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

PRESENT: BARBARA JAFFE J.S.C. Justice

PART 5

Hossain, Kazi

INDEX NO. 406889/07

MOTION DATE

- v -

MOTION SEQ. NO. 005

City of NY.

MOTION CAL. NO. 54

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

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED

JUN 23 2011

NEW YORK COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 6-20-11

JUN 20 2011

BARBARA JAFFE J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

---x

KAZI HOSSAIN, MOHAMMED AKHAND, and MOHAMMED ALI,

Individually, and on behalf of all other similarly situated as class representatives,

Plaintiffs,

-against-

CITY OF NEW YORK, and THOMAS R. FRIEDEN, Commissioner of the Department of Health & Mental Hygiene,

Defendants.

---x

Index No. 406889/07

Mot. Arg: 4/12/11
Mot. Seq. No.: 005
Cal. No.: 54

DECISION AND ORDER

FILED

JUN 23 2011

NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, J.:

For plaintiffs:
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By notice of motion dated July 7, 2010, plaintiffs move for an order granting them leave to reargue a prior decision and order denying their motion for summary judgment. Defendants oppose the motion.

Plaintiffs, hot dog vendors working in the City of New York, commenced the instant class action lawsuit on behalf of themselves and all others similarly situated who received notices of violation (NOVs) for employing a "single bin method" of storage whereby a single stainless steel bin of hot water stores both warm hot dogs and stainless steel containers of condiments. Plaintiffs allege that defendant City of New York Department of Health & Mental Hygiene

(DHMH) violated the New York City Administrative Procedure Act (CAPA) by adopting a rule banning the single bin method without following CAPA's procedures, that defendants violated plaintiffs' constitutional rights, and that the ban of the single bin method is arbitrary and capricious and void as a matter of law. It is undisputed that before 2008, there was no law, rule or regulation banning the single bin method, and that in 2008 DHMH amended Article 89 of the New York City Health Code through the formal CAPA process and banned the method, which plaintiffs argue should have been done prior to their receipt of NOVs.

On May 5, 2009, Samako Gbenu, a public health sanitarian employed by DHMH from 2005 to 2007, testified at an examination before trial (EBT) that his direct supervisor was Sam Singh, a senior health sanitarian, and that Singh "informed [him] that there was a change [in policy]" and "that from now on food vendors cannot be selling hot dogs from the cart without a permanent partition between the hot dog and the onion and sauerkraut containers." Gbenu had never before issued an NOVs for hot dog vendors employing the single bin method. (Affirmation of Brian T. Kohn, Esq., dated July 7, 2010, Exh. 1).

By decision and order dated May 18, 2010, another justice of this court denied plaintiffs' and defendants' motions for summary judgment. As pertinent here, the court held that Gbenu's testimony about Singh's instruction constituted inadmissible hearsay to the extent it was offered for the truth of the matter asserted therein, i.e., that Singh had issued a new rule banning the single bin method. The court thus concluded that plaintiffs did not submit "admissible evidence *conclusively* demonstrating that DHMH issued a '*statement or communication* of general applicability that (I) implements or applies law or policy, or (ii) prescribes the procedural requirements of an agency including an amendment, suspension, or repeal of any such statement

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or communication'" (emphasis in original), and that absent such evidence, it could not determine whether DHMH implemented a "rule change" pursuant to CAPA.

II. CONTENTIONS

Plaintiffs argue that the court misapprehended or misapplied applicable law when it deemed Gbenu's testimony about Singh's statement hearsay as the statement constituted an admission against interest and was thus admissible as an exception to the hearsay rule, and that Singh's admission is admissible against defendants as he was their agent and the statement was within the scope of his authority and made during the course of the business for which he was employed. (Memorandum of Law, dated July 7, 2010).

Defendants deny that the court misapprehended or misapplied the law as Singh's alleged statement was not an admission as plaintiffs submitted no statement by Singh but only testimony by Gbenu about a statement that Singh allegedly made, and that in any event, Singh was not an agent of defendants with authority sufficient to bind them as he was not a DHMH policymaker and could not bind them on the issue of whether DHMH instituted a new policy or rule. They also argue that even if Singh's statement constitutes an admission, plaintiffs fail to submit evidence that defendants effected a rule change covered by CAPA. Rather, they assert that they have offered evidence that DHMH effected no policy change. (Memorandum of Law, dated Aug. 2, 2010).

In reply, plaintiffs deny that Gbenu's testimony constitutes inadmissible hearsay and contend that Singh's general supervisory authority is sufficient to bind defendants to the alleged admission against their interest. (Reply Memorandum of Law, dated Aug. 12, 2010).

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]).

Hearsay is an out-of-court statement offered for the truth of the assertion contained therein and is inadmissible unless it is not offered for its truth or falls within an exception to the hearsay rule. (*People v Huertas*, 75 NY2d 487 [1990]). An admission is a statement made by a party which is inconsistent with the party's position at trial and is evidence of the facts admitted. (Prince, Richardson on Evidence § 8-201, 202 [Farrell 11th ed]). An admission is admissible wherever, whenever, or to whomsoever made. (*Id.*).

The statement of an agent may be received against the principal only if the agent has authority to speak on behalf of the principal and the statement is made within the scope of the agent's authority. (*Id.* at § 8-208). The burden is on the proponent to show that a statement constitutes an admission. (*Tyrrell v Wal-Mart Stores Inc.*, 97 NY2d 650 [2001]).

Here, Gbenu's statement that Singh told him that there was a change in policy relating to the single bin method constitutes an admission that defendants had in fact instituted such a change in policy only upon a showing by plaintiffs that Singh was authorized to make such a statement on defendants' behalf. However, plaintiffs' evidence establishes only that Singh was a senior health sanitarian and Gbenu's immediate supervisor, and that his authority encompassed the supervision of health inspectors. There is no evidence offered to indicate that Singh had any authority to make any statement beyond his authority, especially statements concerning department-wide policy changes.

Plaintiffs have thus failed to meet their burden of demonstrating that the Singh's alleged statement constitutes an admission against defendants' interest. (*See eg Boyce v Gumley-Haft, Inc.*, 82 AD3d 491 [1st Dept 2011] [statement was not admission as there was no evidence that building superintendent was authorized to speak on defendant's behalf with respect to building's employment practices and hiring and firing of employees]; *Silvers v State*, 68 AD3d 668 [1st Dept 2009], *lv denied* 15 NY3d 705 [2010] [no evidence that defendant's field representative was authorized to speak for defendant on particular issue]; *Alvarez v First Nat. Supermarkets, Inc.*, 11 AD3d 572 [2d Dept 2004] [store manager's statement not admission against store as plaintiffs failed to submit evidence that manager had speaking authority on behalf of store]).

For this reason, plaintiffs have not established that the court overlooked or misapprehended any legal issues in denying their motion for summary judgment.

IV. CONCLUSION

Accordingly, plaintiffs' motion for leave to reargue is denied.

FILED

JUN 23 2011

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: June 20, 2011
New York, New York