

**York Hunter Constr. Servs., Inc. v El-Ad
Skyview, Inc.**

2008 NY Slip Op 31695(U)

June 10, 2008

Supreme Court, New York County

Docket Number: 0120872/2003

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART _____

Justice

Index Number : 120872/2003

YORK HUNTER CONSTRUCTION

VS.

EL-AD SKYVIEW

SEQUENCE NUMBER : 003

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n 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

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

JUN 17 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/10/08

JUDITH J. GISCHE, J.S.C. J.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: PART 10

-----X
YORK HUNTER CONSTRUCTION SERVICES,
INC.,

Plaintiff,

-against-

EL-AD SKYVIEW, INC., H.G. SKYVIEW, INC.,
TITLE ASSOCIATES AGENCY, INC., EL-AD
SKYVIEW, INC., H.G. SKYVIEW, INC.,
TITLE ASSOCIATES AGENCY, INC., GPS
GLOBAL PARKING SOLUTIONS LLC, CARA
GOLDENBERG CASTALDO, ANDREW P.
CASTALDO, DAVID TUTERA, RYAN JURICA,
JOHN HOUSTON, trustee, FRANCISCO
DUQUE, IOANNIS DANALIS, MICHAEL
FERRENTINO, ROBERT B. LEVINE, KAREN
KULVIN, GAIL M. LANDER, MICHAEL TING,
JENNY W. LEE, SHANE HENTY SUTTON,
JOHN L. FIELD, EDWARD DIRNFELD, WILLIAM
LEVIS, GEORGIA LEVIS, TAMARA SHARON
STEELE, PANKAJ SAMTANI, CLAUDE
VU I L L I E M E C H A M B A D A L , P H I L I P P E
C H A M B A D A L , G A O W M I C H E L L E
S U W A N N U K U L , S A K A R I N S U W A N N U K U L ,
A D A M M . L E V I N E , C H R I S T I N E J A N S I N G ,
R A L P H J A M E S S I L V A , J r . , W I N G H U N G
A L I S T E R L O , A R U N K . N E M A L I , G A Y A T R I
N E M A L I , W I L L I A M M . R O B E R T S , A L I S O N M A R I
R O B E R T S , W A L T E R K E I T H V A N C E , J A N E T
L Y N N V A N C E , T H O M A S R . E L L I S , C H R I S T I A N
L . M U N D I G O , B R A D E N K . R H E T T S , T E V Y A
F I N G E R , N O R M A N Y . S C H O E N B E R G , J A M E S
M I N U T E L L O , W I L L I A M P O R T N O Y , L L C ,
W I L L I A M M . P O R T N O Y , J A C K O ' K E L L E Y I I I ,
M A R C R I C H A R D S , L I S A R I C H A R D S , S H E R O N
K O R P U S , A M Y J I L L B R A S L A W , K E L L I S
R O G E R S , S T E P H E N J . K A N T O R , D A V I D M .
L I N D S E Y , C I N D Y J . O ' H A G A N , C H R I S T O P H E R
R O B E R T S O N , E D W I N S C U L H A F E R , B O M B A Y
S U N E Q U I T I E S , L L C , E R I C L U F T I G , D A V I D A .
K A N E , P A R A G P A N D E , R I T U P A N D E , J U L I A N
A D D I S O N , A L E X A N D R A W H E L A N , J O S E P H S .

Decision/Order

Index No.: 120872/03
Seq. No. : 002

Present:
Hon. Judith J. Gische
J.S.C.

FILED
JUN 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

SACHS, STEVEN BROWN, NYU SCHOOL OF LAW FOUNDATION, MICHAEL J. ASHWORTH, JEREMY PALMER, RAQUEL PALMER, GLENN N. LEDESMA, and JOHN AND JANE DOES 1 THROUGH 100, the names John and Jane Doe being fictitious, representing owners and holders of liens against the subject premises, the true names of defendants being currently unknown,

Defendants.

-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Def's motion [reargue] w/SJG affirm in support, exhs	1
Pltf's opp w/SC affirm in support, exh	2

Upon the foregoing papers, the decision and order of the court is as follows:

The underlying action was brought to foreclose on a mechanic's lien. Plaintiff York Hunter Construction Services, Inc. ("York Hunter") previously moved to amend the complaint. CPLR § 3025 (b); Lien Law § 44. Defendants El-Ad Skyview, Inc. and H.G. Skyview, Inc. (collectively herein referred to as "Skyview") opposed that motion and cross-moved for partial summary judgment: (1) reducing York Hunter's breach of contract and lien foreclosure claims; and (2) dismissing York Hunter's claim for damages due to an alleged breach of a "last look agreement." CPLR § 3212.

In the court's decision and order dated August 30, 2007 (the "prior order"), the court granted York Hunter's motion to amend the complaint and denied Skyview's cross motion for partial summary judgment. Skyview now "seeks to reargue that portion of the [prior order] which apparently determined that the \$760,000 that Skyview paid directly to the subcontractor, [John Civetta and Sons, Inc. ("Civetta")] for [York Hunter], is not a credit

against York Hunter's claim. CPLR 2221.

For the reasons set forth more fully below, Skyview's motion to reargue must be denied. Skyview has failed to establish that the court overlooked any controlling principle of law or misapprehended any material fact. A motion to reargue is addressed to the discretion of the court and is intended to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any principle of law. CPLR § 2221 [d] [2]. Its purpose is not, however, to enable the unsuccessful party to argue once again the very questions decided against him or her (Foley v. Roche, 68 AD2d 558, 567 [1st Dept 1979]). Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application (id.).

Upon the original motion, this court held that Skyview failed to meet its burden because there were issues of fact which precluded a finding that a portion of the amount due under the contract between York Hunter and Skyview had been discharged by a subsequent contract between Skyview and Civetta. Upon reargument, Skyview now argues that it is entitled to a credit of \$760,000 because "Justice Gammerman, in a prior action between Civetta and York Hunter [entitled John Civetta and Sons, Inc. v. York Hunter Construction, Index No. 104140/02 ("Civetta Action")], already determined that the \$760,000 paid by Skyview to Civetta was to complete the same work that Civetta had performed under its subcontract with York Hunter (order, Gammerman, J. dated 3/20/03).

Although Skyview has failed to provide a copy of the underlying motion papers, (which itself renders this motion defective), there is no dispute that Skyview failed to raise this collateral estoppel argument in its cross motion in-chief, but rather, first put this

before the court in its reply papers on that cross motion.¹ A court should not consider arguments making their initial appearance in reply papers (Azzopardi v. American Blower Corp., 192 AD2d 453 (1st Dept 1993); Dannasch v. Bifulco, 184 AD2d 415 [1st Dept 1992]; Ritt v. Lenox Hill Hospital, 182 A.D.2d 560 [1st Dept 1992]). Reply papers provide the opportunity to address arguments made in opposition to the position taken by the movant and do not to permit the movant to introduce new arguments in support of, or new grounds for the motion (Dannasch v. Bifulco, *supra* at 417).

Although a court may, in its discretion, consider a claim or evidence offered for the first time in reply where the offering party's adversaries responded to the newly presented claim or evidence (see e.g. Fiore v. Oakwood Plaza Shopping Ctr., Inc., 164 AD2d 737, 739 [1991], *affd.* 78 NY2d 572 [1991], *cert. denied* 506 US 823 [1992]), that was not the case on the original motion. Skyview contends that the collateral estoppel argument "was brought up by York Hunter itself in its opposition papers to Skyview's motion for partial summary judgment" when York Hunter submitted the affidavit of Kenneth Colao (the "Colao affidavit"). However, the court rejects this assertion. Skyview has not even submitted a copy of the Colao affidavit on this motion. Therefore, Skyview has failed to establish that the court misapprehended any matters of fact or law.

Assuming *arguendo* that the Colao affidavit reads as Skyview represents to the court on this motion, nonetheless, mere discussion of the \$760,000 payment in an affidavit by the adversary does not, in and of itself, transform into an argument by Skyview for partial summary judgment on the ground of collateral estoppel resulting from Justice

¹Skyview has only submitted to the court its memorandum of law and reply memorandum of law on the prior motion.


Gammerman's order dated 3/20/03. Skyview's submission of the collateral estoppel argument for the first time in its reply memorandum of law was improper and therefore was correctly not considered by the court. A motion for reargument is not an appropriate vehicle for raising new questions (Simpson v Loehmann, 21 NY2d 990 [1968]). Therefore, to the extent that this new position is inconsistent with that previously relied upon, it is not properly the subject of a motion to reargue. This does not mean that issues of set off and credit are decided in this case. These issues remain for trial. Accordingly, Skyview's motion to reargue is denied.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
June 10, 2008

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
JUN 17 2008
COUNTY CLERK'S OFFICE
NEW YORK