Levy v Braman Motorcars
2013 NY Slip Op 33774(U)
May 3, 2013
Supreme Court, Queens County
Docket Number: 15306/10
Judge: Bernice D. Siegal
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This opinion is uncorrected and not selected for official publication.

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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

---X

Marlon O. Levy,

Plaintiff,

-against-

Braman Motorcars and Dennis C. Newby,

Defendants.

---X

Index No.: 15306/10
Motion Date: 2/28/13
Motion Cal. No.: 106
Motion Seq. No.: 5

2013 MAY 10 AM 11: 53
QUEENS COUNTY CLERK
FILED

The following papers numbered 1 to 9 read on this Order to Show Cause for an order granting plaintiff leave to reargue the motion of defendant, Dennis Newby and upon such reargument, for the denial of said motion on the ground that the Court overlooked or misapprehended the matters of fact as specified in the supporting papers and evidence submitted in support of this application.

	PAPERS NUMBERED
Order to Show Cause Affidavits-Exhibits..............................	1 - 4
Affirmation in Opposition..	5 - 9

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Plaintiff, Marlon O. Levy ("Levy" or "plaintiff"), moves for an order pursuant to CPLR §2221 to reargue the decision of this court dated December 7, 2012.

Plaintiff brought the within action to recover personal injuries allegedly sustained from a

[* 2]

motor vehicle accident which occurred on December 2, 2009. The subject vehicle was operated by Dennis Newby ("Newby") and Levy was a passenger in the vehicle. According to the testimony of Levy, Newby was driving on a highway when a "truck swerved over in Mr. Newby's lane" and that the truck was "coming toward Mr. Newby" and the truck "almost hit Mr. Newby." Levy went on to testify that Newby, in attempt to take "evasive action to avoid hitting the truck" he "left the roadway" and the car flipped causing plaintiff's alleged injuries.

For the reasons set forth below, plaintiff's motion to reargue is denied.

Motion to Reargue

A motion to reargue "[...] shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion [...]." CPLR §2221(d)(2). A motion to reargue does not grant the moving party the ability to offer arguments or facts not previously presented. (*See Pryor v. Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2nd Dep't., 2005].) "A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law." (*see McGill v. Goldman*, 261 A.D.2d 593, 594 [2nd Dept. 1999].)

Discussion

The issue before this court is whether plaintiff created issues of fact for trial as to whether Newby's responses to the circumstances was reasonable in light of the Emergency Doctrine. Plaintiff argues that summary judgment was inappropriate as Newby had yet to testify at his deposition and because the police report indicated that Newby "drove too fast for conditions."

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As the court noted in the December 7, 2012 order, "[a]lthough the existence of an emergency and the reasonableness of a party's response to it will ordinarily present questions of fact they may in appropriate circumstances be determined as a matter of law." (*Bello v. Transit Authority of New York City*, 12 A.D.3d 58, 60 [2nd Dept 2004] citing *Morgan v. Ski Roundtop Inc.*, 290 A.D.2d 618 [3rd Dept 2002].)

This court conclude that Newby established his prima facie entitlement to judgment as a matter of law by demonstrating, via plaintiff's own deposition testimony, that a truck swerved into Newby's lane forcing Newby to maneuver out of the way. Specifically, Levy testified that Newby was forced to leave the roadway because "the truck swerved over in Mr. Newby's lane" and that Newby left the road to avoid hitting the truck.

Furthermore, plaintiff's reliance on the police report prepared by an officer that did not witness the accident is inadmissible heresay. (*Sanchez v. Steenson*, 101 A.D.3d 982 [2nd Dept 2012]; *Hazzard v. Burrowes*, 95 A.D.3d 829 [2nd Dept 2012].)

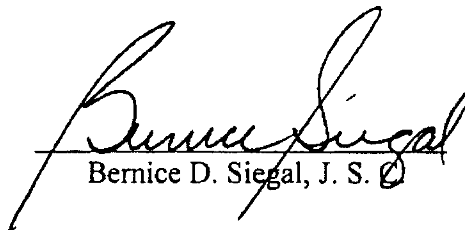
In addition, the court notes that it fully addressed each of plaintiff's contentions in the December 7, 2012 decision. A motion for leave to reargue "is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented." (Id.; *see also Mazinov v. Rella*, 79 A.D.3d 979, 980 [2nd Dept. 2010].)

Accordingly, plaintiff failed to establish that any matters of fact or law that were overlooked or misapprehended by the court in determining the prior application. (*see* CPLR §2221[d][2].)

Conclusion

For the above stated reasons, plaintiff's motion to reargue is denied.

Dated: May 3, 2013



Bernice D. Siegal, J. S. C.

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