

MacCarthy v Railworks Corp.

2009 NY Slip Op 30727(U)

March 30, 2009

Supreme Court, New York County

Docket Number: 113804/05

Judge: Judith J. Gische

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.

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART _____

Index Number : 113804/2005

MACCARTHY, JOHN

vs.

RAILWORKS

SEQUENCE NUMBER : 002

RENEWAL

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

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

FILED

APR 02 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/30/09

J. G.
JUDITH J. GISCHE, J.S.C.
J.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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

JOHN MACCARTHY,

Plaintiffs,

-against-

RAILWORKS CORPROATION and L. K.
COMSTOCK & COMPANY, INC.,

Defendants.

DECISION/ORDER

Index No.: 113804/05

Seq. No.: 002

Hon. Judith J. Gische
J.S.C.

FILED

APR 02 2009

COUNTY CLERK'S OFFICE
NEW YORK

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

Papers	Numbered
Defs n/m (§renew/reargue) w/PJM affirm, JM affid, exhs	1
Pltf's opp affirm (JKG)	2
Defs PJM reply affirm	3

Upon the foregoing papers the court's decision is as follows:

This action is brought under the labor law. Defendant Railworks Corporation ("Railworks") now moves to renew/reargue the decision/order of this court dated May 27, 2008 (the "prior decision"), and upon renewal/reargument, dismissing plaintiff's Labor Law § 240 (1) claim pursuant to CPLR § 3212, or in the alternative, reversing the award of partial summary judgment on the issue of Railwork's liability with respect to plaintiff's Labor Law § 240 (1). CPLR 2221. Plaintiff opposes the motion.

In the prior decision, insofar as it relates to the instant motion, the court: [1]

granted plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240 (1) claim against defendant Railworks; and [2] denied defendants' cross-motion for summary judgment dismissing plaintiff's Labor Law § 200 claim against Railworks because, in part, there was an issue of fact as to whether Railworks "created the hazard with respect to the masonite floor coverings that may have caused plaintiff's injury".

The instant motion is premised upon the recent Court of Appeals decision in Cohen v. Memorial Sloan-Kettering Cancer Center, 2008 NYSlipOp 8161 which reversed the First Department's decision (50 A.D.3d 227 [1st Dept 2008]). Railworks claims because the court relied in part on the now reversed First Department decision in Cohen, and since the court found an issue of fact as to whether the masonite floor coverings may have caused plaintiff's injury, the prior decision is infirm. For the reasons that follow, the motion to reargue/renew is denied.

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.).

Railworks has not argued that the court overlooked or misapprehended any fact, or misapplied any principal of law. Rather, Railworks contends that the Court of Appeals decision impacts the prior decision. Therefore, this motion is properly

considered as a renewal of the prior motion. A motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination” (CPLR § 2221 [e] [2]). Such motion “shall contain reasonable justification for the failure to present such facts on the prior motion” (id. [e][3]).

Railworks' motion to renew must be denied because the facts in Cohen are distinguishable from this case. In Cohen, the plaintiff fell when, while descending a ladder, his foot became wedged in between the second rung of that ladder and an unconnected metal pipe protruding from the wall. The Court of Appeals reversed the First Department's decision granting summary judgment in favor of the plaintiffs, because the protruding unconnected pipes were a separate hazard wholly unrelated to the risk which brought about the need for the ladder. The Court of Appeals holding in Cohen is limited to the facts, to wit: the ladder was an adequate safety device for Cohen to perform his elevation-related task, and Cohen's injury arose from the protruding pipe, which was simply “one of the usual and ordinary dangers of a construction site.”

Railworks contends that no Labor Law § 240 (1) liability exists if the ladder MacCarthy used was not itself defective, but rather, the ladder shifted due to the movement of the loose masonite floor coverings upon which the ladder must have been placed for plaintiff to perform his elevation-related task, thereby causing plaintiff's injury. However, in defendant's alternative scenario, the ladder would still be insufficient for MacCarthy to perform his elevation-related task, and unlike in Cohen, the core objective


of Labor Law § 240 (1) would not have been met (Nieves v Five Boro Air Conditioning & Refrig. Corp., 93 NY2d 914, 916 [1999]). This is not a case where plaintiff tripped on an object on the floor, or an object protruding from the wall or that the accident otherwise occurred as a result of "a separate hazard wholly unrelated to the danger that brought about the need for the ladder". (cf Nieves v Five Boro Air Conditioning & Refrig. Corp., *supra* [no Labor Law § 240 (1) liability because there was no evidence that the ladder was defective or unstable in its placement]; Ross v. Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 [1993]).

Accordingly, Railworks' motion to renew/reargue is denied.

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

This shall constitute the decision and order of the court.

Dated: New York, New York
March 30, 2009

So Ordered: 

Hon. Judith J. Gischa, JSC

FILED
APR 02 2009
COUNTY CLERK'S OFFICE
NEW YORK