

Messner v City of New York/Dept. of Sanitation

2011 NY Slip Op 30604(U)

January 13, 2011

Supreme Court, Richmond County

Docket Number: 101890/06

Judge: Thomas P. Aliotta

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

-----x
JAMES MESSNER and SANDRA MESSNER,

Plaintiffs

-against-

THE CITY OF NEW YORK/DEPARTMENT OF
SANITATION, MICHAEL HACKET, MACK TRUCKS,
INC., HEIL ENVIRONMENTAL INDUSTRIES, LTD.,
and "JOHN DOES 1-10", first and last name being
fictitious and representing agents, servants and/or
employees of the Defendants,

Defendants.
-----x

Part: C-2

Present:
Hon. Thomas P. Aliotta

DECISION AND ORDER

Index No.: 101890/06
Motion No. 2748 - 005

The following papers numbered 1 to 10 were marked submitted on the 17th day of
November, 2010:

	Pages Numbered
Plaintiffs' Notice of Motion for Leave to Reargue, with Supporting Papers and Exhibits 1 though 30 (dated August 16, 2010).....	1
Affirmation in Opposition by Defendant Heil Environmental Industries, Ltd. (dated October 13, 2010).....	2
Affirmation in Opposition by Defendants The City of New York/ Department of Sanitation and Michael Hacket (dated October 29, 2010).....	3
Affirmation in Opposition by Defendant Mack Trucks, Inc. (dated October 29, 2010).....	4
Plaintiffs' Reply Affirmation to Opposition by Defendant Mack Trucks, Inc. (dated November 10, 2010).....	5
Plaintiffs' Reply Affirmation to Opposition by Defendant Heil Environmental Industries, Ltd. (dated November 10, 2010).....	6

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Plaintiffs' Reply Affirmation to Opposition by Defendant The City of New York/ Department of Sanitation and Michael Hackett (dated November 10, 2010).....	7
Affidavit of Dr. Irving U. Ojalvo (dated December 3, 2009).....	8
Affidavit of Kristopher J. Seluga (dated December 3, 2009).....	9
Letter from Dr. Anne Marie Stillwell (dated December 3, 2009).....	10
Letter from Dr. John C. L'Insalata and Attachments (dated November 16, 2009).....	11

Upon the foregoing papers, plaintiffs' motion for leave to reargue is granted, in part, and denied, in part, in accordance with the following.

This action arises from an accident which occurred on September 15, 2005 at approximately 10:00 A.M. in which James Messner (hereinafter, "plaintiff"), a New York City Sanitation worker, was injured while performing garbage collection duties at the corner of Bennett Street and Jewett Avenue on Staten Island. In the complaint, Mr. Messner, a 15-year veteran of the Sanitation Department, alleges that on the above date, while standing behind the garbage truck and attempting to maneuver a piece of wood into the hopper, his hand became caught on the wood and subsequently stuck between it and the hopper, which purportedly self-activated, pulling his arm and body into the rear of the truck and crushing his right hand and arm. It is uncontroverted that plaintiff's fellow employee, defendant Michael Hackett, was seated in the cab of the truck when the accident occurred.

By way of background, the instant complaint contains twenty-three causes of action, alleging, *inter alia*, that the accident "occurred as a result of the carelessness, negligence and recklessness of the defendants, their agents, servants and/or employees, in their ownership, design, manufacturing, operation, control, maintenance, repair, supervision, inspection and care of the subject sanitation truck." Specifically with

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respect to defendants Mack and Heil, plaintiff's claims are predicated on allegations of (a) negligent design, (b) negligent manufacture, (c) breach of express warranty, (d) breach of implied warranty, (e) strict liability, (f) failure to warn, (g) failure to inspect, (h) breach of contract, (i) negligence and (j) gross negligence, and seeks punitive damages. As to the City and Hackett, plaintiff alleges, among other things, improper maintenance, negligent hiring, improper design, and that the City's employee, Hackett, either activated the "hopper" from inside the cab, thereby causing the accident, or unjustifiably failed to keep his partner under surveillance and respond in a timely manner to his pleas for help before the injury occurred.

In the present motion, plaintiffs seek leave to reargue the Decision and Order of this Court dated June 28, 2010 which (1) granted defendants' motions for summary judgment, and (2) denied plaintiffs' motion for partial summary judgment on the issue of liability.

In support of reargument, plaintiffs argue, *inter alia*, that the Court "never considered [their] motion for summary judgment since it granted defendants' motions for summary judgment and ruled that plaintiffs' motion was moot." In this regard, plaintiffs allege that the Court neglected to consider the "substantial evidence" offered in opposition to defendants' motions and in support of their motion for partial summary judgment. In addition, plaintiffs claim that the Court failed to address a "dispositive" procedural issue, i.e., the untimely "filing" of the summary judgment motions by the City and Mack Trucks.¹ Plaintiffs further contend that the Court (1) made impermissible credibility determinations in its evaluation of the deposition testimony of the various witnesses and plaintiffs' experts, and (2) overlooked the eyewitness account of Joseph Crosby allegedly corroborating the injured plaintiff's testimony that the hopper blade malfunctioned when it self-activated from a stopped position.

¹ In a so-ordered Stipulation dated August 11, 2009, the parties agreed that summary judgment motions were "to be *filed* within 90 days of the note of issue (emphasis supplied)."

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Additionally, it is alleged that the Court erred in dismissing as speculative plaintiffs' claim that negligence on the part of defendant Michael Hacket, i.e., his purported failure to maintain a "proper lookout" and obey departmental work rules which prohibit the use of earphones, was a substantial cause of the injury.

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 the foregoing principles, plaintiffs have failed to demonstrate that this Court overlooked or misapprehended any fact or the law in (1) granting the motions for summary judgment and dismissing the complaint as against defendants Mack Trucks and Heil, and (2) denying (in light of the determination dismissing the complaint as against the City) plaintiffs' motion for partial summary judgment on the issue of liability. Simply re-stating or re-casting the same arguments previously rejected 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 grant the City's motion for summary judgment. To this extent, the Court has been persuaded that it "misapprehended" the

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legal effect of the deposition testimony of plaintiff, defendant Michael Hacket and third-party Joseph Crosby on the limited issue of whether any negligence on the part of plaintiff's coworker was a substantial factor in causing plaintiff's injury. More specifically, the Court should have concluded, on the papers before it, that issues of fact exist with regard to defendant Hacket's alleged violation of the New York City Department of Sanitation's "Code of Conduct" precluding the use of earphones, as well as his alleged failure to observe his partner's actions and maintain a proper lookout at the time of the incident. In view of the deposition testimony indicating that plaintiff's hand remained "stuck" between the piece of wood and the "stopped" hopper blade for approximately three minutes during which this defendant was unresponsive to plaintiff's yelling and the "shouts" for assistance by, e.g., several neighbors, a question of fact has been raised as whether his delay, if any, in responding to the emergency was a substantial contributing factor to plaintiff's arm being crushed.

Accordingly, it is

ORDERED, that so much of plaintiffs' motion for leave to reargue the Decision and Order of this Court dated June 28, 2010, *inter alia*, dismissing the complaint as against defendants The City of New York, its Department of Sanitation and Michael Hacket is granted; and it is further

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

ORDERED, that upon reargument, so much of the foregoing defendants' motion as is for the dismissal of any cause(s) of action predicated on the purportedly negligent acts or omissions of defendant Michael Hacket is denied; and it is further

ORDERED, that, in all other respects, the prior determination of this Court is adhered to; and it is further

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ORDERED, that the Clerk enter judgment in accordance herewith.

E N T E R,

Dated: January 13, 2011

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