

**Nimmo v City of N.Y. Dept. of Transp.**

2009 NY Slip Op 32180(U)

September 23, 2009

Supreme Court, New York County

Docket Number: 402708/06

Judge: Doris Ling-Cohan

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

PRESENT: **JUSTICE DORIS LING-COHAN**

PART 36

Justice

John N. ... III

INDEX NO.

402708/06

MOTION DATE

MOTION SEQ. NO.

005

MOTION CAL. NO.

- v -

The City of New York Dept of Transportation

Third-Party action

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 ...

1, 2

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

5

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

6, 7

3, 4

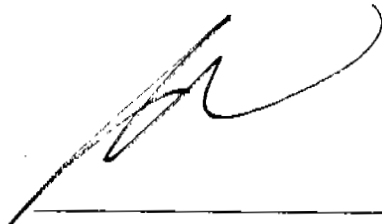
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion & cross-motion to renew/reargue are decided in accordance with the attached memorandum decision.

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

**FILED**  
SEP 25 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: \_\_\_\_\_

9/23/09  


**JUSTICE DORIS LING-COHAN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 36

----- X  
JOHN NIMMO III,

Plaintiff,

INDEX NO.  
402708/06

-against-

THE CITY OF NEW YORK DEPARTMENT  
OF TRANSPORTATION,

Motion Seq.  
No.: 005

Defendant.

----- X  
THE CITY OF NEW YORK DEPARTMENT  
OF TRANSPORTATION,

Third-Party Plaintiff,

INDEX NO.  
590796/06

-against-

PARSONS BRINKERHOFF CONSTRUCTION  
SERVICES, INC.,

Third-Party Defendant.

----- X  
**DORIS LING-COHAN, J.:**

Third-party defendant Parsons Brinkerhoff Construction Services, Inc. ("Parsons") moves for an order pursuant to CPLR 2221 granting it leave to reargue and renew its prior cross-motion (seq. no. 004) for summary judgment, which was denied by this court in a decision and order dated January 6, 2009 (the "prior order"), and upon such reargument and renewal granting the cross-motion. Defendant and third-party plaintiff The City of New York Department of Transportation ("DOT") cross-moves for an order pursuant to CPLR 2221 and 5015 granting it leave to reargue its prior motion (seq. no. 004) for summary judgment, which was denied by the

prior order, and upon reargument granting the motion.

The underlying facts are fully set forth in the prior order (exhibit A to Parsons' moving papers) and will be referred to herein only as needed. This is an action for damages for personal injuries allegedly sustained by plaintiff on July 2, 2004, when a steel plate fell on his foot while he was working on a project to renovate the Third Avenue Bridge. DOT is the owner of the bridge. Third-party defendant Parsons was the resident engineer for the project. Non-party Kiska Construction Corporation ("Kiska") was the general contractor and plaintiff's employer.

Plaintiff's complaint alleges that DOT was negligent and violated sections 200, 240(1) and 241(6) of the Labor Law, numerous sections of the Industrial Code, and Article 1926 of OSHA. After serving its answer, DOT commenced a third-party action against Parsons asserting causes of action based on negligence, contribution, common law and contractual indemnification, and breach of contract. The breach of contract claim was based on Parson's alleged failure to procure insurance naming DOT as an additional insured. In its answer to the third-party complaint Parsons asserted counterclaims for common law and contractual indemnification and contribution.

DOT moved for an order granting it summary judgment (i) dismissing plaintiff's complaint including any and all cross-claims (there were no cross-claims) with prejudice; and, (ii) granting it summary judgment with respect to its cross-claims (*viz.*, third-party claims) against Parsons for common law and contractual indemnification. Parsons cross-moved for an order granting it summary judgment dismissing all claims and third-party claims asserted against it. Plaintiff cross-moved for an order granting him summary judgment against DOT on the issue of liability pursuant to sections 240(1) and 241(6) of the Labor Law.

All three motions were denied by the prior order. DOT's request for summary judgment dismissing the complaint was denied on the ground that triable issues existed with respect to whether DOT provided reasonable and adequate protection and safety devices for plaintiff as required by sections 240(1) and 241(6) of the Labor Law. DOT's request for summary judgment on its third-party claims against Parsons for common law and contractual indemnification was denied on the ground that issues existed with respect to Parson's negligence. Parsons' request for summary judgment dismissing DOT's third-party claims (except for the breach of contract claim, which was denied because Parsons failed to supply a copy of the insurance policy) was denied for the same reason.<sup>1</sup> Plaintiff's cross-motion for summary judgment was denied on the ground that he failed to demonstrate that DOT did not provide reasonable and adequate protection and safety devices. Parsons has now moved for leave to reargue and renew its prior cross-motion and DOT has cross-moved for leave to reargue its prior motion.

A motion 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" (CPLR 2221[d][2]). 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]).

In support of its application for reargument Parsons contends that DOT's third-party claims for common law and contractual indemnification should have been dismissed because DOT failed to establish that Parsons was negligent. Parsons argues that DOT failed to "establish" (i) that Parsons exercised control or supervision over the work plaintiff was engaged

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<sup>1</sup> Parsons also moved for dismissal of plaintiff's claims against it, but that was denied as academic because plaintiff did not assert any claims against Parsons.

in at the time of his accident; and (ii) that Parsons had actual or constructive notice of the allegedly unsafe condition. Parsons then cites the court's prior determination that there was no evidence that DOT was negligent.

Parsons' application for reargument is denied. DOT was not required to "establish" that Parsons was negligent. Parsons sought summary judgment. Since Parsons was the party seeking summary judgment, to prevail, Parsons was required to establish, as a matter of law, that it was not negligent (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], reargued 3 NY2d 941 [1957]); upon the submitted papers, Parsons failed to do so. The court's determination that there was no evidence that DOT was negligent is not tantamount to a determination that Parsons was not negligent.

Additionally, in support of its application for renewal, Parsons furnishes a copy of the previously unfurnished insurance policy. CPLR 2221(e)(3) provides that a motion for leave to renew "shall contain reasonable justification for the failure to present such facts on the prior motion." The "reasonable justification" offered by Parsons for its prior failure to furnish the required insurance policy is that "the Court misapprehended the facts of this matter regarding the issue of [Parsons'] insurance in this matter" (see Morgenweck affirmation in support of Parsons' motion, ¶ 5). However, this argument by Parsons is unavailing.

Although renewal is generally not available where, as here, the newly submitted material was available at the time of the original motion, the court has broad discretion to grant renewal in view of the strong public policy in favor of resolving cases on the merits (see *Framapac Delicatessen, Inc. v Aetna Cas. and Sur. Co.*, 249 AD2d 36, 36-37 [1<sup>st</sup> Dept 1998]). The court will grant the application in view of the fact that a copy of the policy has now been furnished by

Parsons and DOT does not dispute that it was covered thereunder. Upon renewal of Parson's prior cross-motion, DOT's breach of contract claim against Parsons is dismissed.

In support of its application for reargument, DOT contends that its prior motion should have been granted to the extent of dismissing plaintiff's negligence and Labor Law § 200 claims because the court determined that there was no claim by plaintiff that DOT was negligent and no evidence to support a finding of liability on DOT's part for another's negligence.

The court agrees. Plaintiff sought summary judgment against DOT on his claims under §§ 240(1) and 241(6) of the Labor Law and DOT sought dismissal of the entire complaint. In opposition, plaintiff was unable to demonstrate that an issue existed with respect to DOT's negligence and/or its purported violation of § 200 of the Labor Law and, as the court stated, there was nothing in the papers before it to support a finding of negligence on DOT's part. Thus, plaintiff's negligence and Labor Law §200 claims are dismissed.

In her reply affirmation, DOT's attorney argues that Parsons should be ordered to immediately take over DOT's defense. As this request was contained in reply papers, it is improper; there is nothing in DOT's notice of cross-motion to suggest that it was seeking declaratory relief. Furthermore, the court will not consider arguments making their initial appearance in reply papers (see *Azzopardi v American Blower Corporation*, 192 AD2d 453, 454 [1<sup>st</sup> Dept 1993]).

Plaintiff argues that movants' requests for leave to reargue are untimely because they were not made within 30 days after service of a copy of the prior order with notice of entry as required by CPLR 2221(d)(3). No affidavit of service of the prior order has been furnished to the court, although Parsons, while responding that its motion was timely, concedes that service was

\* 7 ]  
made on the date claimed by plaintiff. Whether late or not, the court has jurisdiction to entertain the instant applications for reargument (see *Liss v Trans Auto Systems, Inc.*, 68 NY2d 15, 20 [1986] [“[r]egardless of statutory time limits concerning motions to reargue, every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action”]).

Accordingly, it is hereby

ORDERED that Parsons’ motion (seq. no. 005) is denied to the extent that it seeks leave to reargue its prior cross-motion (seq. no. 004) for summary judgment dismissing all claims and third-party claims asserted against it; and it is further

ORDERED that Parsons’ motion (seq. no. 005) is granted to the extent that it seeks leave to renew its prior cross-motion (seq. no. 004), and upon renewal the motion is granted to the extent that DOT’s cause of action against Parsons for breach of contract is dismissed; and it is further

ORDERED that DOT’s cross-motion (seq. no. 005) for leave to reargue its prior motion for summary judgment dismissing plaintiff’s complaint and all cross-claims with prejudice is granted, and upon reargument the cross-motion (seq. no. 004) is granted to the extent of dismissing plaintiff’s causes of action based upon negligence and violation of § 200 of the Labor Law. In all other respects the cross-motion is denied.

This constitutes the decision and order of the court.

DATED: 9/23/2009

J:\Renew.Reargue\Nimmo.wpd

Hon. Doris Ling Cohan, J.

FILED  
SEP 25 2009  
COUNTY CLERK'S OFFICE  
NEW YORK