

**O'Halloran v City of New York**

2010 NY Slip Op 31138(U)

May 5, 2010

Supreme Court, New York County

Docket Number: 108759/04

Judge: Barbara Jaffe

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5/5/10

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

PRESENT: JAFFE BARBARA JAFFE  
J.S.C.

PART 5

Index Number : 108759/2004

O'HALLORAN, JAMES

INDEX NO. \_\_\_\_\_

VS

CITY OF NEW YORK

MOTION DATE \_\_\_\_\_

Sequence Number : 003

MOTION SEQ. NO. \_\_\_\_\_

REARGUMENT/RECONSIDERATION

MOTION CAL. NO. \_\_\_\_\_

CAL # 88

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

PAPERS NUMBERED

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

1  
2

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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**  
MAY 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 5/5/10

MAY 05 2010

BARBARA JAFFE 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 5 **BARBARA JAFFE**  
-----X  
J.S.C.

JAMES and MARILYN O'HALLORAN, and  
GREENWICH INS. CO. a/s/o JAMES and  
MARILYN O'HALLORAN

Plaintiff,

-against-

Index No. 108759/04  
Motion Date: 5/04/10  
Motion Seq. No.: 003  
Calendar No.: 88

THE CITY OF NEW YORK,  
Defendant.

-----X  
THE CITY OF NEW YORK,  
Third-Party Plaintiff,

-against-

THE HALCYON CONSTRUCTION CORP,  
Third-Party Defendant.

-----X  
BARBARA JAFFE, JSC:

**For Halcyon:**  
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**FILED**  
MAY 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

By notice of motion dated April 2, 2010, third-party defendant Halcyon Construction Corp. (Halcyon) seeks an order granting leave to reargue its motion for summary dismissal, dated December 3, 2009, which was denied by decision and order dated March 4, 2010. Third-party plaintiff City opposes.

In the decision, I held as follows, in pertinent part:

Although Halcyon argues that City's oversight and approvals of its work precludes summary dismissal in City's favor, it provides no supporting legal authority or sufficient admissible evidence. Moreover, it is reasonably inferred from Ricci's testimony that the sewer repair was a collective effort by City and Halcyon. That Ricci never accused Halcyon of negligence does not satisfy Halcyon's burden of proof. (See *Peskin v NYCTA*, 304 AD2d 634 [2d Dept 2003] ["a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense"]; cf *Manning v 6638 18<sup>th</sup> Ave. Realty Corp.*, 28 AD3d 434 [2d Dept 2006] [defendant met its burden by demonstrating that plaintiff merely speculated as to cause of her accident]).

Monte's affidavit, moreover, is too conclusory and self-serving to provide a basis for granting Halcyon's motion. (See *Winegrad*, 64 NY2d at 853 ["bare conclusory assertions" by defendants "do not establish that the cause of action has no merit as to entitle defendants to summary judgment"]). . . . For all of these reasons, Halcyon has failed to establish, *prima facie*, that it did not cause plaintiffs' damages.

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, but shall not include any matters of fact not offered on the prior motion." (CPLR 2221[d][2]). The motion may not be used to permit an unsuccessful party to argue the precise issues previously determined. (*Fosdick v Town of Hempstead*, 126 NY 651 [1891]). Reargument does not provide "a party an opportunity to advance arguments different from those tendered on the original application. . . . [or] . . . assume a different position inconsistent with that taken on the original motion." (*Foley v Roche*, 68 AD2d 558, 568 [1979]).

Halcyon contends that it is entitled to reargument because the decision rests on inadmissible hearsay without giving it an opportunity to address, and inadmissible lay opinion testimony. It also asserts, as it did in its original papers, that City offered no admissible evidence to raise a triable issue of fact, and that I misstated its burden on the motion. It maintains that I

ignored its evidence that “negated the element of a breach of duty” as set forth in the affidavit of Joe Monte, the deposition testimony of Geraldo Vasquez, and “the signed admissions of City’s engineers that everything Halcyon did was proper.” (Affirmation of Richard A. Fogel, Esq., dated Apr. 2, 2010). Halcyon annexes the Monte affidavit, the Vasquez deposition, and the deposition of City inspector Freddy Ricci, along with the sign-off sheets, and reiterates its arguments on the original motion that these exhibits reflect no complaints from City about its work or any testimony indicating that Halcyon was negligent. (*Id.*, Exhs. E, F, H).

In opposition, City denies having offered hearsay evidence in support of its opposition to Halcyon’s motion, and denies that my reference to it in the decision is improper. In any event, it observes that O’Halloran’s statement about the alleged admission may qualify as a present sense impression or admission, and that his statement about Halcyon’s aggressive striking of the road was offered only to place Halcyon at the scene at the time the damage occurred, alleging that the circumstance “raises a host of questions about whether Halcyon created the condition that caused damages.” (Affirmation of Vanessa R. Campagna, Esq., dated Apr. 16, 2010). In sum, City argues that Halcyon failed to establish that its employees did not create or exacerbate the damages sustained by plaintiffs or establish a basis for dismissing the third-party complaint. (*Id.*).

I first address Halcyon’s reliance on *Whitman Realty Group, Inc. v Galano*, 52 AD3d 505 (2d Dept 2008). There, the court held: “The power of the court to award summary judgment for or against a nonmoving party pursuant to CPLR 3212 (b) does not dispense with the necessity for fair notice and an opportunity of a party to present his or her defenses.” Here, Halcyon’s motion for summary judgment was denied based on evidence contained within the submissions of both parties; no judgment was awarded any party. In any event, Halcyon was not precluded from

arguing that evidence not relied on by City should not be considered.

Halcyon re-submits the deposition transcripts without citation to any particular portion and does not demonstrate that they or the Monte affidavit were overlooked. Rather, they were found insufficient to satisfy Halcyon's burden of proving, *prima facie*, that it should not be held liable for plaintiffs' damages. Having submitted the Vasquez transcript only in its reply papers on the original motion, I declined to consider it then and have no reason to alter that course now.

Although the statements of which Halcyon complains in O'Halloran's deposition testimony would have been properly considered in opposition to Halcyon's motion, along with the evidence that Halcyon was working at the site at the time of the incident and O'Halloran's own observations at the scene (*see DiGiantomasso v The City of New York*, 55 AD3d 502, 502-503 [1<sup>st</sup> Dept 2008] [inadmissible hearsay may be offered in opposition to motion for summary judgment if not the only evidence offered]; *In re New York City Asbestos Litigation v AC & S, et al*, 7 AD3d 285 [1<sup>st</sup> Dept 2004] [evidence otherwise excludable at trial may be considered in opposition to motion for summary judgment as long as not sole basis for court's determination]; *Navedo v 250 Willis Avenue Supermarket*, 290 AD2d 246, 247 [1<sup>st</sup> Dept 2002] [hearsay evidence may suffice to demonstrate existence of triable fact if not sole evidence submitted]; *Koren v Weihs*, 201 AD2d 268, 269 [1<sup>st</sup> Dept 1994] [same]), the statements are only referenced in the recitation of the procedural background and did not figure in the analysis.

Finally, Halcyon merely reiterates the arguments made in its original motion concerning the burden of proof on a motion for summary judgment.

For all of these reasons, Halcyon has failed to demonstrate its entitlement to reargument.

Accordingly, it is hereby

Accordingly, it is hereby

ORDERED, that the motion for leave to reargue is denied.

This constitutes the decision and order of the court.

  
Barbara Jaffe, JSC

**BARBARA JAFFE**  
**J.S.C.**

DATED: May 5, 2010  
New York, New York  
MAY 05 2010

**FILED**  
MAY 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE