to perform the actual work, the subcontract submitted by Zaffuto also indicates that Zaffuto was to have a site safety manager whose duties included the monitoring of the site "on a regular basis" for safety concerns, and that the site safety manager was to maintain a site safety log and conduct safety meetings. Thus, while Zaffuto argued that it had no responsibility for the cleanup of the area where plaintiff fell and had no notice of the same, there was evidence submitted on the underlying motion indicating that a superintendent employed by Zaffuto was actively supervising the exterior brick renovation work at and before the time of plaintiff's injury. On that point, the Court stated in its prior decision the following:

While Zaffuto contends that it [bore] no responsibility for the cleanup of the area

where plaintiff fell, and had no notice of the [hazardous condition], there is evidence that a superintendent employed by Zaffuto was actively supervising the exterior brick renovation work at the time of plaintiff's injury.

Where, as here, a motion to reargue fails to demonstrate that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in making its decision, the motion must be denied (McGill v Goldman, 261 AD2d 593 [1999]; Gellert & Rodner v Gem Community Management, Inc., 20 AD3d 388 [2005]; Woody's Lumber Co., Inc. v Jayram Realty Corp., 30 AD3d 590 [2006]. "[As] reargument does not provide a party an opportunity to advance arguments different from those tendered on the original application, [] renewal is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." Rubinstein v. Goldman, 225 A.D.2d 328; see, O'Dell v. Caswell, 12 A.D.3d 492 (2004). Consequently, the motion for reargument and renewal is denied.

Cross Motion

The cross motion by Bovis for summary judgment in its favor dismissing all claims and cross claims against it on the ground that it was hired to serve in a consultative capacity is denied. Given the circumstances of this case and the absence of any pretrial discovery from Bovis, the request for summary judgment based solely upon the deposition testimony of Zaffuto's witness is premature (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]; Juseinoski v New York Hosp. Med. Ctr. of Queens, 29 AD3d 636 [2006]; Colombini v Westchester County Healthcare Corp., 24 AD3d 712 [2005]; Afzal v Board of Fire Commrs. of Bellmore Fire Dist., 23 AD3d 507 [2005]). However, that branch of the motion of Bovis' motion which seeks summary judgment dismissing the complaint insofar as asserted against it is denied without prejudice to renewal upon the completion of discovery (see generally Olmedo-Garcia v Dobson, 31 AD3d 727 [2006]; Ticali v Locascio, 24 AD3d 430 [2005]).

Conclusion

The motion for leave to renew/reargue the court's prior decision denying summary judgment to Zaffuto is denied. The cross motion by Bovis for summary judgment in its favor dismissing all claims and cross claims against it is denied with leave to renew upon completion of discovery.

Dated: November 15, 2007

.....  
J.S.C.