Wesley v City of New York
2011 NY Slip Op 31592(U)
June 10, 2011
Sup Ct, NY County
Docket Number: 110947/09
Judge: Barbara Jaffe
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.

SCANNED ON 6/14/2011

[* 1]

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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Index Number : 110947/2009

WESLEY, BLOSSOM

INDEX NO. _____

VS

CITY OF NEW YORK

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. _____

REARGUMENT/RECONSIDERATION

MOTION CAL. NO. _____

Cal # 129

The following papers, numbered 1 to _____ were read on this motion to/for reargue

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

JUN 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/10/11 JUN 10 2011

BARBARA JAFFE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

----------x

BLOSSOM WESLEY,

Plaintiff,

-against-

THE CITY OF NEW YORK and
SIX AVENUE CHELSEA, INC.

Defendants.

----------x

Index No.	110947/09
Motion Date:	4/5/11
Motion Seq. No.:	002
Calendar No.:	129

DECISION & ORDER

FILED

JUN 14 2011

COUNTY CLERK'S OFFICE
NEW YORK

BARBARA JAFFE, JSC:

For plaintiff:
Alexander Kran III, Esq.
Leav & Steinberg, LLP
120 Broadway, 18th Floor
New York, NY 10271
212-766-5222

For defendant Six Avenue:
John J. Bruno, Esq.
Harvey Gladstein & Partners LLC
110 Wall Street
New York, NY 10005
212-352-1111

For defendant City:
Andrew Lucas, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-788-0560

By notice of motion dated December 1, 2010, defendant City moves pursuant to CPLR 2221 for an order granting it leave to reargue a prior decision and order dated October 25, 2010, in which I denied City's motion for summary judgment. Plaintiff and defendant Six Avenue Chelsea, Inc. (Six Avenue) oppose the motion.

I. PRIOR ORDER

In the October 2010 decision, I denied City's motion on the ground that:

> Although there is no dispute that City had no duty to maintain this sidewalk, plaintiff and co-defendant have raised legitimate concerns that City has not performed a comprehensive search proving that it performed no work at the accident location. Given the paucity of answers elicited from City's record searcher regarding the records on which City relies in support of its motion, the other parties promptly requested the production of another City witness. City's argument in reply, specifying where relevant work would have been reflected in the search, is of no evidentiary value as it is not advanced by a party with knowledge. (*Kelly v Rubin*, 224 AD2d 262 [1st Dept 1996] [facts alleged only in counsel's affirmation are without evidentiary value]). Having failed to demonstrate,

through an employee with sufficient knowledge, that the records reflect that City had not performed work at the location, City has not sustained its *prima facie* burden of demonstrating that it neither caused nor created the defect. Moreover, because the documents recovered reflect work performed by a City agency on behalf of which the witness could not testify, there is an issue of fact as to whether City created the defect. (*See Cabrera v City of New York*, 21 AD3d 1047, 1048 [2d Dept 2005] [summary judgment denied where City testimony regarding its records raised issue of fact as to whether it caused or created defect]).

II. CONTENTIONS

City contends that I misapprehended the evidence presented on its motion as there is no document reflecting any work performed by or for a City agency, and that its witness was a records searcher who only testified as to the documents already produced in discovery and had no knowledge, nor would she have had knowledge, as to whether City performed work at the location of plaintiff's accident. It maintains, through counsel, that it conducted a complete and comprehensive search for any relevant records, as DOT records would include any work performed by any City agency, not just DOT, and that the records reflect that it performed no work at the location at issue. City thus argues that it established *prima facie* entitlement to an order dismissing the complaint against it. (Affirmation of Andrew Lucas, ACC, dated Dec. 1, 2010).

In opposition, Six Avenue alleges that City did not make a *prima facie* showing as it produced no witness who testified that City performed no work at the location, and that its assertion that any work performed by a City agency would be reflected in a DOT search is made solely by counsel. It thus contends that City failed to establish a ground upon which to grant it leave to reargue. (Affirmation of John J. Bruno, Esq., dated Jan. 31, 2011).

Plaintiff denies that I misapprehended or overlooked any relevant facts or law, and that

City improperly submitted new arguments and evidence. (Affirmation of Alexander Kran III, Esq., date Feb. 4, 2011).

III. ANALYSIS

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]). Whether to grant re-argument is committed to the sound discretion of the court, and a motion to re-argue may not "serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." (*Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]). Nor may the movant advance new arguments not previously presented. (*Kent v 534 E. 11th St.*, 80 AD3d 106 [1st Dept 2010]; *Mazinov v Rella*, 79 AD3d 979 [2d Dept 2010]).

In support of its motion for summary judgment, City produced documents responsive to a search of DOT records for any documents related to the location for two years prior to and including the date of plaintiff's accident, which reflect that no work was performed by a City agency. However, City still fails to submit any testimony or an affidavit based on personal knowledge or a review of DOT's records interpreted by someone with personal knowledge concluding that (1) City performed no work at the location, and (2) City's search was comprehensive in that it would have reflected any work performed by any City agency at the location of plaintiff's accident. (*See eg Amarosa v City of New York*, 51 AD3d 596 [1st Dept 2008] [contractor met burden by submitting affidavit from manager stating that records showed no work at location]; *Arrucci v City of New York*, 45 AD3d 617 [2d Dept 2007] [contractor submitted affidavit from officer attesting that it performed no work at location]). Counsel's

allegations are not probative, and City's witness did not know if any work had been performed at the location, nor had she personally conducted the search for the records. (*See McNeill v City of New York*, 40 AD3d 823 [2d Dept 2007] [denying City's motion to dismiss for lack of prior written notice where DOT employee's testimony not based on personal knowledge]; *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455 [2d Dept 2006] [evidence submitted by defendant consisted of hearsay affirmation of attorney stating that there were no open repair orders and no complaints had been made about unsafe condition and deposition testimony that did not address these issues, which was insufficient to establish *prima facie* entitlement to dismissal]).

Consequently, City has not established that it is entitled to an order dismissing the complaint against it.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for leave to reargue is granted and upon reargument, the motion is denied.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: June 10, 2011
New York, New York

JUN 10 2011

FILED

JUN 14 2011

NEW YORK
COUNTY CLERK'S OFFICE