

Alers v Verizon N.Y., Inc.

2010 NY Slip Op 33592(U)

November 22, 2010

Supreme Court, Richmond County

Docket Number: 102339/07

Judge: Thomas P. Aliotta

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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PAUL ALERS and CHELSEA GRADY,

Plaintiffs,

-against-

VERIZON NEW YORK, INC., CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., ALAN SPITALNIK,
THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION and
TIME WARNER ENTERTAINMENT COMPANY, L.P.,
d/b/a STATEN ISLAND CABLE,

Defendants.

-----X
TIME WARNER CABLE, INC.,

Third-Party Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION and
ALAN SPITALNIK,

Third-Party Defendants.

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The following papers numbered 1 to 4 were marked fully submitted on the 20th day of October, 2010:

	Pages Numbered
Notice of Motion for Leave to Reargue by Plaintiffs Paul Alers and Chelsea Grady, with Supporting Papers (dated August 3, 2010).....	1
Affirmation in Opposition by Defendant Consolidated Edison Company of New York, Inc. (dated August 4, 2010).....	2
Affirmation in Opposition by Defendant/Third-Party Plaintiff Time Warner Entertainment Company L.P. s/h/a Time Warner Cable, Inc. and d/b/a Staten Island Cable (dated October 12, 2010).....	3
Reply Affirmation by Plaintiffs Paul Alers and Chelsea Grady (dated October 15, 2010).....	4

Upon the foregoing papers, plaintiffs' motion for leave to reargue is granted, in

ALERS v. VERIZON

part, and denied, in part, in accordance with the following.

This action was commenced to recover damages for personal injuries allegedly sustained by plaintiff Paul Alers (hereinafter, “plaintiff”) on April 3, 2007 when he fell from his 28-foot extension ladder while connecting a cable line onto a utility pole for the purpose of installing cable television service to a residence located across the street at 745 Craig Avenue, Staten Island, New York. At the time, plaintiff and his co-worker were employed by Uptown Communications, a subcontractor retained by defendant Time Warner Cable, Inc. to install cable television service on Staten Island.

In the present motion, plaintiffs are seeking leave to reargue the Decision and Order of this Court dated June 29, 2010 which (1) granted the summary judgment motions of defendants Consolidated Edison Company of New York, Inc. (hereinafter, “Con Edison”) and Time Warner Entertainment Company, L.P. s/h/a Time Warner Cable, Inc. and d/b/a Staten Island Cable (hereinafter, “Time Warner”) dismissing the complaint and any cross claims against them and (2) denied plaintiffs’ cross motion for partial summary judgment on the issue of liability under Labor Law §240(1).

It is movants’ contention, *inter alia*, that the Court misconstrued plaintiff Paul Alers’ affidavit in support of the cross motion as being contradictory to his earlier deposition testimony. It is further alleged that the Court overlooked and/or failed to properly consider the deposition testimony of Time Warner’s witness, Ken Shepard, to the effect that (1) “in-house” cable installers are able to use their 28-foot ladders “safely” while extended to their maximum lengths, (2) Time Warner did not have an “in-house policy as to when a bucket truck should be used”, and (3) its cable installers are provided with and required to use safety harnesses and hard hats. In view of the foregoing, movants maintain that the Court erred in finding that the decision by plaintiff, an employee of one of Time Warner’s subcontractors, to use an available 28-foot extension ladder to install cable service at the above location instead of rescheduling the work until a Time Warner bucket truck became available, was the sole

ALERS v. VERIZON

proximate cause of his accident.

Also called into question is the propriety of the Court's ruling that the activity in which plaintiff was engaged, i.e., adding a line to an existing cable terminal box, was not part of construction, demolition or excavation of a structure within the meaning of Labor Law §241(6) and the New York State Industrial Code. In particular, plaintiffs' argue, once again, that the installation of a new cable service connection constitutes "construction work", while asserting, for the first time, that 12 NYCRR 23-1.4(b)(13) applies in this case. Finally, movants challenge the Court's failure to conclude that plaintiff's "altering of [a] utility pole is [a] basis for Con Edison's liability."

It is well established that a motion for leave to reargue is addressed to the sound discretion of the court and affords the moving party an opportunity to show that the court overlooked or misapprehended the facts or the law or for some other reason mistakenly arrived at its earlier decision (*see* CPLR 2221[d][2]; Boboyev v Gomez, 304 AD2d 600; Doirio v City of New York, 202 AD2d 625). It is not to be used, however, as the means by which an unsuccessful party is permitted to argue against the very issues previously decided (*see* Pro Brokerage v Home Ins. Co., 99 AD2d 971), or to present new or different arguments from those originally tendered (*see* Gellert & Rodner v Gem Community Mgt. Inc., 20 AD3d 388; Pryor v Commonwealth Land Tit. Ins. Co., 17 AD3d 434, 435-436); Amato v Lord & Taylor Inc., 10 AD3d 374, 375).

Consonant with these principles, plaintiffs have failed to demonstrate that this Court overlooked or misapprehended any relevant fact or the law in either granting Con Edison's motion for summary judgment dismissing the complaint and any cross claims as against this defendant, or granting so much of Time Warner's motion for summary judgment as sought dismissal of plaintiffs' claims against it for violations of Labor Law §241(6), the New York State Industrial Code, Labor Law §200 and common-law negligence. Simply restating or re-casting the same arguments previously rejected, and

ALERS v. VERIZON

belatedly raising new arguments does not justify the granting of leave to reargue (*see Pryor v Commonwealth Land Tit. Ins. Co.*, 17 AD3d at 435-436; *Amato v Lord & Taylor Inc.*, 10 AD3d at 375 *Boboyev v Gomez*, 304 AD2d at 601; *Pro Brokerage v Home Ins. Co.*, 99 AD2d at 971).

However, the same cannot be said for the branch of plaintiffs' motion which seeks leave to reargue the Court's decision to (1) dismiss any claims against Time Warner for its alleged violation of Labor Law §240(1), and (2) deny plaintiff's motion for partial summary judgment thereunder. To this extent, the Court has been persuaded that it "misapprehended" the legal effect of the deposition testimony of Time Warner's witness, Ken Shepard. Accordingly, leave to reargue is granted solely on the issue of Time Warner's liability under Labor Law §240(1).

Upon reargument, the Court finds that, as evidenced by Ken Shepard's deposition testimony, the injured plaintiff's decision to use an extension ladder rather than a bucket truck to perform this *particular* cable installation was not contraindicated, as it was conceded by the witness that such ladders could be used safely even if extended to their maximum length, and that plaintiff's decision did not contravene any specific directive requiring the use of a bucket truck for subcontractor installations such as the one at issue. Accordingly, the Court should not have concluded that "plaintiff's decision to proceed with the installation without the use of an available safety device, i.e., a bucket truck, was the sole proximate cause of his accident for the purposes of Labor Law §240(1)." Moreover, inasmuch as it is also clear from Ken Shepard's deposition testimony that Time Warner did not provide safety harnesses to the employees of its subcontractors, plaintiffs have demonstrated *prima facie* Time Warner's breach of its non-delegable duty under the Labor Law to protect workers from gravity-related injuries (*see generally, Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280). Given Time Warner's failure to rebut this showing and/or raise a triable issue of fact with regard thereto, plaintiffs' are entitled to partial summary judgment against it on the

ALERS v. VERIZON

issue of liability under Labor Law §240(1).

Accordingly, it is

ORDERED, that leave to reargue the prior decision and order of this Court, *inter alia*, dismissing the complaint and any cross claims as against defendant Time Warner Cable Inc. and denying plaintiffs' cross motion for partial summary judgment against it under Labor Law §240(1) is granted as to this issue only; and it is further

ORDERED, that upon reargument, so much of the prior motion by said defendant as was for summary judgment dismissing the complaint and any cross claims against it for alleged violations of Labor Law §240(1) is denied; and it is further

ORDERED, that plaintiff's cross motion for summary judgment on the issue of liability under Labor Law §240(1) is granted as against this defendant; and it is further

ORDERED, that the balance of plaintiffs' motion for leave to reargue is denied; and it is further

ORDERED, that the matter be set down for a trial on the issue of damages upon the filing of any necessary papers and the payment of any required fees.

E N T E R,

Dated: November 22, 2010

/s/ _____
Hon. Thomas P. Aliotta
J.S.C.