

Kish v City of New York
2013 NY Slip Op 30765(U)
April 12, 2013
Sup Ct, Richmond County
Docket Number: 101726/2009
Judge: Thomas P. Aliotta
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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CHARLES KISH and GAIL KISH,

PART C - 2

Plaintiffs,

Present:
HON. THOMAS P. ALIOTTA

- against -

DECISION AND ORDER

THE CITY OF NEW YORK
and H.O. MACHINERY, INC.,

Index No. 101726/2009
Motion No. 3487 - 005

Defendants.

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The following papers numbered 1 to 3 were marked fully submitted on the 27th day of February, 2013.

Papers Numbered

Notice of Motion for Leave to Reargue by Defendant The City of New York, with Supporting Papers (dated November 29, 2012).....	1
Plaintiffs' Affirmation in Opposition (dated December 19, 2012).....	2
Reply Affirmation by Defendant The City of New York (dated February 25, 2013).....	3

Upon the foregoing papers, the motion of defendant The City of New York for leave to reargue is denied.

This personal injury action arises from an accident which occurred on January 26, 2009 wherein plaintiff Charles Kish (hereinafter, "plaintiff"), a bulldozer operator for the City's Department of Sanitation was injured upon exiting its cab. According to plaintiff, as he dismounted onto the tracks of the bulldozer, it unexpectedly began to roll

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forward and down the hill on which it was parked. Plaintiff allegedly lost his balance and fell off the machine, which proceeded to run over and crush his feet.

In the present motion, The City of New York (hereinafter, the “City”) seeks leave to reargue the Decision and Order of this Court dated October 3, 2012 which denied its motion for summary judgment. In support of reargument, the City maintains that there is no conflicting evidence regarding the details of the immediate post-accident inspection which was performed by the City’s employee, Charles Thompson (a mechanic), who actually drove the bulldozer and tested its brake system within an hour of the incident and found that the emergency brake was properly working. Movant also points out that subsequent inspections of the bulldozer were conducted by various other individuals, *i.e.*, a Department of Sanitation Supervisor (Michael Parisi), and plaintiff’s experts, all of whom found no indication of a defective emergency brake. According to the City, the record is devoid of evidence that the City’s implementation of its preventive maintenance schedule with periodic oil changes was negligent, or that a lack of maintenance in any way caused the emergency brake to fail on the day of plaintiff’s accident.

The City also argues that the Court misconstrued (1) the affidavits of plaintiff’s experts who were unable to identify a viable theory of liability or provide an explanation for the alleged malfunction of the brake system, and (2) plaintiff’s own testimony that he never experienced any deficiencies with the brakes, and was not aware of any prior incidents or mechanical problems with the bulldozer. Finally, movant contends that the

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Court applied undue weight to the issue of whether or not the injured plaintiff applied the emergency brake prior to exiting the vehicle.

Based on the foregoing, the moving defendant maintains that the Court incorrectly denied its motion for summary judgment since there is no evidence in the record showing that (1) the subject bulldozer was defective, (2) the City was negligent in the exercise of its duty to maintain it in proper working order, and (3) the City had either actual or constructive notice of any alleged defect.

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, the City has failed to demonstrate that this Court overlooked or misapprehended any fact or the law in denying its motion for summary judgment on the issue of liability. Simply re-stating or re-casting the same

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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).

The Court is not convinced that its interpretation of the deposition testimony of the witnesses and its analysis of the experts' affidavits was flawed in any respect, and supports its finding that the "conflicting evidence in the record regarding, *e.g.*, the details of any of the immediate post-accident inspections and whether or not the City had actual or constructive notice of any defect in the bulldozer's braking mechanism", raised material issues of fact which precluded summary judgment. Probative in this regard is the City's failure to take note of the fact that certain post-accident photographs of the bulldozer's cab tend to support plaintiff's testimony that the safety brake had been fully engaged, and that one of his experts opined that the brakes on the instant bulldozer were so poorly maintained and adjusted that they would have offered only "marginally sufficient" resistance to movement.

Accordingly, it is

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

E N T E R,

Dated: April 12, 2013

/s/

HON. THOMAS P. ALIOTTA

J.S.C.

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