

**Thompson-Payne v Cohen Brothers Realty &  
Constr. Corp.**

2008 NY Slip Op 31502(U)

May 29, 2008

Supreme Court, New York County

Docket Number: 0103737/2003

Judge: Walter Tolub

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

PRESENT: \_\_\_\_\_

PART \_\_\_\_\_

*Justice*

Index Number : 103737/2003  
THOMPSON-PAYNE, KATHERINE  
VS.  
COHEN BROTHERS REALTY &  
SEQUENCE NUMBER : 002  
REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**

JUN 03 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/20/08

WALTER B. TOLUB S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
KATHERINE THOMPSON-PAYNE, aka  
KAE THOMPSON PAYNE

Plaintiff,

Index No.103737/03  
Mtn Seq.002

-against-  
COHEN BROTHERS REALTY & CONSTRUCTION  
CORP., COHEN BROTHERS REALTY CORPORATION, TONY  
VIERA, STEVE ALVAREZ, and SCHINDLER BROTHERS

Defendants.

**FILED**  
JUN 03 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

-----x  
WALTER B. TOLUB, J.:

This is a motion by the Plaintiff to reargue this court's decision dated January 4, 2008 which transferred the instant matter to the New York City Civil Court and, upon reargument, transferring the instant matter to the Supreme Court of the State of New York, New York County. Defendant cross- moves for an order striking the Note of Issue and permitting further discovery.

Facts

Plaintiff claims that on March 3, 2000, she was employed by the Inner City Broadcasting Corp. as a radio talk show host, working from broadcast studios on the 41<sup>st</sup> floor of the building. Plaintiff claims that one afternoon she entered the #8 express elevator on the 41<sup>st</sup> floor. The doors closed and the elevator appeared to free-fall before bouncing and stopping at the 28<sup>th</sup> floor.

Plaintiff claims that as a result of the free-fall and the jerking stops, she sustained, inter alia, orthopedic injuries requiring surgery and a shift in her lumbar spine. Plaintiff now has a fear of elevators and claims she had to discontinue her career with Inner City Broadcasting as a result of the incident.

Additionally, AFTRA, the broadcasters' labor union, has a collateral source lien which seeks reimbursement of benefits paid out for medical care associated with plaintiff's injuries.

The parties appeared before this court on January 4, 2008 for a pre-trial conference where inquiries were made with respect to Plaintiff's claimed injuries. Counsel for plaintiff, Mr. Sherman, failed to indicate that plaintiff had undergone surgery following her accident at which point this court determined that the matter should be referred to the Civil Court of the City of New York pursuant to CPLR 325-d.

Plaintiff now seeks to reargue this court's decision dated January 4, 2008 which transferred the instant matter to the New York City Civil Court and, upon reargument, transferring the instant matter back to the Supreme Court of the State of New York. Defendant cross-moves for an order striking the Note of Issue and permitting further discovery.

#### Discussion

The only question on a motion to reargue is whether the court overlooked or misapprehended fact or law in determining a

\* 4 ]  
prior motion. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very same questions previously decided. (Foley v. Roche, 68 A.D.2d 558, 418 NYS2d 588, 593-94 [1<sup>st</sup> Dept. 1979]) citing Fosdick v. Town of Hempstead, 126 NY 651). Moreover, a motion for leave to reargue may not include "any matters of fact not offered on the prior motion." (CPLR §2221(d)(2)).

CPLR §325(d) provides that the Supreme Court has discretion and may transfer a matter to the New York City Civil Court "where it appears that the amount of damages sustained may be less than demanded, and the lower court would have jurisdiction but for the amount demanded." (CPLR §325(d); 22 NYCRR 202.13(a)).

This court did not consider the fact that the Plaintiff underwent surgery for the injuries she sustained. Plaintiff's damages claim coupled with the lien meets the Supreme Court's jurisdictional threshold of \$25,000. It follows that this court's earlier finding that Plaintiff's damages will not meet the jurisdictional threshold was misapprehended and therefore, Plaintiff's motion to reargue is granted and upon reargument retransferring the instant matter to the Supreme Court of the State of New York, New York County pursuant to CPLR 325(b).

Defendants cross-move to strike Plaintiff's Note of Issue and permit the parties to conduct further discovery. Defendants argue that discovery in this matter has been delayed over the

years and that discovery remains outstanding as to Plaintiff's losses and physical injuries. Defendants seek time to "explore new discovery just exchanged including but not limited to a further deposition of the plaintiff regarding her loss of income and injuries related by Dr. Lee in Plaintiff's new medical exchange." (Defendants' cross-motion pp. 7-8).

It appears that the "new discovery" is not so new. Plaintiff claims that the records Defendants seek to further explore have been in their possession since August 7, 2007 including a report by Dr. Lee. In August of 2008, Defendant prepared a Supplemental Response to Expert Demand that attached an IME report by Dr. Unis. Dr. Unis' report included reference to a review of Plaintiff's treatment records with Dr. Lee. (Plaintiff's Ex. 5).

Although discovery in this matter may have been overly delayed, it is finally complete and the matter is ready for trial.

Accordingly, it is

ORDERED that Plaintiff's motion to reargue this court's decision dated January 4, 2008 which transferred the instant matter to the New York City Civil Court is granted and, upon reargument, the matter is re-transferred back to the Supreme

[\* 6]  
Court of the State of New York, New York County pursuant to CPLR 325(b); and it is further


ORDERED that Defendants' cross-motion to vacate the Note Of Issue is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Counsel for the parties are directed to appear for a pre-trial date, **at which time a trial date will be issued**, on September 12, 2008 at 11 AM in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/29/08

  
HON. WALTER B. TOLUB, J.S.C.

**FILED**  
JUN 03 2008  
COUNTY CLERK'S OFFICE  
NEW YORK